Resisting Unlawful Arrest: A Due Process Perspective

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RESISTING UNLAWFUL ARREST:
A DUE PROCESS PERSPECTIVE

PENN LERBLANCE*

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I. INTRODUCTION

To resist arrest is a crime. But is it a crime if the arrest resisted is unlawful? More particularly, is a lawful arrest an issue in a trial for resisting arrest?

This inquiry invokes the constitutional due process problem of proof illustrated in Hoover v. Garfield Heights Municipal Court, decided in September 1986 by the United States Court of Appeals for the Sixth Circuit. Hoover's Ohio state conviction for resisting arrest was vacated because the trial court failed to instruct that a lawful arrest was an element of the offense. The failure to so instruct was a constitutional error, a violation of the due process principle that the state has the burden of proving every element of an offense beyond a reasonable doubt. Moreover, a failure to instruct the jury that it had to find that the arrest was lawful in order to convict of resisting arrest could not be considered a harmless error.

The Hoover court's analysis predicates the due process question on a state law determination of whether lawfulness of the arrest is an element of the offense of resisting arrest. Thus the extent to which a state prosecution for resisting arrest presents a due process issue depends upon the state's definition of the crime of resisting arrest. The extent to which the states have made a lawful arrest an element of resisting arrest, and thus a due process issue, is the thrust of this article. While some courts

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1 802 F.2d 168 (6th Cir. 1986).
have spoken in terms of whether a lawful arrest is an element of the resisting arrest crime, others have spoken in terms of whether an arrestee has the right to resist an unlawful arrest. Both perspectives will afford insight on whether lawful arrest must be proven to convict for resistance. This "defined element" approach as an exclusive due process consideration, however, is inadequate. Even if a lawful arrest is not a formal element of a state definition of the resisting arrest crime, an unlawful arrest may be a material fact, and therefore, relevant to the critical due process interests at stake. Before further discussion of the relevancy of lawful arrest in a resisting arrest prosecution, a more detailed analysis of Hoover is appropriate.

II. **Hoover v. Garfield Heights Municipal Court**

Police officers responding to a call regarding a domestic disturbance arrived at an apartment house to find petitioner Hoover and Barbara Forbes yelling at one another. When one of the officers sought to remove petitioner, Hoover punched the officer in the face. Petitioner was then arrested for assaulting an officer and for resisting arrest, but not for domestic violence. Petitioner was found guilty at a jury trial. He was fined $400 and sentenced to 60 days in the Cleveland House of Corrections on each charge, the sentences to be served consecutively. Petitioner's convictions were affirmed by an Ohio Court of Appeals. The Ohio Supreme Court dismissed his appeal for want of a substantial constitutional question. Petitioner then filed for habeas relief from these convictions in the U.S. District Court.

Among other errors, Hoover cited the trial court's failure to instruct that the underlying arrest must be found lawful to convict for resistance. The district court, although finding an instructional error in this regard, denied habeas relief. The U.S. District Court and the Ohio Appellate Court found the trial court instructions to be a "misstatement of the law," but ruled the erroneous instructions constituted harmless error because the arrest was lawful. The Court of Appeals concluded the error could not be harmless and reversed.

The Sixth Circuit's analysis began with the familiar *In re Winship* proposition that the due process clause of the Fourteenth Amendment requires the state to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged. Additionally, in determining what facts must be proved beyond a reasonable doubt, the state legislature's definition of the elements of the

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2 *Id.* at 170.
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offense is usually dispositive.\(^4\) Operating on these constitutional principles, the Sixth Circuit found that the Ohio statute defining resisting arrest, Ohio Rev. Code section 2921.33 (A), clearly makes a "lawful arrest" an element which the state must prove to establish the crime of resisting arrest.\(^5\) Moreover, Ohio courts had previously acknowledged that a lawful arrest was a prerequisite to a conviction for this offense.

The trial court, in refusing to instruct that the prosecution had to prove the lawfulness of the arrest, cited the Ohio Supreme Court decision of *City of Columbus v. Harris.*\(^6\) The *Harris* opinion relied on another Ohio Supreme Court decision, *City of Columbus v. Fraley.*\(^7\) The *Fraley* decision, reviewing a resisting arrest conviction under a Columbus city ordinance, held that a citizen may not use force to resist arrest by a known officer who is engaged in the performance of his duty, "whether or not the arrest is illegal under the circumstances."\(^8\) However, Hoover's resisting arrest conviction was based on a state statute, Ohio Rev. Code section 2921.33, rather than on a city ordinance. Thus, the *Fraley* decision was ruled inapposite. Because the city ordinance contained no specific lawful arrest requirement, the Ohio Supreme Court was free to interpret the ordinance as prohibiting violence against a police officer attempting to make any arrest whether lawful or unlawful. The statute under which Hoover had been convicted clearly did require a lawful arrest and did not prohibit resisting an unlawful arrest.\(^9\)

Having determined that a lawful arrest was an element of the state resistance crime under which Hoover was tried, the Sixth Circuit concluded that the trial court's erroneous instructions constituted constitutional error. The trial court's failure to instruct that the state had to prove the element of lawful arrest violated the due process principle that no one may be convicted of a crime absent proof beyond a reasonable doubt of every fact necessary to constitute the crime.\(^10\) Constitutional error, however, does not necessarily require conviction reversal. The *Hoover* court considered whether this constitutional error required reversal of the conviction, or whether it could be deemed harmless error under the doctrine of *Chapman v. California.*\(^11\) The *Hoover* court noted that the federal courts of appeal disagree as to whether a trial court's failure to instruct on an essential element of an offense may be considered harmless error. After reviewing the reasonings of these decisions, the *Hoover* court

\(^5\) 802 F.2d at 173.
\(^6\) *Id.* City of Columbus v. Harris, 44 Ohio St. 2d 89, 338 N.E.2d 530 (1975).
\(^7\) 802 F.2d at 173. *City of Columbus v. Fraley,* 41 Ohio St. 2d 173, 324 N.E.2d 735, cert. denied, 423 U.S. 872 (1975).
\(^8\) 41 Ohio St. 2d at 180, 324 N.E.2d at 740.
\(^9\) 802 F.2d at 174.
\(^10\) *Id.*
found guidance in the U.S. Supreme Court's discussion of harmless error in *Rose v. Clark*. In *Rose*, the Supreme Court observed that a harmless error analysis would not apply if a trial court directed a verdict for the state in a criminal case. Using this guide, the *Hoover* court reasoned that when an instruction prevents a jury from considering a material issue, the instruction is the equivalent to a directed verdict on that issue and therefore could not be considered harmless. "[T]he trial court's failure to instruct the jury that it had to find that Hoover's arrest was lawful in order to convict him of resisting arrest prevented the jury from considering that element and constituted a directed verdict on it." Thus the court concluded that this instructional error could not be considered harmless and granted habeas relief.

The *Hoover* analysis, whether there is a constitutional due process right to an instruction that a lawful arrest must be proved to convict for resisting arrest, depends upon the definition of the resistance offense charged. In Ohio, a person charged with resisting arrest in violation of the Columbus city ordinance would not be entitled to such an instruction. If that same person, however, were charged with resisting arrest under the state statute, he would be entitled to such an instruction. The constitutional principles as applied in *Hoover* lead to an inquiry as to the extent to which resisting arrest is defined to require a lawful arrest, and to observations as to whether the due process interests are well served thereby.

### III. THE RIGHT TO RESIST AN UNLAWFUL ARREST

Although many courts have addressed the issue in terms of whether a lawful arrest is a necessary element of the crime of resisting arrest, most courts have spoken in terms of whether there is a right to resist an unlawful arrest. The common law rule is that a person has a right to resist an unlawful arrest. It is useful to an understanding of the common law rule to have some appreciation of what is meant by an "unlawful arrest."

The authority of an officer to arrest is granted by statute and delineated to specific situations. A series of important judicial decisions have

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13 *Id.* at 3106.
14 802 F.2d at 177.
16 *See*, e.g., *Okla. Stat.* tit. 22, § 196 (1982) (when an officer may arrest without a warrant); *Cal. Penal Code* § 836 (West 1985); *N.Y. Crim. Proc.* §§ 120.20, 140.05, 140.10 (McKinney 1981). The prevailing rule is that while an officer may arrest with a warrant for any crime, an officer is permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if reasonable
fashioned the constitutional limits on the lawful seizure of a person by an officer.\textsuperscript{17} Generally, an arrest is unlawful if the arresting officer has no probable cause to make an arrest.\textsuperscript{18} Additionally, an arrest under authority of a warrant may be unlawful if the warrant is facially defective\textsuperscript{19} or, if facially sufficient, was unlawfully issued.\textsuperscript{20} An arrest not authorized by statute, executed without probable cause or executed upon an invalid warrant, is likewise unlawful. The officer’s “good faith” does not operate to make an unlawful arrest, one lacking in probable cause, a lawful arrest.\textsuperscript{21}

Another definition is in order. What is meant by “resisting” an officer? Basically any action or inaction by an arrestee which impedes, or makes more difficult, the arrest is within the meaning of “resistance” and related offenses of assault on an officer. Resistive conduct may be categorized as an arrestee’s affirmative physical act toward an officer, an arrestee’s passive conduct, or an arrestee’s mere verbal resistance. The broad scope of resistance is illustrated by the following acts which have been held to be criminal: striking an officer;\textsuperscript{22} scuffling;\textsuperscript{23} pulling away

\textsuperscript{17} See e.g., Terry v. Ohio, 392 U.S. 1 (1968); United States v. Edwards, 415 U.S. 800 (1973); United States v. Robinson, 414 U.S. 218 (1973); See generally Whitebread, CRIMINAL PROCEDURE: CONSTITUTIONAL LIMITS ON LAWFUL SEIZURE, § 2.03 (1980).

\textsuperscript{18} See, e.g., Terry, 392 U.S. 1. The test for determining lawfulness of an arrest is whether at the moment the arrest was made, facts and circumstances within the arresting officer’s knowledge, and of which he had reasonably trustworthy information, were sufficient to warrant a prudent man to believe the arrestee had committed, or was committing, a crime. Cooks v. State, 699 P.2d 653 (Okla. Crim. App. 1985).

\textsuperscript{19} See, e.g., Holbird v. State, 650 P.2d 66 (Okla. Crim. App. 1982)(arrest warrant issued in Oklahoma is invalid if executed outside Oklahoma).

\textsuperscript{20} See, e.g., Coolidge v. New Hampshire, 403 U.S. 443 (1971)(warrant invalid because it was not issued by a neutral magistrate); Franks v. Delaware, 438 U.S. 154 (1978)(false statements in affidavit for warrant invalidate warrant).

\textsuperscript{21} The officer’s “good faith” in executing an unlawful arrest may be a defense in deciding if the officer is guilty of false arrest or some other tort. Pierson v. Ray, 386 U.S. 547 (1967). Although there is no probable cause to arrest, the arresting officer is not liable for violation of the civil rights of the arrestee if the officer believed in good faith that arrest was lawful and if this belief was reasonable. Lindsey v. Louglin, 616 F. Supp. 449, 452 (E.D. N.Y. 1985). The officer’s “good faith” may also be relevant in deciding if the evidence obtained by an unlawful arrest is admissible in a prosecution of the arrestee. Massachusetts v. Sheppard, 468 U.S. 981 (1984); United States v. Leon, 468 U.S. 897 (1984). See also United States v. Williams, 622 F.2d 830 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981). See generally Comment, The Good Faith Exception: The Seventh Circuit Limits the Exclusionary Rule in the Administrative Context, 61 DEN. L.J. 597 (1984).

\textsuperscript{22} See, e.g., People v. Henderson, 58 Cal. App. 3d 349, 129 Cal. Rptr. 844 (1976)(assault upon an officer with a deadly weapon).

\textsuperscript{23} State v. Best, 91 W. Va. 559, 113 S.E. 919 (1922)(slight pushing is obstruction).
from an officer;\textsuperscript{24} blocking an officer's path;\textsuperscript{25} refusing to obey an officer's orders;\textsuperscript{26} going limp;\textsuperscript{27} remaining seated;\textsuperscript{28} verbal threats of interference;\textsuperscript{29} or hindering profanity.\textsuperscript{30} The key is uncooperative conduct.

At common law, the determination of guilt for resisting arrest depended on whether the officer was performing a lawful duty of his office. The courts reasoned that an unlawful arrest, one without a valid warrant or probable cause, was not a "duty" of an officer.\textsuperscript{31} If an officer is not performing a lawful duty, the arrestee has a right to resist and defend against the unlawful arrest.\textsuperscript{32} The genesis for this centuries-old common law rule is the theory that the unlawful arrest, an action by an official in excess of his authority, constituted a trespass. This trespass by the official was a "provocation" to the arrestee, justifying the use of physical force in repelling the officer's trespass.

The theoretical application of the rule was demonstrated in a 1666 English decision, \textit{Hopkin Hugget's Case}.\textsuperscript{33} There, the defendant and others had killed a constable who was illegally attempting to impress a man into the Army. Although the victim of the impressment apparently offered no resistance, others had sought physically to prevent the constable's action. Because their efforts had resulted in the death of the constable, they were charged with murder. The court, however, stated that "if a man be unduly arrested or restrained of his liberty \[it\] is a provocation to all other men \ldots to endeavor his rescue."\textsuperscript{34} Because the defendant's initial intrusion, interference with the officer's unlawful

\begin{itemize}
\item \textsuperscript{24} See, e.g., \textit{In re Culver}, 69 Cal. 2d 898, 447 P.2d 633, 73 Cal. Rptr. 393 (1968)(fleeing arrest is resistance or obstruction).
\item \textsuperscript{26} See \textit{State v. Avnayim}, 1 Conn. Cir. Ct. 34, 185 A.2d 295 (1962)(refusal to obey police orders was resistance); \textit{Des Moines v. Reiter}, 251 Iowa 1206, 102 N.W.2d 363 (1960)(refusal to accept ticket); \textit{State v. Keehn}, 135 Minn. 211, 160 N.W. 666 (1918)(refusal to accept summons).
\item \textsuperscript{27} See, e.g., \textit{People v. Raby}, 40 Ill. 2d 392, 240 N.E.2d 595, cert. denied, 393 U.S. 1083 (1968)(arrestee assumed limp posture).
\item \textsuperscript{30} \textit{State v. Harris}, 4 Conn. Cir. Ct. 534, 236 A.2d 479 (1967); \textit{State v. Estes}, 185 N.C. 752, 117 S.E. 581 (1923).
\item \textsuperscript{32} \textit{John Bad Elk v. United States}, 177 U.S. 529, 534 (1900); \textit{see Annot., supra} note 15.
\item \textsuperscript{33} 84 Rev. Rep. 1082 (K.B. 1666).
\item \textsuperscript{34} \textit{Id.}
\end{itemize}
seizure was justified he was not guilty of murder, but of manslaughter. In another early case, *The Queen v. Tooley*, the defendant and others had interfered with a constable, causing his death, while the constable was attempting an unlawful arrest. Tooley's murder conviction was set aside by the court because "if anyone against the law imprison a man, he is an offender." The court reasoned the constable's offending conduct "to be a sufficient provocation," justifying the defendant's interference. The English courts extended this principle to non-homicide cases. Where an unlawful arrest by a constable provoked an assault on the constable, not resulting in homicide, the English courts held that there was no crime committed by the arrestee because the assault was excused by the officer's unlawful arrest.

The early courts in this country adopted the same premise: an unlawful arrest was deemed a wrongful and provocative attack, justifying resistance by the arrestee. By 1900, this rule was so firmly established that it was acknowledged by the U.S. Supreme Court in *John Bad Elk v. United States*. In that case, the Supreme Court reversed a conviction for murder of an officer because the trial "court clearly erred in charging that the policeman had the right to arrest the plaintiff in error, and to use such force as was necessary to accomplish the arrest, and that the plaintiff in error had no right to resist it." The court stated this rule: "If the officer had no 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." If such resistance causes the death of the officer, "the offense of the party resisting arrest would be reduced from what would have been murder to manslaughter." In 1948, the Supreme Court again had occasion to observe that "[o]ne has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases."

The resistance right, as it has developed, means that the subject of an unlawful arrest is privileged to resist with reasonable force, that which is "absolutely necessary to repel the assault constituting the attempt to arrest." Force in revenge, or force disproportionate to effect escape, is

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35 [92 Eng. Rep. 349 (K.B. 1710).](#)
36 [Id. at 353.](#)
37 [Id.](#)
39 [177 U.S. 529 (1900).](#)
40 [Id. at 534.](#)
41 [Id. at 535 (citation omitted).](#)
42 [Id. at 534.](#)
43 [United States v. Di Re, 332 U.S. 581, 594 (1948).](#)
not privileged.\textsuperscript{45} If only reasonable force is used, the resistance is excused. If the arrestor is killed by the resistance, the killing is not murder, but manslaughter because the killing was provoked by the unlawful arrest.\textsuperscript{46} The courts have described the resistance as a limited self-defense, justifying reasonable force to avoid an unlawful seizure.\textsuperscript{47} Moreover, the resistance right has not been extended to situations where the arrest is under a warrant, facially sufficient, but containing a legal defect or otherwise technically defective.\textsuperscript{48} It would appear that resistance, as a kind of self-defense, is not justified when the officer appears to have authority by virtue of a facially sufficient warrant.

In summary, the resistance right is predicated upon the absence of lawful action by the officer. If the officer's unlawful action provokes a reasonable resistive force, it is deemed justified and not criminal. Because the resistance right is grounded upon the absence of a lawful arrest, it follows that a lawful arrest is an essential element which must be proved to convict one of resisting arrest. In jurisdictions adhering to the general common law resistance right, it would be, under \textit{Hoover}, a constitutional due process violation if the jury was not instructed that the state had to prove the element of lawful arrest.

The common law resistance rule, however, is no longer universal in American jurisdictions. The number of jurisdictions adhering to the resistance right has declined significantly, especially since the promulgation of the Model Penal Code by the American Law Institute (A.L.I.) in 1958. According to the Model Penal Code: "The use of force is not justifiable to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful."\textsuperscript{49} The A.L.I.'s comment in support of this departure from existing law states that it "should be possible to provide adequate remedies against illegal arrest."\textsuperscript{50} Such remedies include civil tort actions by the arrestee against the officer or

\begin{thebibliography}{99}
\bibitem{411} 411 S.W.2d 678 (Ky. 1967); Jones v. State, 4 Md. App. 616, 244 A.2d 459 (1968); People v. Gray, 23 Mich. App. 139, 178 N.W.2d 172 (1970); State v. Messley, 366 S.W.2d 390 (Mo. 1963); Long v. State, 223 Tenn. 238, 443 S.W.2d 476 (1969); Banner v. Commonwealth, 204 Va. 640, 133 S.E.2d 305 (1963).
\bibitem{46} See Annot. \textsuperscript{supra} note 15. There is authority in a few states justifying the use of deadly force merely to prevent arrest. See, e.g., Perdue v. State, 5 Ga. App. 821, 63 S.E. 922 (1909); State v. Bethuen, 112 S.C. 100, 99 S.E. 753 (1919).
\bibitem{47} State v. Wright, 1 N.C. App. 479, 162 S.E.2d 56, aff'd, 274 N.C. 380, 163 S.E.2d 897 (1968).
\bibitem{48} \textit{Id.}
\bibitem{50} \textsc{Model Penal Code} § 3.04 (2)(a)(i)(Tent. Draft No. 8, 1958).
\end{thebibliography}
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administrative review of police conduct. The thrust of the A.L.I.'s recommendation is a preference for redress in court and administrative procedures rather than physical force. At least twenty-one jurisdictions have followed the example of the Model Penal Code, providing by statute no justification for forceful resistance to an unlawful arrest by a known officer. At least six jurisdictions have, by judicial decision, abandoned the common law resistance right.

If a legislature disallows a privilege to resist an unlawful arrest, does it follow that a lawful arrest is not an essential element of the resisting arrest offense? More precisely, does legislative repeal of the resistance right eliminate any constitutional requirement for an instruction that a lawful arrest is necessary to convict for resisting arrest? The answer to these questions is not clear given the diverse views taken by the courts in jurisdictions where the resistance justification has been statutorily abrogated.

IV. WITH NO RESISTANCE RIGHT, AN UNLAWFUL ARREST IS AUTHORIZED

Legislative abrogation of the resistance right is manifested typically in a statutory provision under the rubric or justification that a person is "not authorized" to use force in resisting a known officer. Often the statutory definition of the crime of resisting arrest is the same traditional language: it is a crime to resist or obstruct a known officer in the performance of his duty, or resist or obstruct the performance of any authorized act by an officer. What is the impact of the statutory change in justification on the definition of a resistance offense?

The answer, according to the Illinois courts, is that a lawful arrest is not a necessary element of the resistance crime. Although the Illinois Criminal Code, Section 31-1, makes it a crime to knowingly resist or

51 ALA. CODE Tit. 13A § 3-28 (1982); ALASKA STAT. § 11.81.400 (1983); ARIZ. REV. STAT. ANN. § 13-404(B) (1978); ARK. STAT. ANN. § 41-512(1) (1977); COLO. REV. STAT. § 18-8-103(2) (1986); CONN. GEN STAT. § 53a-23 (1972); DEL. CODE ANN. tit. 11, § 464(d) (1974); FLA. STAT. ANN. § 776.051(1) (West 1976); HAW. REV. STAT. § 703-304(a)(a) (1976); ILL. ANN. STAT. ch. 38 § 7-7(a) (Smith-Hurd 1972); IOWA CODE ANN. § 804.12 (West 1978); KAN. STAT. ANN. § 21-3217 (1981); KY. REV. STAT. § 503.060(1) (Baldwin 1955); MONT. CODE ANN. § 94-3-108 (1977); NEB. REV. STAT. § 28-904(2) (1985); N.Y. PENAL LAW § 35.27 (McKinney 1975 & Supp 1987); N.D. CENT. CODE § 12.1-05-03(1)(1976); OR. REV. STAT. § 161.260; 18 (1985); PA. CONS. STAT. § 505(b)(1)(i) (1983); S.D. CODIFIED LAWS ANN. § 22-11-5 (1979); TEX. PENAL CODE ANN. § 9.31 (B)(2) (Vernon 1974).

obstruct the performance by a known officer of "any authorized act within his official capacity." 53 Section 7-7 disallows forceful resistance even if the arrest is unlawful. 54 Given this latter enactment, the Illinois Supreme Court in People v. Locken held that the Legislature "intended that the making of an unlawful arrest is to be considered an 'authorized act.'" 55 As another Illinois decision reasoned, "authorized act" in the statutory definition of the resistance crime means only whether the officer is generally "endowed with [the] authority to make an arrest," not whether the specific arrest was lawful or unlawful. 56

Similar logic was employed by the Second Circuit construing 18 U.S.C. § 111, which makes it a felony to interfere with a federal officer engaged in the "performance of his official duties." 57 This performance of duties refers generally to whether he is "acting within the scope of what the agent is employed to do." 58 Thus, an officer, "even if effecting an arrest without probable cause, is still engaged in the performance of his official duties, provided he is not on a 'frolic of his own.'" 59

Because the resistance right is a court-made rule, the courts can unmake it. The courts in several jurisdictions have done just that. A New Jersey court in State v. Koonce, 60 persuaded by the arguments against the common law resistance right, disallowed such a privilege without legislative enactment. It concluded that a person "may not use force to resist" a known officer engaged in the "performance of his duties, whether or not the arrest is illegal." 61 The courts in at least five other jurisdictions have also disallowed any resistance right. 62 The disallowance of a resistance right, according to these courts, renders it immaterial whether the particular arrest resisted was lawful. Thus, a lawful arrest is not an essential element of the offense in those jurisdictions.

V. EVEN WITH NO RESISTANCE RIGHT, A LAWFUL ARREST IS ESSENTIAL TO CONVICT

In contrast to the reasoning of the Illinois courts, New York state courts have ruled that a lawful arrest is a necessary element to convict for resisting arrest, even though the legislature expressly disallowed a

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63 ILL. ANN. STAT. ch. 38 § 31-1 (Smith-Hurd 1961).
64 Id. at § 7-7.
71 89 N.J. Super. at 173, 214 A.2d at 436.
72 See supra note 53.
forceful resistance right. In 1968, the New York Legislature abrogated the resistance right with the enactment of the so-called “no-sock” principle, Penal Law section 35.27. Although this statute provides that a person “may not use physical force to resist arrest, whether authorized or unauthorized,” it did not, the courts reasoned, expand the substantive scope of the resisting arrest offense. As to the definition of that offense, the New York courts have held that “[a]n authorized arrest is an indispensable element of a resisting arrest offense.” That crime “does not occur if the arrest is illegal or unlawful.” The New York misdemeanor resistance offense is defined in terms of attempting to prevent a known officer from effecting an “authorized arrest.” Felony assault on an officer is defined in terms of causing physical injury to an officer while “performing a lawful duty.” In view of this language, the New York courts have concluded that the “arrest must in fact be one that is authorized by the rules of arrest.” Absent a lawful warrant or probable cause, the arresting officer is neither effecting an “authorized arrest,” nor “performing a lawful duty.” Clearly, a lawful arrest is an essential element for the resistance offenses in New York.

The courts in Connecticut and Pennsylvania have adopted a similar view. Both state legislatures enacted “no-sock” statutes prohibiting forceful resistance to “a legal or illegal arrest.” Nevertheless, the Connecticut courts have held that if the arrest is illegal, there can be no crime of interference. The Pennsylvania resisting arrest offense and assault on an officer offense are defined in terms of a “lawful arrest.”

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69 Id. at § 205.30 (Practice Commentaries).  
70 CONN. GEN. STAT. ANN. § 53a-23 (West 1972); 18 PA. CONS. STAT. § 505(b)(1983): “The use of force is not justifiable under this section: (i) to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful; . . .”  
72 18 PA. CONS. STAT. § 2702(a)(1983): “A person is guilty of aggravated assault if he: . . . (3) attempts to cause or intentionally or knowingly causes bodily injury to a police officer making or attempting to make a lawful arrest . . . .” 18 PA. CONS. STAT. § 8104 (1983): “A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest . . . , the person creates a substantial risk of
According to the Pennsylvania courts, the disallowance of forceful resistance enactment "cannot render the legality of the arrest irrelevant."\textsuperscript{73}

VI. WITH NO RESISTANCE RIGHT, RESISTANCE IS ASSAULT OR BATTERY

In addition to the polar extremes of New York and Illinois, another position exists regarding whether a lawful arrest remains a necessary element of a resistance offense after enactments disallowing forceful resistance. The California Supreme Court, in \textit{People v. Curtis}, concluded that the statutory disallowance of forceful resistance\textsuperscript{74} eliminated the common law defense, but it did not "make such resistance a new substance crime."\textsuperscript{75} The resistance offenses are defined by the statutes which create such offenses. California, by statute, makes it a felony to commit a battery against a known "officer engaged in the performance of his duties."\textsuperscript{76} Because an officer has no duty to make an unlawful arrest, the statute was read as "excluding unlawful arrests from its definition of 'duty.'" Therefore, if the officer is engaged in an unlawful arrest when the resistance occurs, such resistance cannot be punished as felony battery against an officer.\textsuperscript{77} A lawful performance of official duty, \textit{i.e.}, a lawful arrest, is a necessary element of this crime.

However, the court in \textit{Curtis} reasoned that the general crimes of simple assault and battery contain no element requiring that the person assaulted be engaged in lawful performance of official duty. Therefore, if an officer engaged in an unlawful arrest is assaulted, the attacker can be convicted of simple assault or battery, but not of a felony assault on an officer engaged in the performance of an official duty.\textsuperscript{78}

\textsuperscript{73} Commonwealth v. Bartman, 240 Pa. Super. 495, 367 A.2d 1121, 1124 (1976). See also Commonwealth v. Stortecky, 238 Pa. Super. 117, 352 A.2d 491, 493 (1975) (Huffman, J., dissenting) ("The requirement that the arrest be lawful, therefore, constitutes an element of [resisting an arrest and assault on a police officer] . . . [I]t is also a 'material element of [the] offense.'")

\textsuperscript{74} \textit{CAL. PENAL CODE} § 834a (West 1970): "If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest."

\textsuperscript{75} People v. Curtis, 70 Cal. 2d 347, 349, 450 P.2d 33, 37, 74 Cal. Rptr. 713, 717 (1969).

\textsuperscript{76} The applicable section, \textit{CAL. PENAL CODE} § 243.1 (West Supp. 1984), now states: When a battery is committed against the person of a custodial officer as defined in Section 831 of the Penal Code, and the person committing the offense knows or reasonably should know that such victim is a custodial officer engaged in the performance of his duties, and such custodial officer is engaged in the performance of his duties, the offense shall be punished by imprisonment in the state prison.

\textsuperscript{77} Curtis, 450 P.2d at 38, 74 Cal. Rptr. at 718.

\textsuperscript{78} Id.
The *Curtis* conclusion ignores the resistance right foundational theory that the officer, executing an unlawful arrest, is a trespasser. Generally, reasonable force in defense against the wrongful trespasser is justified and excusable. It would seem under this general trespass theory that reasonable resistance force would be justified, thus preventing a conviction for simple assault or battery. Be that as it may, the California courts hold that a lawful arrest, or other lawful performance, is a necessary element to convict for felony battery on an officer. Resistance to an unlawful arrest, however, might be punishable as assault or battery because the Legislature disallowed a resistance justification.

**VII. DUE PROCESS BETTER SERVED: BEYOND FORMALISM AND FEDERALISM**

The *Winship* due process requirement of "proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged," as applied in *Hoover*, has at least one limiting aspect: The due process issue turns upon each jurisdiction's definition of the crime of resisting arrest. While that aspect may be viewed as appropriate deference to federalism, "which demands '[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement,'" it places arbitrary and drastic consequences on technical definitions which vary from jurisdiction to jurisdiction, or, as in Ohio, depending on whether the same conduct of resistance is prosecuted under a state statute or city ordinance. From the vantage point of the innocent person who is subjected to an unlawful arrest, the *Winship* - *Hoover* federalism analysis is capricious and fundamentally unfair. Moreover, it is submitted that *Hoover*’s exclusive dependence on a jurisdiction's formal definition of the resistance crime does not serve the values and objectives upon which *Winship*’s reasonable doubt standard was based.

It is important to grasp the practical consequence where a lawful arrest is not an element of resisting arrest. Then there need be no instruction that a lawful arrest must be proven beyond a reasonable doubt in order to convict. In a resistance prosecution, that would mean there is no issue of a lawful or unlawful arrest. If lawfulness is not an issue, the jury as

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79 See generally *R. Perkins and R. Boyce, Perkins and Boyce on Criminal Law* 1131 (3d ed. 1982) [Hereinafter cited as Perkins and Boyce]. Unless the person making the arrest has the authority to do so, any force used to secure the apprehension is unprivileged. Unprivileged application of force constitutes a battery. *Id.* at 554. Touching to effect an unlawful arrest is battery. *Restatement (Second) of Torts* § 118 comment b (1965). Furthermore, the privilege to use force in self-defense is not limited to prevention of death or great bodily harm. The privilege to use reasonable nondeadly force as a defense against nondeadly force is well established. *State v. Evenson*, 122 Iowa 88, 97 N.W. 979 (1904). See *State v. Sherman*, 16 R.I. 631, 18 A. 1040 (1889).


fact-finder need not be instructed as to what is a lawful arrest. Without this guidance, and with evidence going to the lawfulness of the arrest excluded as immaterial, the fact-finder could not appreciate any argument that the accused was an innocent person, reacting defensively and understandably against a perceived unlawful denial of liberty.

Removal of consideration of the lawfulness of the arrest, which goes to the state of mind of the accused, is tantamount to exclusion of a material fact. The Supreme Court has held that Winship's due process requirement of proof beyond a reasonable doubt of "every fact necessary to constitute the crime," does apply "to facts not formally identified as elements of the offense charged."82 Surely the state of mind of the resisting arrestee is a relevant fact of the prosecution of such an offense. It is a maxim of Anglo-American jurisprudence that mens rea (a blameworthy state of mind) is essential to convict.83

In Mullaney v. Wilbur, the Supreme Court held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion or sudden provocation when the issue is properly presented in a homicide case."84 The ancient phrase, "heat of passion," means that at the time of the alleged criminal act, the defendant's reason is disturbed by passion to an extent that might make ordinary men act irrationally without due deliberation or reflection, and from passion rather than judgment.85 This passion, a state of reduced culpability, must result from a provocation sufficient to inflame an ordinary person as to tend to cause him for the moment to act from passion, not reason, that is, sufficient to tend to deprive a reasonable person of self-control.86 Provocation, in the homicide context, is a mitigating factor, reducing the offense from murder to manslaughter.

Provocation was the operative principle when the Supreme Court reversed a murder conviction in John Bad Elk v. United States.87 Because the officer was attempting an unlawful arrest, and was killed by the resistance of the arrestee, "the offense of the party resisting arrest would be reduced from what would have been murder . . . to manslaughter."88 The unlawful arrest is the provocation, justifying the resistance.89 Although the killing was excessive force in resistance, resistance to an unlawful attack reduces the blameworthiness of the state of mind.

While provocation, in the homicide context, reduces the offense to

82 Id. at 86.
85 W. LAFAVE & A. SCOTT, CRIMINAL LAW 653, n. 5 (2d ed. 1986).
86 PEKINS & BOYCE, supra note 79, at 87.
87 177 U.S. 529 (1900).
88 Id. at 534.
manslaughter, a finding of self-defense would exonerate the defendant. In a non-homicide context, reasonable resistive force to an unlawful arrest has been described by the courts as self-defense, exonerating the arrestee's resistance.\textsuperscript{90}

According to the Supreme Court, due process requires proof beyond a reasonable doubt of the "facts in issue,"\textsuperscript{91} because that "standard is indispensible to command the respect and confidence of the community in applications of the criminal law."\textsuperscript{92} Moreover, the reasonable doubt standard is a due process requirement because it serves a vital role in protecting the accused's "interest of immense importance," for "he may lose his liberty upon conviction and . . . be stigmatized by the conviction."\textsuperscript{93} To serve adequately the due process interests which prompted the \textit{Winship} holding, it seems imperative that the fact-finder consider whether the arrest resisted was lawful. Under appropriate circumstances, a lawful arrest is a "fact in issue," regardless of whether it is formally identified as an element of the offense charged.\textsuperscript{94}

The paramount due process interests, the community's respect for the criminal justice system, and the accused's immensely important interest in his liberty and stigmatization by conviction, are in jeopardy if the fact-finder cannot consider whether the resistance was a reasonable and understandable reaction to a wrongful attack, a trespass described as an outrageous affront\textsuperscript{95} to one's liberty. Surely "a society that values the good name and freedom of every individual"\textsuperscript{96} should not condemn a man without due consideration as to whether he reacted reasonably to an unlawful arrest, which is a wrongful denial of his liberty.

Of course, not every resistance to an unlawful arrest will be deemed reasonable or blameless. A fact-finder may determine, under the facts of a given case, that the resistance was not an instinctive defensible reaction to the unlawful arrest, but rather an escape by a guilty mind. It might be determined that, in some instances, the resistance was disproportionate to the liberty denial. The formalization of the crime-element approach, as seen in the \textit{Hoover} court's focus on whether a lawful arrest is or is not an element of the crime, does not adequately afford an appropriate consideration of a material fact.\textsuperscript{97} That material fact is whether the resistance was the product of a blameworthy mind. And that material fact, so fundamentally basic in our system of justice, is most

\textsuperscript{90} See \textit{State v. Wright}, 1 N.C. App. 479, 162 S.E.2d 56 (1968).
\textsuperscript{91} In \textit{re Winship}, 397 U.S. at 368 (1970).
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.} at 363-64.
\textsuperscript{95} \textit{People v. Cherry}, 307 N.Y. 308, 310-11, 121 N.E.2d 238, 240 (1954).
\textsuperscript{96} In \textit{re Winship}, 397 U.S. at 363-64 (1970).
\textsuperscript{97} "[T]he reasonable-doubt standard is indispensible for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'" \textit{Id.} at 364.
certainly determinable only if the fact-finder is properly allowed to consider the lawfulness of the arrest resisted, a fact at issue.

Yet, the question of provocation and self-defense may be immaterial if the lawfulness of the arrest is not an issue. If the fact-finder need not decide if the defendant was resisting a lawful or unlawful arrest, it can conclude guilt without sufficiently considering the blameworthiness of his state of mind when he resisted. If lawful arrest is not an issue, it need not be proved at all. The critical due process problem here is not the appropriate standard of proof; rather, it is exclusion of a material fact which might explain the resistance. There is something innately offensive and fundamentally unsound about convicting a person without allowing the fact-finder to consider whether his was a reasonable reaction to an unlawful attempt to seize his person. Most appropriate is the Supreme Court's admonition: "one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution."98