

“UNHAND ME, GENTLEMEN!”*
THE RIGHT TO RESIST UNLAWFUL ARREST IN SOUTH CAROLINA

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The charge of resisting arrest is a versatile tool in the hands of an enterprising police officer. The charge is easy to levy by police officers, as it relies on a subjective determination of whether a suspect’s bodily movements are in opposition to the arrest or merely the expected twitches and re-positionings of a body under restraint.¹ Even when the underlying offense is unclear or dismissed, resisting arrest charges may be levied against the criminal defendant.² However, scrutiny is occasionally applied against the charge, with surprising results. For example, in 2009, a Florida court threw out more than a dozen resisting arrest charges in separate cases, citing “overreaction” by police officers and poor training regarding citizens’ rights.³ More recently, the U.S. Department of Justice released a scathing report of police practices in Ferguson, Missouri, noting that officers

* WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK, act 1, sc. 4 (“Unhand me gentlemen. By heaven I will make a ghost of him that lets me!”).

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1. See Monica Potts, *What Policing Looks Like to a Former Investigator of Misconduct*, NPR: CODE SWITCH (Aug. 13, 2014, 11:27 AM), <http://www.npr.org/sections/codeswitch/2014/08/13/340076968/what-policing-looks-like-to-a-former-investigator-of-misconduct>.

2. See, e.g., Martin Kaste, *Arrested for Resisting Arrest—Yes, It’s Possible*, NPR (Jan. 29, 2015, 9:07 PM), <http://www.npr.org/sections/thetwo-way/2015/01/29/382497080/arrested-for-resisting-arrest-yes-its-possible> (“If you continue with this, I will arrest you for resisting arrest.”).

3. See cf. *Officers Abusing the Charge of “Resisting Arrest” in Florida*, Ocala Post (May 16, 2014), <http://www.ocalapost.com/officers-abusing-charge-resisting-arrest/>

[e]xpect and demand compliance even when they lack legal authority. They are inclined to interpret the exercise of free speech rights as unlawful disobedience, innocent movements as physical threats, indications of . . . physical illness as belligerence.⁴

The rise of social media has accelerated public scrutiny over police conduct, with videos on sites such as YouTube showing unlawful arrests by officers and violent reactions in the face of justifiable protests.⁵ All of which begs the question—when can a citizen say “no” and actively resist an arrest? For most of our nation’s history, the answer has been “whenever the arrest is unlawful”—an unlawful arrest⁶ was simply treated as any other species of assault or battery. This deeply rooted common law right was repeatedly affirmed in English law and imported to the States, but its recognition began to seriously decline during the tumult of the 1960s and ’70s.⁷ Today only fourteen states, including South Carolina, continue to expressly recognize a citizen’s right to resist.⁸

This Comment briefly surveys the common law origins of this long-held privilege and then turns to an examination of South Carolina law governing its continued viability and application. The discussion continues with an exploration of some of the common criticisms of the doctrine and concludes with an overview of the doctrine’s enduring importance in American law.

(acknowledging that resisting arrest charges stem from officers’ misunderstanding of the law and are often thrown out before reaching trial).

4. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

5. See, e.g., Josh Kovner, Russell Blair, Vinny Vella & Dave Altamari, *Police Face Scrutiny in Real Time*, HARTFORD COURANT (July 10, 2016, 6:56 AM), <http://www.courant.com/news/connecticut/hc-dallas-shootings-police-recruits-0710-20160709-story.html>.

6. The United States Supreme Court has defined an “arrest” as the taking of a person into custody against her will for purposes of criminal prosecution or interrogation. See *Dunaway v. New York*, 442 U.S. 200, 216 (1979). In South Carolina, an arrest is not accomplished until an officer makes physical contact with the suspect incident to the arrest, or the suspect yields to an outward display of the officer’s authority such as the declaration “Stop, Police!” See *State v. Bannon*, 379 S.C. 487, 503, 666 S.E.2d 272, 280 (Ct. App. 2008).

7. See James Engel, *Criminal Law—The Right to Resist an Unlawful Arrest in Modern Society*, 18 SUFFOLK U. L. REV. 107, 109–10 (1984).

8. See discussion *infra* pp. 8–9.

I. A PRACTICAL CAUTION

But first, a word of warning. Resisting arrest is a terrible idea and is never recommended even in the face of egregiously wrongful arrests. The police are almost guaranteed to win any encounter with a citizen by dint of numbers, technology, and resources. There are a lot of cops—over 11,000 sworn officers in South Carolina alone, according to the latest U.S. Department of Justice statistics.⁹ They will respond rapidly and in force to aid a fellow officer. They have customized high-performance vehicles,¹⁰ aerial and space-based surveillance,¹¹ and increasing stockpiles of surplus military equipment.¹² By training and instinct, police will escalate force in any encounter until control is achieved, and they take a dim view of challenges to their authority.¹³ Former Los Angeles Police Department officer Sunil Dutta presented this perspective frankly in a *Washington Post* op-ed:

[H]ere is the bottom line: if you don't want to get shot, tased, pepper-sprayed, struck with a baton or thrown to the ground, just do what I tell you. Don't argue with me, don't call me names, don't tell

9. BRIAN REAVES, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 at app. tbl. 6 (2011), <http://www.bjs.gov/content/pub/pdf/cslea08.pdf>.

10. See, e.g., 2017 Ford Police Interceptor, FORD, <http://www.ford.com/fordpoliceinterceptor/features/#/performance/> (last visited Aug. 25, 2017) (describing available 365 horsepower V-8 engine and sport-tuned suspension on Ford Interceptor cruisers).

11. See Patrick Korody, Note, *Satellite Surveillance Within U.S. Borders*, 65 OHIO ST. L.J. 1627, 1629 (2004); see also Matthew Feeney, *Surveillance Takes Wing: Privacy in the Age of Police Drones*, CATO INST. (Dec. 13, 2016), <https://www.cato.org/publications/policy-analysis/surveillance-takes-wing-privacy-age-police-drones> (noting that law enforcement is increasingly using drones).

12. Adam Andrzejewski, *War Weapons for America's Police Departments: New Data Shows Feds Transfer \$2.2B in Military Gear*, FORBES (May 10, 2016, 9:56 PM), <http://www.forbes.com/sites/adamandrzejewski/2016/05/10/war-weapons-for-americas-local-police-departments/#70efb8e554fe>; see Ryan Welch & Jack Mewhirter, *Does Military Equipment Lead Police Officers to Be More Violent? We Did the Research*, WASH. POST (June 30, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/30/does-military-equipment-lead-police-officers-to-be-more-violent-we-did-the-research/?utm_term=.b8a6c76cf27b (explaining that law enforcement agencies began receiving more surplus military equipment post-9/11).

13. See Kaste, *supra* note 2 (“There is this—it’s not necessarily an evil mentality—but it is a mentality that, ‘I am in charge, and you shall not contradict me, you’re going to do what I say, at all costs’ . . . And if you don’t do what they say, well now all of a sudden you’re a bad person and they’ve got to arrest you for that.”).

me that I can't stop you Most field stops are complete in minutes. How difficult is it to cooperate for that long?¹⁴

Even when resistance is nonviolent but simply loud and insistent, tragedy can result. A notorious example is the choking death of Eric Garner, a New York man who protested police inquiry into his alleged sale of loose cigarettes by yelling “I’m minding my business” and “I’m tired of it. It stops today!”¹⁵ New York police officer Daniel Pantaleo responded by sneaking behind Garner and placing him in a chokehold,¹⁶ a tactic that was barred by the police department in 1993.¹⁷ Mr. Garner, an asthmatic, collapsed to the ground under the hold and died on the scene.¹⁸ Video taken by bystanders chronicles the tragic encounter,¹⁹ and the New York medical examiner ruled Mr. Garner’s death a homicide.²⁰

So resistance may, indeed, be futile at the scene of the arrest. Nonetheless, because “the right to be let alone [is] . . . the right most valued by civilized men,” opportunities to present the defense will continue.²¹ Indeed, in light of the current political climate, the opportunities may only grow.

II. AN ANCIENT PRIVILEGE

As long as there have been armed men with the power to arrest, there have been angry citizens hell-bent on resistance. The Biblical figure Samson

14. Sunil Dutta, *I’m a Cop. If You Don’t Want to Get Hurt, Don’t Challenge Me*, WASH. POST (Aug. 19, 2014), https://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/?utm_term=.fba66c28b810.

15. Crimesider Staff, “*Modified Duty*” for Medics After Fatal NYC Arrest, CBS NEWS: CRIMESIDER (July 21, 2014, 10:55 AM), <https://www.cbsnews.com/news/modified-duty-for-medics-after-fatal-new-york-city-arrest/>.

16. Barry Paddock, Rocco Parascandola & Corky Siemaszko, *Eric Garner’s Death Ruled a Homicide: NYC Medical Examiner*, N.Y. DAILY NEWS (Aug. 2, 2014, 2:22 AM), <http://www.nydailynews.com/new-york/nyc-crime/eric-garner-death-ruled-homicide-medical-examiner-article-1.1888808>.

17. *Id.*

18. *Medical Examiner Rules Eric Garner’s Death a Homicide, Says He Was Killed by Chokehold*, NBC N.Y. (Aug. 21, 2014, 7:20 AM), <https://www.nbcnewyork.com/news/local/Eric-Garner-Chokehold-Police-Custody-Cause-of-Death-Staten-Island-Medical-Examiner-269396151.html>.

19. At the time of this writing, video of the Garner encounter was available from New York Daily News. See N.Y. Daily News, *Eric Garner Video - Unedited Version*, YOUTUBE (July 12, 2015), <https://www.youtube.com/watch?v=JpGxagKOkv8>.

20. Paddock, *supra* note 16.

21. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

was said to have slain 1,000 Philistines who attempted to arrest him for a host of alleged crimes, including arson and murder.²² In 1215, similarly agitated English lords forced the imperious King John to sign the Magna Carta, which provided “[n]o free man shall be seized or imprisoned . . . except by the lawful judgment of his equals or by the law of the land.”²³ English courts gave this guarantee teeth by rejecting murder charges against citizens detained after resisting an unlawful arrest, even if the arrest was unlawful on purely technical grounds.²⁴ For example, in *Sir Henry Ferrer’s Case*, a bailiff attempted to arrest Sir Ferrer for a debt.²⁵ Ferrer’s servant attacked and killed the officer, and Ferrer was charged with aiding and abetting a murder.²⁶ The court acquitted Ferrer of murder, holding that the warrant for Ferrer’s arrest was defective—it read “Sir Henry Ferrers, Knight,” when it should have read “Sir Henry Ferrers, Baronet.”²⁷ Therefore, the bailiff was a mere “trespasser,” and no murder could have occurred.²⁸

The clearest expression of the early common law right to resist occurred in *Queen v. Tooley*.²⁹ In *Tooley*, a constable arrested Ms. Anne Dekins for disorderly conduct but without a warrant.³⁰ A group of men saw the arrest and approached the constable with drawn swords, which prompted him to “shew[] his constable’s staff, and declare[] he was about the Queen’s Business.”³¹ The assailants did not much care, and when the constable called another officer over to aid him, the men killed that officer.³² They were charged with murder, but the Queen’s Bench rejected the charge and held “where the liberty of the subject is invaded, it is a provocation to all the subjects of England.”³³ Thus, any person who unlawfully arrests another “is an offender against [Magna Carta]” and can be resisted as a “tyrant.”³⁴

22. *Judges* 14:19–15:16 (King James).

23. See Homer D. Crotty, *Magna Carta: Myth and Reality*, 40 L.A. B. BULL. 366, 368, 402 (1965).

24. See *Sir Henry Ferrers’s Case* (1634) 79 Eng. Rep. 924, 924; Cro. Car. 371, 372 (K.B.).

25. 79 Eng. Rep. at 924, Cro. Car. at 371.

26. *Id.*

27. *Id.*

28. *Id.*

29. *The Queen v. Tooley* (1710) 92 Eng. Rep. 349, 2 Ld. Raym. 1296 (K.B.).

30. *Id.* at 349–50, 2 Ld. Raym. at 1296–97.

31. *Id.* at 350, 2 Ld. Raym. at 1297.

32. *Id.*

33. *Id.* at 352, 2 Ld. Raym. at 1301.

34. *Id.* at 353, 2 Ld. Raym. at 1302. While *Tooley* involved third-parties opposing the arrest of another, English courts logically extended the defense to first-party arrests. See, e.g.,

III. AN ENDURING, BUT QUALIFIED, RIGHT

The right to resist the “tyranny” of unlawful arrest passed with the rest of English common law to the United States.³⁵ The United States Supreme Court endorsed the principle in *Bad Elk v. United States*,³⁶ and scores of state court decisions concurred.³⁷ Perhaps nowhere was the principle expressed more forcefully than in South Carolina.³⁸ In *State v. Bethune*, the court held a citizen may “resist an unlawful arrest, even to the extent of taking the life of the aggressor, if it be necessary, in order to regain his liberty.”³⁹

A subsequent case, *State v. Francis*, reaffirmed this right while refining the standard for the use of deadly force.⁴⁰ In *Francis*, the court quoted secondary authority for the proposition that an arrestee “may resist force with force, but he is not authorized to go beyond the line of force proportioned to the character of the assault.”⁴¹ This language appeared to erode *Bethune*’s warrant for the use of deadly force to simply effect an escape. However, the court did not return to a limited expression of the doctrine for nearly a century.⁴²

State v. Jackson involved a police officer who went to the home of a suspect late at night to investigate an unpaid cab fare.⁴³ The suspect claimed

King v. Curvan (1826) 1 Mood. 132, 132–34, 168 Eng. Rep. 1213 (K.B.) (noting an acquittal of a man accused of assaulting a constable after being charged with insulting another).

35. See Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1131 (1969).

36. 177 U.S. 529, 534 (1900).

37. See, e.g., Chevigny, *supra* note 35. After *Bad Elk*, the U.S. Supreme Court never again addressed the right to resist directly but continued to mention the right in dicta. See *United States v. Di Re*, 332 U.S. 581, 594 (1948) (“One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases.”); cf. *Wainwright v. New Orleans*, 392 U.S. 598, 615 (1968) (Justice Douglas dissenting from the Court’s decision to dismiss writ of certiorari as improvidently granted and opining the Court’s refusal to directly address the right to resist suggests the Court “[has] forsaken the Western tradition and taken a long step toward the oppressive police practices not only of Communist regimes but of modern Iran, ‘democratic’ Formosa, and Franco Spain”).

38. James B. Lindsey, *The Right to Resist an Unlawful Arrest: Judicial and Legislative Overreaction?*, 10 AKRON L. REV. 171, 174 (1976) (“Of particular note in [South Carolina] is the fact that the right is not conditioned or qualified on any danger to the arrestee’s life, but rather the right is given when it is necessary for the arrestee to free himself from the illegal custody.”)

39. *State v. Bethune*, 112 S.C. 100, 99 S.E. 753, 754 (1919).

40. *State v. Francis*, 152 S.C. 17, 149 S.E. 348, 355 (1929).

41. *Id.*, 149 S.E. at 356 (quoting 2 A. & E. Enc. of Law, 909).

42. *State v. McGowan*, 347 S.C. 618, 622–24, 557 S.E.2d 657, 659–60 (2001).

43. *State v. Jackson*, 227 S.C. 271, 274, 87 S.E.2d 681, 682 (1955).

he was startled awake by a commotion near his front door.⁴⁴ When he went to investigate, someone within the house shined a flashlight into his face, blinding him.⁴⁵ The suspect was armed with a pistol and opened fire; only then did he observe that the wielder of the flashlight was a police officer.⁴⁶ A conviction for murder followed but was set aside on appeal by the South Carolina Supreme Court.⁴⁷ The court’s decision was based primarily on the trial court’s failure to charge self-defense, but the court separately affirmed the common law right to resist arrest with deadly force.⁴⁸ The court took care to note that the right extends “to [the] use [of] so much force as apparently necessary to accomplish [the detainee’s] *deliverance* and no more.”⁴⁹ After *Jackson*, the court maintained its emphasis on the “*deliverance*” rationale and neglected the “proportionate force” rule of *Francis*.⁵⁰

In *State v. McGowan*, the court sidestepped *Jackson* through the expedient of ignoring the case.⁵¹ *McGowan* involved the nearly comical scenario of a miscreant who called the police to file a false report against another, only to find himself on the wrong side of the law.⁵² When an officer arrived, and things did not go as the arrestee had planned, he brandished a pistol only to be disarmed.⁵³ Undeterred, he allegedly began “ranting and raving,” which prompted an attempted arrest for disorderly conduct.⁵⁴ The arrestee fled toward his house, was caught by his ponytail at the front door, and began to scuffle with the officer.⁵⁵ Breaking free, he retrieved a shotgun from his bedroom; the officer fired a “warning shot”; the arrestee returned fire but somehow missed with his shotgun blast; and finally, the officer fired again, hitting McGowan in the hand and concluding the fracas.⁵⁶

McGowan was convicted of assault and battery with intent to kill (ABIK) and appealed on the ground that the underlying arrest was unlawful;

44. *Id.* at 275, 87 S.E.2d at 683.

45. *Id.*

46. *Id.*

47. *Id.* at 272, 279, 87 S.E.2d at 685.

48. *Id.* at 278–79, 87 S.E.2d at 684–85.

49. *Id.* at 277 (emphasis added).

50. *See, e.g., State v. Poinsett*, 250 S.C. 293, 297, 157 S.E.2d 570, 571 (1967) (noting that the defendant’s right to resist arrest depended on whether the attempted arrest was unlawful).

51. *State v. McGowan*, 347 S.C. 618, 557 S.E.2d 657 (2001).

52. *Id.* at 620–21, 557 S.E.2d at 659.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

thus, he had every right to use deadly force to effect his escape.⁵⁷ The court rejected the defense wholesale: Not every wrongful arrest can give license to a deadly struggle.⁵⁸ Dispensing with citation to *Jackson* or its progeny, the court opined that “[c]learly, *Bethune* and *Francis* stand for the proposition that a defendant has the right to resist an arrest to the point of deadly force only if *necessary*, and may not use force disproportionate to the injury threatened.”⁵⁹ Therefore, the charge of A.B.I.K. was properly submitted to the jury.⁶⁰

It is difficult to credit the court’s citation to *Bethune* in support of the proportionality doctrine. It has been cited as an example of the deadly force prerogative for decades, and its facts involve a quintessentially disproportionate use of force: The decedent was killed after commanding a defendant to stay in his carriage.⁶¹ Nonetheless, the court’s citation to *Francis* was sound, and the doctrine of proportionality is the current law of the State of South Carolina.⁶²

IV. A DANGEROUS PREROGATIVE?

South Carolina’s preservation of the right to resist is a substantial departure from the twentieth century trend.⁶³ This trend began in the 1940s following publication of the Uniform Penal Act, which condemned the use of any form of force to resist an arresting officer “regardless of whether or not there is a legal basis for the arrest.”⁶⁴ The 1960s saw a steady erosion of the right, beginning judicially with the New Jersey Supreme Court’s decision in *State v. Koonce*.⁶⁵ *Koonce* established the template for modern critics of the doctrine: Resistance would frequently “escalate into

57. *Id.*

58. *Id.* at 621–22, 557 S.E.2d at 659.

59. *Id.* at 624, 557 S.E.2d at 660.

60. *Id.* at 622, 557 S.E.2d at 659.

61. *State v. Bethune*, 112 S.C. 100, 99 S.E. 753, 754 (1919); Informal Opinion from S.C. Atty. Gen. to Capt. Mark Keel (Aug. 23, 1996); see Lindsey, *supra* note 38 (citing *Bethune* when explaining that South Carolina came very close to recognizing the right to resist as an absolute right).

62. *McGowan* has since been cited for the proposition that South Carolina recognizes a charge of assault and battery against a police officer who has conducted an unlawful arrest, even if the officer did not use excessive force. *Horton v. City of Columbia*, No. 2014-UP-491, 2014 WL 10009645, at *3 (S.C. Ct. App. Feb. 26, 2014) (citing *State v. McGowan*, 347 S.C. 618, 623, 556 S.E.2d 657, 660 (2001)).

63. Craig Hemmens & Daniel Levin, *Not a Law at All: A Call for a Return to the Common Law Right to Resist Unlawful Arrest*, 29 SW. L. REV. 1, 6 (1999).

64. Sam Bass Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 345 (1942).

65. *State v. Koonce*, 214 A.2d 428, 436 (N.J. App. Div. 1965).

bloodshed”; the modern era of “constantly expanding legal protections” would provide adequate relief to the aggrieved; and police officers should be free from the specter of physical harm while performing their duties in good faith.⁶⁶

Most of the Southern states, and a few in the Northeast and West, resisted the trend.⁶⁷ Today, the right to resist endures in fourteen states: South Carolina, Alabama, Georgia, Louisiana, Maryland, Michigan,⁶⁸ Mississippi, New Mexico, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wyoming.⁶⁹ In Indiana, a form of the right was recently legislatively resurrected by the passage of a bill which gives citizens the right to resist the use of “unlawful force” by the police or any unauthorized entry into a citizen’s home or vehicle.⁷⁰

Preservation of the common law right has not gone unlamented. In the *Criminal Law of South Carolina*, Professor William McAninch and the other co-authors declare the right to resist with deadly force “an unfortunate

66. *Id.* at 436.

67. See Hemmens & Levin, *supra* note 63, at 24.

68. The Michigan Supreme Court revived the right judicially by overruling precedent that had interpreted a Michigan statute as abrogating the common law. *People v. Moreno*, 814 N.W.2d 624, 629 (2012).

69. ALA. CODE § 13A-3-28 (LexisNexis 2005); *Ex parte* Wallace, 497 So. 2d 96, 97 (Ala. 1986); GA. CODE ANN. § 16-10-24 (2007); *Long v. State*, 583 S.E.2d 158, 160 (Ga. Ct. App. 2003); LA. STAT. ANN. § 14:108 (2004 & Supp. 2010); *State v. Ceaser*, 2002-3021 (La. 10/21/03); 859 So. 2d 639, 643 (citing *City of Monroe v. Goldston*, 95-0135 (La. 9/29/96), 661 So.2d 428); MD. CODE ANN., CRIM. LAW § 9-408(b) (LexisNexis 2002 & Supp. 2010); *Lamb v. State*, 786 A.2d 783, 800–01 (Md. Ct. Spec. App. 2001); *Chambers v. State*, 973 So. 2d 266, 271 (Miss. Ct. App. 2007) (quoting *Brendle v. City of Houston*, 759 So.2d 1274, 1284 (Miss. Ct. App. 2000)); *State v. Phillips*, 203 P.3d 146, 149–50 (N.M. Ct. App. 2008); *People v. Jensen*, 654 N.E.2d 1237, 1240 (N.Y. 1995); *Commonwealth v. Jackson*, 924 A.2d 618, 620 (Pa. 2007) (citing *Commonwealth v. Biagini*, 540 Pa. 22, 32, 655 A.2d 492, 497 (1995)); *State v. McGowan*, 347 S.C. 618, 624, 557 S.E.2d 657, 661 (2001); *Messier v. Commonwealth*, No. 1956-06-2, 2007 Va. App. LEXIS201, *2 (Va. Ct. App. May 15, 2007); *State v. Mullins*, 62 S.E.2d 562, 564–65 (W. Va. 1950); *Mickelson v. State*, 906 P.2d 1020, 1023 (Wyo. 1995) (quoting WYO. STAT. § 6-5-204(a)–(b)); *Van Horn v. State*, 802 P.2d 883, 885 (Wyo. 1990) (quoting WYO. STAT. § 6-5-204(a)–(b)). Two states’ laws, Ohio and Vermont, are ambiguous. OHIO REV. CODE ANN. § 2921.33 (LexisNexis 2010); *City of Columbus v. Fraley*, 324 N.E.2d 736, 739–40 (Ohio 1975); *State v. Durham*, 2007-Ohio-6262, ¶ 12 (citing OHIO REV. CODE ANN. 2903.13(A), (C)(3)); VT. STAT. ANN. tit. 13, § 3017 (2009); *State v. Peters*, 450 A.2d 332, 335 (Vt. 1982).

70. IND. CODE § 35-41-3-2(i)(1)–(2) provides that a person is privileged to use reasonable force if he reasonably believes that the force is necessary to protect himself from the imminent use of unlawful force by police; prevent unlawful entry into his home or vehicle by police; or terminate unlawful entry of his home or vehicle by police. The Preamble to the Act declares that “it is the policy of this state that people have a right to defend themselves and third parties from physical harm and crime.”

doctrine.”⁷¹ The authors further criticize the use of non-deadly force to resist, echoing *Koonce*, by opining it is “most predictable” that “any time” a police officer is resisted during an arrest “someone, perhaps even an innocent bystander, will be seriously injured or killed.”⁷² In light of these odds, the citizen must bear the “indignity and loss of freedom entailed in an unlawful arrest” and wait for a judicial resolution.⁷³

This criticism adopts the perspective of institutional authority as the default perspective from which to view individual rights. Its technical defects betray this institutional bias. For example, the right to resist with deadly force is limited by *McGowan* to those circumstances when a proportionate harm would be threatened, as when necessary to defend life.⁷⁴ The expression of this natural instinct for self-preservation in the face of unlawful and life-threatening conduct is difficult to reckon as categorically “unfortunate.”

Further, there is not a necessary connection between a resisting arrest charge and violence. South Carolina has not clearly defined the parameters of “resisting,” but other states have rendered the definition so broad as to encompass most nonviolent protests.⁷⁵ New York defines resistance as any intentional act that prevents, or attempts to prevent, a police officer from effecting an arrest.⁷⁶ California permits charges against one who resists or “delays” a police officer in making an arrest.⁷⁷ North Carolina adopts the same approach.⁷⁸ Mississippi broadly authorizes the charge against anyone who resists by force “or in any other manner.”⁷⁹ Florida has expressly adopted the charge of “resisting arrest without violence,” which permits detention of anyone who merely “opposes” the officer.⁸⁰

Even if resistance must be “physical” to warrant a resisting charge, it need not be “violent.”⁸¹ The instinctive retreat by a protestor who is grabbed from behind; the shifting of a body under the knee of an official; or the

71. LESLEY M. COGGIOLA ET AL., *THE CRIMINAL LAW OF SOUTH CAROLINA* 645 (6th ed. 2013).

72. *Id.* at 646.

73. *Id.*

74. *State v. McGowan*, 347 S.C. 618, 624, 557 S.E.2d 657, 660 (2001).

75. *See, e.g.*, CAL. PENAL CODE § 148(a)(1) (West 2016); FLA. STAT. § 843.02 (West 2014); MISS. CODE ANN. § 97-9-73 (Rev. 2014); N.C. GEN. STAT. § 14-223 (2016); N.Y. PENAL LAW § 205.30 (McKinney 2010).

76. N.Y. PENAL LAW § 205.30 (McKinney 2010).

77. CAL. PENAL CODE § 148(a)(1).

78. N.C. GEN. STAT. § 14-223.

79. MISS. CODE ANN. § 97-9-73.

80. FLA. STAT. § 843.02.

81. *See Potts, supra* note 1.

sluggishness of a citizen in medical distress may all be interpreted as “resistance.”⁸²

The expansion of resisting arrest charge rationales is unsurprising. As institutional authority over the person grows, it seeks to expand in a predictable sequence. Bureaucratic organizations, such as police departments, metropolitan administrations, and the special interest groups that advance their causes, may seek to dispense with consideration of individual circumstances in favor of broad, institutionally favorable, and impersonal rules.⁸³ Simultaneously, many citizens who see themselves as unaffected by the encroachment of authority—such as those who do not inhabit the poor neighborhoods or demographic niches that often attract police activity—are initially indifferent to the encroachment, or even receptive to its promise of easing the uncertainty of rights-based rule.⁸⁴ Taken to its extreme, the march toward unchallenged institutional authority may begin to characterize resistance to arrest as not only a criminal offense but a crime of moral turpitude. Such a sentiment has been expressed by Louisiana Police Chief Calder Herbert, who advocates charging resisting citizens with a felony hate crime under Louisiana’s “Blue Lives Matter” law.⁸⁵

Police advocates are undeterred by these considerations. They counter that *harsher* penalties for resistance are necessary to combat disorder.⁸⁶ Unfortunately, the resort to harsh penalties badly misunderstands the

82. Journalist Monica Potts, who served on a civilian review board investigating complaints against N.Y.P.D. officers, reports that resisting arrest was one of an array of charges that investigators colloquially referred to as “P.O.P.: Pissing Off Police.” *Id.*

83. The tendency of bureaucracies to expand their sphere of influence has received much comment. A general discussion of the issue can be found in the works of famed sociologist Max Weber, particularly *The Protestant Ethic and the Spirit of Capitalism*. There, Weber discusses the metaphorical “iron cage” of bureaucracy that expands impersonal and procedurally rational goals while shrinking the sphere of “substantive rationality” that informs traditional values. *See generally* MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 182 (T. Parsons trans.) (Routledge 2005).

84. For a book-length discussion of the discomfiting psychological dissonance that can accompany a citizen’s freedom to choose between competing societal interests, see ERICH FROMM, *ESCAPE FROM FREEDOM* (Holt 1st paperback ed. 1994).

85. *See* Jacob Sugarman, *Resisting Arrest Can Now be Considered a Hate Crime in Louisiana*, SALON (Jan. 26, 2017), http://www.salon.com/2017/01/26/resisting-arrest-can-now-be-considered-a-hate-crime-in-louisiana_partner/. In the face of media criticism and disagreement from the Louisiana Governor’s Office, Calder later issued a “clarification” of his original position. *See* Valerie Ponseti, *Chief Clarifies Use of Hate Crime Law*, KATC (Jan. 26, 2017), <http://www.katc.com/story/34310586/st-martinville-police-hope-change-comes-with-states-new-hate-crime-law>. However, the clarification merely provided that each officer may apply the laws of the state “under their understanding and discretion in the field.” *Id.*

86. *See* discussion *supra* note 84.

relevant dynamic. First, the doctrine is fundamentally *post factum*. Consideration of its use will not typically arise until a post-arrest interview between lawyer and client in which the lawyer explains the parameters of a viable defense.⁸⁷ In this light, the doctrine is simply another species of affirmative defense that protects vested public rights, such as the common law right to lawfully resist warrantless entry into the home.⁸⁸ Rampant disorder is an unlikely (and nowhere empirically supported) outcome of criminal process.

Second, resisting arrest is overwhelmingly a “spontaneous act,” not a calculated crime.⁸⁹ Citizens faced with unlawful detention do not dispassionately weigh the costs of resistance; they resist because the affront to their liberty arouses an instinct of self-defense against arbitrary power. Post-hoc governmental penalties will have a poor deterrent effect against this defensive instinct.⁹⁰ “In its immediate and most essential form, self-defense is not something government can really stop.”⁹¹

On a more fundamental level, the public order objection simply misunderstands the type of order a free society should prefer. Lawful resistance can occur only after public order has already been disturbed—by the unlawful arrest itself.⁹² Invasion of the citizen’s right to “possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law” is quintessentially disordered.⁹³ Thus, categorically suppressing the right may certainly lead to a *kind* of order, but it is the order of the throne room. In a nation committed to *constitutional* order, certain methods of control are simply taken off the table in deference to a free society.⁹⁴

87. See Chevigny, *supra* note 35, at 1133–34.

88. Regarding the right to resist warrantless entry into the home, see generally *Investigation and Police Practices*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 3, 80 (2006).

89. *People v. Cherry*, 121 N.E.2d 238, 239–40 (1954) (“[A]n illegal arrest is an outrageous affront . . . resisted as energetically as a violent assault . . .”).

90. Bruce Kaufman, *Emotional Arousal as a Source of Bounded Rationality*, 38 J. ECON. BEHAV. & ORG. 135, 135–44 (1998).

91. Nicholas J. Johnson, *Self-Defense?*, 2 J.L. ECON. & POL’Y 187, 194 (2006). Self-defense is used in this context as the instinctual response to aggression or restraint, and does not refer to the technical legal defense. *State v. Bethune*, 112 S.C. 100, 99 S.E. 753 (1919), distinguished the legal doctrines of self-defense and resistance to unlawful arrest.

92. A famous rebuttal to a plea for passivity in the face of injustice reminds critics to avoid “the superficial kind of social analysis that deals merely with effects and does not grapple with underlying causes.” JONATHAN RIEDER, *GOSPEL OF FREEDOM: MARTIN LUTHER KING JR.’S LETTER FROM BIRMINGHAM JAIL AND THE STRUGGLE THAT CHANGED A NATION* 171 (2013).

93. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

94. *District of Columbia v. Heller*, 544 U.S. 570, 636 (2008).

The tension between personal freedom and order was discussed by the United States Supreme Court in *District of Columbia v. Heller*.⁹⁵ *Heller* addressed the perennial debate over gun control in the United States.⁹⁶ Petitioner *Heller* applied for a handgun registration certificate in the District, which was refused.⁹⁷ The District generally banned the possession of handguns, and long-guns were required to be stored unassembled or with a trigger-lock.⁹⁸

The Court struck down the District’s gun-control measures with an opinion steeped in the rhetoric of self-defense.⁹⁹ The natural right of self-defense is properly understood as “the predecessor of our Second Amendment.”¹⁰⁰ At the time of the Founding, Americans understood the “right of self-preservation” as permitting a citizen to “repe[] force by force” when “the intervention of society in his behalf, may be too late to prevent an injury.”¹⁰¹ This included injury by the government, as the right was necessarily invoked against the predations of English Rule.¹⁰²

If taken seriously, *Heller* may give proponents of the right to resist a new and powerful constitutional weapon. Unlike a common law right, which can be modified or altogether legislated out of existence, a constitutional prerogative is comparatively inveterate. It is a short step from *Heller* to conclude that the right to resist arrest is indeed such a right, given its shared origin with the Second Amendment’s “self-preservation” rationale. Of course, the ink on *Heller* is barely dry in jurisprudential terms, so for now the constitutional status of the right to resist must wait for its day in court.

V. AN OUTDATED CONCEPT?

In the meantime, law and order advocates will continue to bewail the doctrine. One of their most often cited arguments is that the common law

95. *Id.*

96. *See id.* at 573–636.

97. *Id.* at 575.

98. *Id.* at 576, 628.

99. *Id.* at 636.

100. *Id.* at 593.

101. *Id.* at 594–95 (quoting 1 J. BLACKSTONE’S COMMENTARIES 145–46 n.42 (1803)).

102. *Id.* at 593; *see* Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT 87, 93 (1992) (“Whether murder, rape, and theft be committed by gangs of assassins, tyrannous officials and judges or pillaging soldiery was a mere detail . . .”).

right is hopelessly outmoded in the modern age.¹⁰³ After all, modern America is not eighteenth-century England, where custodial conditions were potentially deadly:

[P]risoners were often kept in irons. Those without the means to buy better accommodations were frequently huddled together in dark, filthy rooms Under such conditions, imprisonment until the next term of court was often equivalent to a death sentence, especially during the frequent periods when prisons were swept by a malignant form of typhus known as “gaol fever.”¹⁰⁴

Furthermore, the modern judicial system grants fundamental due process protections to those wrongfully detained: probable cause hearings, access to counsel, reasonable bail, and civil remedies against government agents are all available to the modern detainee.¹⁰⁵

It is certainly undeniable that conditions for the detained have dramatically improved. But this argument is a strawman; the conditions existing in eighteenth-century England were not the origin of the doctrine.¹⁰⁶ The doctrine arose in acknowledgement of the inherent “provocation” of an unlawful arrest.¹⁰⁷ This rationale was repeatedly vindicated by state courts until very recently in our legal history. In 1954, the New York Supreme Court opined “an illegal arrest is an outrageous affront . . . to be resisted as energetically as a violent assault.”¹⁰⁸ Legal commentators of the last century shifted focus to prison conditions and modern procedure to obscure or marginalize the animating principle behind the rule.¹⁰⁹ However, the academic tide has begun to turn, with some modern scholars calling for a return to the common law prerogative.¹¹⁰

Even with custodial reform, real and serious costs are imposed today upon those unlawfully detained. An arrest is not a sanguine encounter; it is often attended by great anxiety, emotional upset, and social stigma.¹¹¹

103. See, e.g., Kimberly T. Owens, Note, *Maryland’s Common Law Right to Resist Unlawful Arrest: Does it Really Exist*, 30 U. BALT. L. REV. 213, 220 (2000).

104. Sam B. Warner, *Investigating the Law of Arrest*, 26 A.B.A.J. 151, 152 (1940).

105. See *id.* at 226 (citing *State v. Hobson*, 577 N.W.2d 825, 838 (Wis. 1998)).

106. *The Queen v. Tooley* (1710) 92 Eng. Rep. 349, 2 Ld. Raym. 1296 (K.B.).

107. *Id.*

108. *People v. Cherry*, 121 N.E.2d 238, 239–40 (1954).

109. See, e.g., Hemmens & Levin, *supra* note 63 (citing Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 331 (1941–1942)).

110. *Id.* at 7.

111. See Robert I. Simon, *The Psychological and Legal Aftermath of False Arrest and Imprisonment*, 21 BULL. AM. ACAD. PSYCHIATRY L. 523, 525–27 (1993).

Anxiety may be most acute for those who do not share the established view about the safety of police custody. The widely-reported death of Freddie Gray in 2015 heightened these concerns for many.¹¹² The Baltimore police arrested Mr. Gray for possessing a switchblade knife and then handcuffed and placed him inside a police van.¹¹³ During his transport to the police station, he suffered a severe spinal cord injury that led to his death.¹¹⁴ The medical examiner’s office ruled the death a homicide,¹¹⁵ and the officers involved in the transport were charged with crimes ranging from illegal arrest to “depraved heart murder.”¹¹⁶ Riots broke out in Baltimore after Gray’s death,¹¹⁷ and the failure of the prosecutor’s office to secure convictions against the officers fueled allegations that the Baltimore police are effectively immune from criminal liability.¹¹⁸

Procedural reforms have also failed to provide a panacea. Probable cause hearings are not immediate, and detainees in some jurisdictions can find themselves in jail for days before facing a judge.¹¹⁹ During that time, work shifts are missed, childcare costs accrue, and vehicle impound fees mount.¹²⁰ For the poor, these costs can wreak havoc on their ability to provide for themselves and their families.¹²¹ Multiple court dates are often

112. Andrea K. McDaniels, *Civil Unrest Related to Freddie Gray Death Caused Depressive Symptoms*, BALT. SUN (July 20, 2017, 4:00 PM), <http://www.baltimore.sun.com/health/bs-hs-stress-freddie-gray-20170720-story.html>.

113. Peter Hermann & John Woodrow Cox, *A Freddie Gray Primer*, WASH. POST (Apr. 28, 2015), https://www.washingtonpost.com/news/local/wp/2015/04/28/a-freddie-gray-primer-who-was-he-how-did-he-why-is-there-so-much-anger/?utm_term=.71aa2596e3b3; Brandon Longo, *Timeline: Freddie Gray’s Arrest to His Fatal Spinal Cord Injury*, CBS BALT. (Jun. 23, 2016), <http://baltimore.cbslocal.com/2016/06/23/timeline-freddie-grays-arrest-to-his-fatal-spinal-cord-injury/>.

114. Longo, *supra* note 113.

115. *Id.*

116. *Id.*

117. Hermann & Cox, *supra* note 113.

118. *See id.* For other cases of deaths in police custody, see generally Holly Yan & Sarah Aarthur, *Not Just Freddie Gray: Others Who Died in Police Custody*, CNN, <http://www.cnn.com/2015/04/22/us/suspicious-deaths-in-police-custody/index.html> (last updated Apr. 22, 2015) (describing the case of Victor White, a Louisiana man who allegedly shot himself in the chest while in the back of a police cruiser with his hands cuffed behind him).

119. *See, e.g., Jones v. Lowndes County*, 678 F.3d 344 (5th Cir. 2012) (holding that a detention of more than forty-eight hours did not violate plaintiff’s right to prompt probable cause hearing).

120. *See, e.g., JEAN CHUNG, JUST. POL’Y INST., BAILING ON BALTIMORE: VOICES FROM THE FRONT LINE OF THE JUSTICE SYSTEM* 15 (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailingonbaltimore-final.pdf>.

121. *See id.*

required to resolve the offense, exacerbating the financial burden.¹²² When the charge finally draws the full attention of the prosecuting attorney, it is often simply dropped¹²³—giving the accused a sort of procedural victory, but a Pyrrhic one at best, as there is no recoupment for the expense and anxiety suffered through the process.¹²⁴

The low prosecution rate of resisting arrest charges—in one study, only 4.4% of resisting arrest charges went to trial and garnered convictions¹²⁵—suggests that in most cases, it is the arresting officer, not the court system, that imposes the penalty for resisting arrest. The process is the punishment in such cases, with the ultimate outcome merely incidental to the immediate costs of detention.¹²⁶ Of course, officers can be sued civilly for unlawful arrest,¹²⁷ but recovery in such cases is difficult.¹²⁸ Officers enjoy the legal advantage of qualified sovereign immunity and the narrative advantage of representing the State as its underpaid-yet-dutiful crime fighters.¹²⁹

These conditions exist alongside the increased presence of the police in everyday life. In eighteenth-century England, there was no professional police force.¹³⁰ Some cities hired night constables as a deterrent to criminal

122. See *Pre-Trial Court Appearances in a Criminal Case*, AM. BAR ASS'N, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pretrial_appearances.html (last visited Sept. 10, 2017).

123. See Philip Messing et al., *Only a Fraction of 'Arrest Resisters' Are Prosecuted*, N.Y. POST (Aug. 15, 2014, 1:59 AM), <http://nypost.com/2014/08/15/too-few-resisting-arrest-suspects-are-prosecuted-nypd-official/> (noting only 4.4% of resisting arrest charges result in convictions and most charges are dropped).

124. See Ira P. Robbins, *The Price Is Wrong: Reimbursement of Expenses for Acquitted Criminal Defendants*, 2014 MICH. ST. L. REV. 1251, 1251 (2014).

125. See *id.*

126. See generally MALCOLM FEELY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (2nd ed. 1992) (examining the significant costs and compromises imposed by modern criminal process).

127. See, e.g., *Sorrell v. McGuigan*, 38 F. App'x 970 (4th Cir. 2002) (holding that police officer who arrested plaintiff for legally carrying a folding knife was liable for unlawful arrest).

128. See *id.* at 972 (“Public officials performing their duties are shielded from liability so long as their conduct does not breach ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’”) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

129. See *id.*; see, e.g., Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 294–96 (2017) (arguing that most jurors “giv[e] undue weight to police officer testimony,” especially in majority white jurisdictions).

130. See Ben Johnson, *Sir Robert Peel and His “Bobbies,”* HISTORIC UK, <http://www.historic-uk.com/HistoryUK/HistoryofEngland/Sir-Robert-Peel/> (last visited Sept. 10, 2017) (“Today it is hard to believe that Britain in the 18th century did not have a professional police force.”).

conduct,¹³¹ but the concept of a heavily-armed, permanent police presence was unknown.¹³² Thus, the eighteenth-century citizen simply had less chance to be detained by errant police activity. While large, professional police departments have certainly made society safer, their sheer numbers have also increased the likelihood of encounters that infringe on citizens' rights. In this environment, a retreat from the common law right of resistance would appear fundamentally regressive.

VI. CONCLUSION

The common law is the repository of our shared experience.¹³³ Therefore, in its earliest forms, the law provided scant protection against public or private injury to the person—“the king can do no wrong”¹³⁴ and “let the buyer beware”¹³⁵ were doctrines that reflected the hardscrabble truths of medieval life. As society matured, the law slowly adapted to reflect the emerging demands of a populace that could not be effectively governed without concessions to the individual spirit. Thus, sovereign immunity was abrogated,¹³⁶ and the courts were compelled to compensate the innocent for damages arising from negligence and fraud.¹³⁷ When the medieval veil was rent entirely by the twin upheavals of the Reformation and the Enlightenment,¹³⁸ the concept of individual liberty began a philosophical ascent that would reach its summit in the American Revolution.¹³⁹ So, too, would the common law eventually embrace the idea that the fundamental rights of the individual were inviolable against unwarranted deprivation,

131. See *Crime Justice and Punishment—Policing in London*, OLD BAILEY ONLINE, <https://www.oldbaileyonline.org/static/Policing.jsp#constablestext> (last visited Sept. 10, 2017).

132. See David Friedman, *Making Sense of English Law Enforcement in the 18th Century*, DAVIDDFRIEDMAN.COM, http://www.daviddfriedman.com/Academic/England_18thc./England_18thc.html (last visited Sept. 10, 2017) (“England in the 18th century had no public officials corresponding to either police or district attorneys.”).

133. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881) (“The life of the law has not been logic: It has been experience.”).

134. George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 476 (1953).

135. Page Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 855 (1963) (quoting Chew, *The Suing Grows for Products that Are Faulty*, NAT'L OBSERVER, Jan. 14, 1963, at 21).

136. See Johnathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 539 (1995).

137. See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

138. See, e.g., *The Impact of Enlightenment in Europe*, U.S. HIST. ONLINE TEXTBOOK, <http://www.ushistory.org/us/7a.asp> (last visited Sept. 10, 2017).

139. See *id.*

whether by private actors or the State itself.¹⁴⁰ The doctrine of resistance to unlawful arrest reflects this hard-won consensus. For most of our nation's existence, this consensus has informed the American identity.

This American identity has historically lauded restraint. Therefore, the law in most jurisdictions has compelled the person faced with an attack to retreat when possible in the face of an assault.¹⁴¹ The person dispossessed of his property has generally been barred from engaging in self-help to re-take his stolen goods.¹⁴² But restraint should not be confused with docility. Those who seek to abrogate the right to resist ignore the powerful provocation an unlawful arrest represents to the detainee, who may endure wrongful accusation, assault and battery,¹⁴³ incarceration, and economic loss in one efficient swoop. The provocation is perhaps more acute because it is triggered by a police officer—the very agent charged with the day-to-day safeguarding of the individual.

The difficulties that police officers encounter in the field have not been discussed in this Comment, as the point is virtually axiomatic. Police officers face uncooperative, belligerent, and dangerous actors every day. They deserve our respect. However, they do not deserve the right to unlawfully arrest others. The time when officers were hands of the crown, and presumably faultless when about the King's business, has long passed. Today, officers are fellow citizens charged with the people's business and must proceed in respectful relation to the people's rights when executing their duties. The right to resist unlawful arrest recognizes the appropriate relationship between the citizen and his agents, and is a welcome heritage from the common law.

140. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing a fundamental right to control the education of one's child and protecting this right from government interference).

141. The duty to retreat reflects the reality that a private citizen often abandons an assault once his target has retreated a distance and emotions have cooled. In the case of an unlawful arrest, retreat is not likely to have the same effect because the officer will feel duty-bound to complete the arrest once it is commenced.

142. *See* Symposium, *Self-Help Repossession of Consumer Goods: A Constitutional Look at Section 9-503 of the Uniform Commercial Code*, 7 VAL. U. L. REV. 439 (1973).

143. In South Carolina, an unlawful arrest may support a claim for assault and battery against a police officer. Excessive force is not a necessary component of the assault and battery charge. *See Horton v. City of Columbia*, No. 2014-UP-491, 2014 WL 10009645, at *3 (S.C. Ct. App. 2014).