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## The Right to Resist Unlawful Arrest

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## THE RIGHT TO RESIST UNLAWFUL ARREST

Two recent Louisiana Supreme Court cases involving the right to resist an unlawful arrest illustrate the many legal difficulties inherent in conflicts between police and private citizens. In *City of New Orleans v. Lyons*<sup>1</sup> the supreme court in a plurality opinion upheld a battery conviction stemming from resistance to an arrest even though it declared unconstitutional the ordinance upon which the arrest was based. Shortly thereafter, in *White v. Morris*,<sup>2</sup> the court went far beyond its necessary holding and in dictum strongly affirmed the right to resist an unlawful arrest. This Note will discuss the implications of these decisions and attempt to place them in historical perspective.

The right to resist an unlawful arrest has been part of Anglo-American legal tradition since the signing of the Magna Carta in 1215.<sup>3</sup> The English common law was in flux for a number of years until the right to resist an unlawful arrest was firmly established by the case of *Queen v. Tooley*.<sup>4</sup> Later English cases tempered the right to resist, finding that not every illegal arrest was a provocation as a matter of law. For example, resistance was not justified where an arrest was illegal only because of highly technical defects in the warrant.<sup>5</sup>

Early American jurisprudence generally followed that of England on this issue. The distinction, similar to that developed in England, between technical defects and arbitrary assertions of power was eventually confected in the United States.<sup>6</sup> In the leading case of *John Bad Elk v. United States*<sup>7</sup> the United States Supreme Court reversed a murder conviction and granted a new trial to an Indian in South Dakota who had

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1. 342 So. 2d 196 (La. 1977).

2. 345 So. 2d 461 (La. 1977).

3. Magna Carta § 39.

4. 92 Eng. Rep. 349 (K.B. 1710). In that case Anne Dekins was arrested by a constable for being disorderly. Although the constable had arrested her on previous occasions on the same charge, she was found not to have misbehaved on this occasion. Some men, strangers to Anne Dekins, attempted to effect her rescue, and in the process mortally wounded a man the constable had called to his assistance. The court reduced the charge of murder to manslaughter, stating, "The prisoner in this case had sufficient provocation to all people out of compassion; much more where it was done under a colour of justice, and where the liberty of the subject is invaded, it is a provocation to all the subjects of England." Similar language may be found in *Hopkin Hugget's Case*, 84 Eng. Rep. 1082 (K.B. 1666).

5. *The Queen v. Davis*, 169 Eng. Rep. 1305 (Q.B. 1861).

6. See *United States v. Thompson*, 28 F. Cas. 89 (No. 16,484) (D.D.C. 1823); *State v. Weed*, 21 N.H. 262 (1850); Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1132 (1969).

7. 177 U.S. 529 (1900).

killed one member of a group attempting to arrest him without a warrant. The Court found that the law of South Dakota substantially enacted the common law under which necessary force was justified to resist an unlawful arrest.<sup>8</sup> In a later case the Supreme Court stated in dictum, "One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases."<sup>9</sup>

In the 1968 case of *Wainwright v. City of New Orleans*<sup>10</sup> Justices Warren and Douglas intimated constitutional bases for the right to resist.<sup>11</sup> Wainwright, a Tulane law student, was stopped by police because in their opinion he resembled a murder suspect. He refused to submit to a search and was arrested.<sup>12</sup> In convicting Wainwright of assault, the district court held that the initial arrest had been lawful, and that Wainwright could not resist the police in their duty to search him since he was in lawful police custody. The Louisiana Supreme Court denied an application for writs and held only that the ruling of the lower court was correct.<sup>13</sup> Arguing that he had the right under the fourth amendment to resist an unlawful arrest and search, Wainwright was granted a writ of certiorari to the United States Supreme Court.<sup>14</sup> The writ was later dismissed as improvidently granted due to the inadequacy and "opaque-

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8. Justice Peckham mentioned no cases, but cited as authority 1 E. EAST, PLEAS OF THE CROWN 328 (London 1803) which mentions *Hopkin Huggett's Case*, 84 Eng. Rep. 1082 (K.B. 1666), and *The Queen v. Tooley*, 92 Eng. Rep. 349 (K.B. 1710). The Court further stated a case of murder might prove to be only manslaughter, or the facts might show that no offense had been committed.

9. *United States v. Di Re*, 332 U.S. 581, 594 (1948). The Court did not say whether this "undoubted right" had a constitutional or common law basis.

10. 392 U.S. 598 (1968).

11. *Id.* at 600-10 (Warren, C.J., dissenting); *id.* at 610-15 (Douglas, J., dissenting). Chief Justice Warren, in the belief that Wainwright's arrest and search were illegal under state law, felt it was unnecessary to reach the question whether Wainwright had acted within "a Fourth Amendment right to resist." *Id.* at 603 (Warren, C.J., dissenting). Justice Douglas, decrying the unconstitutionality of Wainwright's "seizure," closed his dissent expressing fear that "with *Wainwright* we have forsaken the Western tradition and have taken a long step toward the oppressive police practices . . . of Communist regimes . . . ." *Id.* at 615 (Douglas, J., dissenting).

12. Wainwright had no identification on his person and refused to remove his jacket to allow police to check for an identifying tattoo. He was arrested on charges of vagrancy, resisting an officer, and reviling the police (Wainwright reportedly called the police "stupid cops"). At the police station Wainwright offered to return to his apartment to secure identification, but offered passive resistance to a search by folding his arms and trying to avoid the police. This resistance led to his conviction for assault six months after the original charges under which he had been arrested were abandoned at trial.

13. *City of New Orleans v. Wainwright*, 248 La. 1097, 184 So. 2d 23 (1966).

14. *Wainwright v. City of New Orleans*, 385 U.S. 1001 (1967).

ness" of the record.<sup>15</sup> The Court thus avoided an opportunity to address directly the question whether there is a constitutional right to resist arrest.<sup>16</sup>

While the United States Supreme Court has seemed hesitant to pursue the constitutionality of the right to resist unlawful arrest, the Louisiana Supreme Court has not been reluctant to do so and in some of its decisions appears to have taken for granted the existence of such a constitutional right. Prior to *Wainwright*, in the case of *City of Monroe v. Ducas*,<sup>17</sup> the Louisiana Supreme Court had stated,

The right of personal liberty is one of the fundamental rights guaranteed to every citizen, and any unlawful interference with it may be resisted. Every person has a right to resist an unlawful arrest; and, in preventing such illegal restraint of his liberty, he may use such force as may be necessary.<sup>18</sup>

In the 1970 case of *State v. Lopez*<sup>19</sup> the court stated, "Under the facts and circumstances of the case, defendant merely asserted his constitutional rights in his encounter with the arresting officer and his partner."<sup>20</sup> The *Lopez* court did not elaborate on the constitutional basis of the right and cited only the *Ducas* case as authority for its holding.

Since *Ducas* and *Lopez* indicate positive recognition of the right to resist an unlawful arrest in Louisiana, the crucial determination to be made by the courts is whether the arrest resisted was unlawful. In *City of New Orleans v. Lyons* the defendant was convicted of a battery committed while resisting arrest for violating a city ordinance prohibiting the use of obscene language directed toward the police.<sup>21</sup> Even though four justices agreed that the statute was unconstitutional, the resistance to ar-

15. *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968) (per curiam).

16. The Supreme Court has never addressed directly the constitutionality of the right to resist. It has been suggested that heretofore there has been no need for reliance on a constitutional basis since the rule allowing resistance is well established in Anglo-American jurisprudence and until fairly recently all of the states recognized the right. Comment, *The Right to Resist an Unlawful Arrest*, 31 LA. L. REV. 120, 126 (1970).

17. 203 La. 971, 14 So. 2d 781 (1943).

18. *Id.* at 979, 14 So. 2d at 784. A minister offered slight resistance to a plainclothes policeman who confronted him as he was taking a black family to a Bible class. The court held that a prosecution for resisting an officer would not lie where the officer was attempting to make an unlawful arrest.

19. 256 La. 108, 235 So. 2d 394 (1970).

20. *Id.* at 130, 235 So. 2d at 402 (emphasis added). *Lopez* had been convicted on charges of vagrancy, disturbing the peace, and resisting arrest, stemming from an arrest while he was sitting in a parked car with his girlfriend.

21. NEW ORLEANS, LA., CODE § 42-24(5) (prior to repeal in 1976): "Disturbing the peace is the intentional performance of any of the following acts: . . . (5) Using obscene,

rest was held improper by a 5-2 vote and the battery conviction was upheld. Although three justices upheld the conviction based upon their belief that the statute was constitutional, the other two believed the arrest to be lawful even though the statute under which Lyons was arrested was unconstitutional. Writing for the court,<sup>22</sup> Justice Calogero stated that in this instance, "the right to personal liberty competes not with a police officer's abusive and self-proclaimed power, but with society's interest in orderly governmental process."<sup>23</sup> He concluded that the test of constitutionality properly resided in the courts, not with the individual, and held that Lyons had no right to resist the arrest.<sup>24</sup> As Justice Dixon's dissent points out, this decision denies the right to resist an unlawful arrest made under color of an unconstitutional statute or ordinance.<sup>25</sup> Thus, under *Lyons*, the exercise of constitutionally guaranteed liberties could lead to an arrest which legally could not be resisted.

The *Lyons* court distinguished arrests which are not authorized by any statute or ordinance from those authorized by unconstitutional laws, and in dictum affirmed the right to resist the former. The court underscored this right in *White v. Morris*,<sup>26</sup> in a far-reaching opinion which may have been prompted by fear of misconstruction or possible impairment of the right. In that case two deputy sheriffs were questioning five

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abusive or insulting language directed to or in the presence of any police officer who is performing his duty in making an arrest, detaining, or questioning any person . . . ."

The defendant had been informed by the police officer of a complaint against her of soliciting for prostitution. She replied with language including "s---" and "f--- you" whereupon she was arrested and a struggle ensued. The ordinance was found to be overbroad and invalid on its face. The court noted Justice Brennan's observation in *Lewis v. City of New Orleans*, 415 U.S. 130, 132-33 n.2 (1974), that a police officer is trained to exercise a higher degree of restraint than the average citizen.

22. On whether the statute was constitutional, Justice Calogero was joined by Justices Dixon and Dennis. See 342 So. 2d at 200 (Dixon, J., concurring in part and dissenting in part); *id.* (Dennis, J., concurring in part and dissenting in part). On the validity of the arrest, Justice Calogero was joined by Chief Justice Sanders and Justices Summers and Marcus. See *id.* at 201 (Marcus, J., dissenting in part and concurring in part); *id.* (Sanders, C.J., dissenting in part and concurring in part); *id.* (Summers, J., dissenting in part and concurring in part). Justice Tate joined in the Calogero opinion by refraining from a dissent or concurrence.

23. 342 So. 2d at 200.

24. This result is not unprecedented. An arrest has been held valid if authorized by a law later declared unconstitutional, and resistance to the arrest has been considered unjustified. See *State v. Briggs*, 435 S.W.2d 361 (Mo. 1968); Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626, 636 (1970). Arrests based on such laws should be distinguished from unconstitutional police orders, which may be resisted. *Wright v. Georgia*, 373 U.S. 284 (1963).

25. 342 So. 2d at 200.

26. 345 So. 2d 461 (La. 1977).

youths who had congregated at a rural drive-in restaurant after closing hours. One youth refused to produce identification, stating that he did not have to "give no damn I. D." The officers then tried to subdue the youth physically and a struggle ensued in which Morris struck a single blow and broke Deputy White's jaw. The Louisiana Supreme Court found that the attempted arrest was unlawful and the resistance justified, and denied damages sought by Deputy White.<sup>27</sup>

The court's decision was based on the narrow holding that the officers were not authorized to stop and question Morris under the Code of Criminal Procedure.<sup>28</sup> Dicta in Justice Dennis's majority opinion, however, went far beyond this holding to address issues raised in the court of appeal regarding the validity of the arrest and the right to resist. The majority stated that even if the deputies had been entitled to demand of Morris his name, address, and explanation of his activities under article 215.1, a refusal to comply would not have justified his arrest.<sup>29</sup> Morris's refusal to furnish identification did not elevate the reasonable suspicion required under article 215.1 into probable cause for an arrest.<sup>30</sup>

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27. Although in *White* the issue of a right to resist was raised in the context of a personal injury tort action, the court did not limit its holding to civil actions. The language and rationale used by the court clearly indicate that the decision is applicable to criminal cases.

28. LA. CODE CRIM. P. art. 215.1(A):

A law enforcement officer may stop any person in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or misdemeanor and may demand of him his name, address, and an explanation of his actions.

The court found that the evidence adequately supported the trial judge's findings that the officers did not have grounds for reasonably suspecting Morris of criminal activity. The trial judge, who had been reared near the point of the incident, felt the boys were engaged in nothing more than a common rural pastime. 345 So. 2d at 462. Several additional circumstances appeared unfavorable to the plaintiff. One of the youths was an employee of the drive-in and had closed up shortly beforehand. The deputies had asked for and received identification from three of the other boys prior to questioning the defendant, thereby lessening any suspicions of possible criminal activity. In addition, the plaintiff failed to call his partner as a witness.

29. As authority for this statement the court cited two decisions interpreting the New York "stop and frisk" statute after which LA. CODE CRIM. P. art. 215.1 was modeled. See N.Y. CRIM. PROC. LAW § 140.50 (McKinney Supp. 1973); *People v. Schanbarger*, 300 N.Y.2d 100, 248 N.E.2d 16 (1969); *People v. Bambino*, 69 Misc. 2d 387, 329 N.Y.S.2d 922 (1972).

30. The constitutional validity of an arrest is dependent upon probable cause. *Beck v. Ohio*, 379 U.S. 89 (1964). The determination of probable cause often leads to difficult factual analysis. It is often hard to determine exactly when an arrest has occurred. *Terry v. Ohio*, 392 U.S. 1 (1968), added to the difficulties to be encountered by upholding the constitutionality of a limited "stop and frisk" on the basis of something less than probable cause. LA. CODE CRIM. P. art. 213 permits arrest without a warrant when the person has

The court of appeal had offered as a ground for the arrest Criminal Code article 59(7) which prohibits criminal mischief.<sup>31</sup> Citing *Lyons* as authority, the supreme court found that the "no damn I. D." statement was a rather mild profanity, and was protected under the first amendment. The majority concluded that the arrest was unjustified and, citing *Ducas* and *Lyons*, stated that the right to resist an unlawful arrest was well established<sup>32</sup> in Louisiana and had been codified.<sup>33</sup>

In response to the plaintiff's urgings that Louisiana follow the example of several other states and abandon the right to resist,<sup>34</sup> the supreme court stated that it could not abrogate the right in light of the legislature's conscious rejection of proposed legislation to that effect.<sup>35</sup> In addition

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committed a felony or if the peace officer has "reasonable cause" to believe the person to be arrested has committed an offense. This "reasonable cause" has been equated with the federal "probable cause" standard and is a substantive determination to be made by the trial court from the facts and circumstances of the case. *State v. Lopez*, 256 La. 108, 129, 235 So. 2d 394, 401 (1970), citing *State v. Johnson*, 249 La. 950, 964, 192 So. 2d 135, 141 (1966).

31. LA. R.S. 14:59 (Supp. 1968) provides in part: "Criminal mischief is the intentional performance of any of the following acts: . . . (7) Acting in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others . . . ."

32. The court indicated "reasonable" force may be used to resist an unlawful arrest. Although not mentioned by the court, the leading cases of *John Bad Elk v. United States*, 177 U.S. 529 (1900), and *City of Monroe v. Ducas*, 203 La. 971, 14 So. 2d 781 (1945), indicate that "necessary" force may be used in exercising the right to resist.

33. The court specifically referred to LA. R.S. 14:108 (Supp. 1968) and LA. CODE CRIM. P. art. 220.

LA. R.S. 14:108 (Supp. 1968) provides in part: "Resisting an officer is the intentional opposition or resistance to, or obstruction of, an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of property, or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property, or serving process is acting in his official capacity."

LA. CODE CRIM. P. art. 220: "A person shall submit peacefully to a lawful arrest. The person making an arrest may use reasonable force to effect the arrest and detention, and also to overcome any resistance or threatened resistance of the person being arrested or detained."

34. See Annot., 44 A.L.R.3d 1078 (1972). Alaska, California, Delaware, Florida, Illinois, and New Jersey have restricted the right to resist in some form.

35. See H.B. 88-89, 33d Reg. Sess. (1970); La. H.B. 563, 38th Reg. Sess. (1975).

Proposed amendment of LA. CODE CRIM. P. art. 220: "When a peace officer is arresting a person, and is identified or identifies himself as a peace officer, it is the person's duty to refrain from using force or any weapon in resisting arrest regardless of whether or not the arrest is lawful."

Proposed amendment of LA. R.S. 14:108 (Supp. 1968): "Resisting an officer is the intentional opposition or resistance to, or obstruction of, a peace officer acting in his official capacity in making an arrest, detaining an arrested person after arrest, seizing property, or serving any process or court order. When the officer is identified or has identified himself as

the court noted the existence of judicial and scholarly authority for the position that the right to resist an unlawful arrest is protected by the fourth amendment.<sup>36</sup> The majority also noted that the Louisiana Constitution<sup>37</sup> offers perhaps an even broader personal liberty and secures a person against unreasonable invasions of privacy as well as unreasonable searches and seizures.

The court's decision to go beyond its narrow holding to discuss the issues raised by the right to resist can be viewed as significant for several reasons. First, the decision is a strong reaffirmation of the right to resist after *Lyons* in which the conviction based on the defendant's resistance was upheld despite recognition of a right to resist unlawful arrests. In addition, the supreme court indicated its willingness to oversee this "difficult, dangerous, and subtle field where the essential office of the policeman impinges upon the basic freedom of the citizen."<sup>38</sup>

Some writers have called for abolition of the right to resist an unlawful arrest, arguing that it is an outdated concept which originated when those arrested might spend years in jail awaiting trial, without bail and subjected to filth and disease. Under modern conditions, a person unlawfully arrested would only be detained for a short period in a reasonably clean place. It has also been suggested that self-help is anti-social in an urbanized society, especially in light of available legal remedies; for the common good the issue should not be settled by violence which might injure innocent bystanders as well as the parties involved. Another reason given for abandoning the right is that resistance is usually futile, gaining at most only a temporary reprieve for the resister. Some commentators have also suggested that only the guilty are

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a peace officer, the opposition, resistance, or obstruction shall be an offense, regardless of whether or not the arrest, detention, seizure of property, or service of process was lawful."

Report of the Louisiana State Law Institute Council Meeting of December 12, 1969.

36. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

37. LA. CONST. art. I, § 5:

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the person or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

38. *Wainwright v. New Orleans*, 392 U.S. 598, 600 (1968) (Fortas, J., concurring).

likely to resist arrest.<sup>39</sup>

Although raising valid points, these arguments may be countered. A progressive society should enable its people to enjoy more freedom and liberty, not less.<sup>40</sup> As for the other legal remedies available to a person wrongfully arrested, neither civil suits<sup>41</sup> nor criminal sanctions<sup>42</sup> against police officers have been considered very effective. Although the restriction of violence is certainly in the public interest, a deprivation of one person's rights is an affront to all citizens. The proposal that only the guilty are likely to resist arrest is also erroneous. While it is true that guilty parties are likely to resist any arrest, the innocent person who suffers such an injustice will naturally react.<sup>43</sup> Police harassment might lead to resistance which would be the basis of a charge of resisting arrest, thereby compounding the injustice.<sup>44</sup>

Most importantly, the arguments to restrict the right of resistance should be recognized as infringements of the most basic and fundamental of rights. Liberty has been given many definitions, yet none would fail to include the right to control one's own person.<sup>45</sup> Above all else, "liberty" or freedom was appreciated by the American forefathers as the natural right to be free from arbitrary physical restraint. They realized

39. See generally *New Jersey v. Koonce*, 89 N.J. Super. 169, 214 A.2d 428 (1965); *Weaver, The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942); Comment, *The Right to Resist Unlawful Arrest*, 7 NAT. RES. J. 119 (1967); Note, *The Right to Resist an Unlawful Arrest: An Outdated Concept?*, 3 TULSA L.J. 40 (1966).

40. "In a democracy police effectiveness is measured even more by what the police do not do than by their positive accomplishments." Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L.C. & P.S. 402, 405 (1960).

41. See *Wilson, Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L.C. & P.S. 395, 400 (1960).

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

43. "For most people, an illegal arrest is an outrageous affront and intrusion—the more offensive because under color of law—to be resisted as energetically as a violent assault." *People v. Cherry*, 307 N. Y. 308, 311, 121 N.E.2d 238, 240 (1954). The resistance of an arrest will likely be an instinctive reaction, "the work of a moment rather than the result of carefully considered alternatives." Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1137 (1969).

44. This possibility has been remedied in California by the holding that the California statute only removes the common law defense of resistance to unlawful arrest, and does not make such resistance a new substantive crime. See *People v. Curtis*, 70 Cal. 2d 347, 354-55, 450 P.2d 33, 37, 74 Cal. Rptr. 713, 717 (1969).

45. Blackstone defined liberty as "[t]he power of locomotion, of changing situation, of moving one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law." 1 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 134 (1822). See also Shattuck, *The True Meaning of the Term Liberty*, 4 HARV. L. REV. 365 (1891).

that none of their rights would have much meaning if they were to be subjected to arbitrary arrest and detention.<sup>46</sup> The right of liberty has been ranked by some above life itself, and the necessity of a "spirit of resistance" to preserve our liberties has been recognized.<sup>47</sup> The arguments for abolishing the right to resist unlawful arrest seem to suggest that the right of resistance or defense can be separated from the right of liberty, at least for policy reasons in the sphere of police action. However, the right of liberty should be seen to include the right to preserve it.<sup>48</sup> Defense is not a separate right that may be treated separately, but is rather a part of all rights.<sup>49</sup> Disallowing resistance in connection with the impairment of fundamental liberties would have the effect of legalizing arbitrary arrest and subjecting American citizens to arbitrary physical detention, thereby endangering all of the rights which we now enjoy.

The supreme court's recognition of the constitutional underpinnings of the right to resist could preclude judicial or legislative abrogation of the right. A very strong argument can be made that the right to resist an illegal arrest forms part of the fourth amendment protection from unreasonable searches and seizures.<sup>50</sup> The United States Supreme Court has already recognized the constitutional right of resistance in connection with other fourth amendment protections.<sup>51</sup> Additionally, the Louisiana

46. In his concurrence in *Whitney v. California*, 274 U.S. 357, 375 (1927), Justice Brandeis stated, "Those who won our independence by revolution were not cowards . . . They did not exact order at the cost of liberty."

John Adams numbered among the natural rights of all men that of "enjoying and defending their liberties." Richard Henry Lee is reported to have said that "liberty, which is necessary for the security of life, cannot be given up when we enter into society." C. ANTIEAU, *RIGHTS OF OUR FATHERS* 95 (1968). And Alexander Hamilton wrote, "The practice of arbitrary imprisonment has been, in all ages, the favorite and most formidable instrument of tyranny." *THE FEDERALIST* No. 84 (A. Hamilton).

47. Thomas Jefferson said, "What country can preserve its liberties if its rulers are not warned from time to time that the people preserve the right of resistance?" J. FOLEY, *THE JEFFERSONIAN CYCLOPEDIA* § 4704 (1900).

48. In 1907 Justice Burr of New York ruled: "There are certain rights pertaining to mankind which have their origin independent of any express provision of law, and which are termed 'natural rights.' One of these is the right of personal liberty. This includes not only absolute freedom to everyone to go where and when he pleases, but the right to preserve his person inviolate from attack by any other person. This right to one's person may be said to be a right of complete immunity, to be let alone." *Gow v. Bingham*, 57 Misc. 66, 107 N.Y.S. 1011 (1907). Justice Brandeis also described a "right to be let alone" in his dissenting opinion in *Olmstead v. United States*, 278 U.S. 438, 478 (1928).

49. See C. ANTIEAU, *RIGHTS OF OUR FATHERS* 92 (1968).

50. See note 36, *supra*, and note 51, *infra*.

51. In *Frank v. Maryland*, 359 U.S. 360, 364-65 (1959), the Court observed, "[T]wo protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy . . . . The second,

Supreme Court in *White v. Morris* noted that the Louisiana Constitution may offer an even broader protection of personal liberty than does the United States Constitution.<sup>52</sup>

The *White* opinion suggests that the Louisiana Supreme Court will not abdicate its judicial responsibility in this area of the law in favor of legislation that would place the discretion for an arrest entirely in the hands of the arresting officer. The practical significance of this decision is that courts will be required to make tough substantive decisions based on very difficult, complex fact situations. Whether there is a right to resist a particular arrest will hinge on a determination of whether the arrest was lawful.<sup>53</sup> Inherent in this determination are the difficulties involved in second guessing the decisions of men involved in a difficult and dangerous field of work. However, value judgments must be made in balancing the desire for liberty and freedom on the one hand and order and security on the other, although these concepts are at times necessarily inimical. The meeting between policeman and private citizen is a paradigm of this conflict. Because disagreement is inevitable in the various arrest situations that will arise, it is certainly desirable that the courts continue to oversee this fragile yet volatile area.

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and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property." Surely if a person has the right to resist the unauthorized securing of information which may lead to a deprivation of liberty, he has the right to resist the deprivation itself. The Court also recognized the great patriot James Otis in his condemnation of the Writ of Assistance, because its use placed "the liberty of every man in the hands of every petty officer." *Id.* at 364. In *Katz v. United States*, 389 U.S. 347, 351 (1967), the Court held that the fourth amendment protects people, not places. And in *Ker v. California*, 374 U.S. 23, 32-33 (1963), the Court said, "Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be 'as of the very essence of constitutional liberty' . . . . *Gouled v. United States*, 255 U.S. 298, 304 (1921) . . . . '[t]he Amendment is to be liberally construed and all owe the duty of vigilance lest there shall be impairment of the right for the protection of which it was adopted.' [*Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)]."

52. See note 37, *supra*.

53. The legality of an arrest is to be determined by state law insofar as it is not violative of the Constitution. *Klinger v. United States*, 409 F.2d 299, 302 (8th Cir. 1969), *citing Miller v. United States*, 357 U.S. 301, 305 (1958).