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under section 4-213. *Before* completion of the process of posting, but *after* some manifestation of a determination to pay an item, the payor bank could become accountable for the value of a check to the payee if section 4-303(1)(d) were applied as the court in *Schultz* briefly suggested. Such a result could not be reconciled with the provisions of section 4-213. That section expressly and unequivocally provides that a payor shall be accountable upon final payment. Subparagraph (1)(c) states that *completion* of the process of posting shall constitute final payment. The preamble to section 4-109 defines "process of posting" as the procedure in determining to pay an item *and* recording the payment.

The *Schultz* decision represents a significant judicial step in the clarification of the concept of final payment under the Uniform Commercial Code. The holding renders meaning to all of the provisions relating to final payment, and substantially advances the intent and policies underlying Article 4 of the Code. However, the court's cursory reference to the applicability of section 4-303(1)(d) in a suit by a payee or holder against a payor indicates that ambiguities persist. It has been suggested that sections 4-303(1)(d) and 4-213(1)(c) were intended to apply to the same factual situations.⁴⁹ In fact, because of the differences in their 'triggering' provisions, such application could render conflicting results. Until legislative resolution of the inconsistencies, it would appear wise to continue to decide payee-payor suits under the provisions of section 4-213(1)(c) which expressly govern accountability.

GEORGE E. MURRAY III

CRIMINAL LAW—SELF DEFENSE AND THE RIGHT TO RESIST AN UNLAWFUL ARREST

*State v. Nunes*¹

Thomas Nunes provoked a fight with the night manager of a grocery store. When three police officers arrived and attempted to arrest Nunes, he began to "flail wildly" at them. Nunes continued his resistance even after being struck on the head with a night stick, handcuffed, and placed in the police car. He finally was subdued when sprayed with mace. Nunes was charged with striking a police officer engaged in the perfor-

49. See authorities cited notes 44 & 45 and accompanying text *supra*. The contrary view is set out in notes 46-48 and accompanying text *supra*.

1. 546 S.W.2d 759 (Mo. App., D.K.C. 1977).

mance of his duties.² He admitted striking the first blow in the altercation with the night manager but asserted that he did not intentionally strike or swing at any police officer; his purpose in grappling with the officers was to protect himself from harm.³ The trial court refused to instruct the jury on Nunes' theory of self defense, relying on the basis of *State v. Briggs*⁴ which denied the right to resist arrest even under a statute later found to be unconstitutional. Nunes was convicted of striking a police officer.

On appeal Nunes contended that the trial court erred in refusing to instruct on self defense. He argued that *State v. Briggs* concerned resisting arrest and not self defense, and that therefore the trial court's reliance on that case in denying the proffered instruction on self defense was misplaced. The Kansas City District of the Missouri Court of Appeals affirmed the conviction. The court found that Nunes was not entitled to a self defense instruction because there was no substantial evidence that excessive force was employed by the police officers when the use of such force was not provoked by the arrestee.⁵ Hence, the proffered instruction was not required by the evidence.

Although the court affirmed the conviction, it agreed with the defendant that the trial court had "confounded two disparate issues—self defense and resistance to arrest."⁶ In considering the question whether there still exists in Missouri the right to defend against the use of excessive force by an arresting officer, the court of appeals differentiated the two defenses. The right to defend oneself and the right to resist an unlawful arrest are separate defenses designed to serve different functions. Self defense permits the arrestee reasonable resistance to excessive force by the arresting officer in order to protect the arrestee's life and limb. The right to resist an unlawful arrest permits reasonable physical resistance to an officer making an unlawful arrest in order to preserve the arrestee's liberty. The right to resist an unlawful arrest

2. Section 557.215, RSMo 1969, provides: "Any person who shall willfully strike. . . any police officer. . . while such officer is actively engaged in the performance of duties imposed on him by law. . . is guilty of a crime. . ."

3. 546 S.W.2d at 761.

4. 435 S.W.2d 361 (Mo. 1968).

5. 546 S.W.2d at 764. *Accord*, *State v. Spencer*, 307 S.W.2d 440 (Mo. 1957); *State v. Ford*, 344 Mo. 1219, 130 S.W.2d 635 (1939); *State v. Milentz*, 521 S.W.2d 1 (Mo. App., D. St. L. 1975). For cases holding that any evidence, even from the defendant alone, is sufficient to instruct on self defense, see *State v. White*, 274 S.W. 17 (Mo. 1925); *State v. Arnett*, 228 Mo. 253, 167 S.W. 526 (1914); *State v. Bidstrup*, 237 Mo. 273, 140 S.W. 904 (1911); *State v. Garrett*, 170 Mo. 395, 70 S.W. 686 (1902); *State v. Fredericks*, 136 Mo. 51, 37 S.W. 832 (1896); *State v. Alley*, 68 Mo. 124 (1878); *State v. Robinson*, 182 S.W. 113 (K.C. Mo. App. 1916); *Brubaker v. Bidstrup*, 163 Mo. App. 646, 147 S.W. 541 (K.C. Ct. App. 1912).

6. 546 S.W.2d at 762.

could be invoked even though the arresting officer does not use excessive force,⁷ but the use of unreasonable and unnecessary force by the arresting officer does not make the arrest itself unlawful and thereby create the right to resist an unlawful arrest. The arrestee can only resist the excessive force in an otherwise lawful arrest under the right of self defense.

The rules of self defense in the context of an arrest are analogous to the rules of self defense generally. An arresting officer may use such force as is reasonably necessary to make the arrest. Unnecessary force used by the officer may be resisted by the arrestee in the same manner that a private individual attacked by another may defend himself if he has reason to believe that he is in danger of receiving great bodily harm.⁸ However, an arrestee being arrested lawfully who provokes the use of force against him by openly defying the arresting officer may not excuse his resistance with a claim of self defense.⁹ This rule parallels that applying to private individuals. The aggressor who creates a situation fraught with peril in which he injures or kills his assailant cannot invoke the right of self defense.

The law requires an officer making an arrest to be the aggressor. He must press forward to overcome all resistance to bring the arrestee under physical restraint. This demonstrates that an arrestee must submit to the amount of force reasonably necessary to make the arrest provided that the arrest itself is lawful. In this respect, the arrestee's right to self defense differs from the law of self defense generally; under the latter, one need not submit to any aggression. This rule is only applicable if the arrestee knows that he is being arrested by a police officer. If he does not know, or have reason to know, the right of self defense should exist as with other private individuals.¹⁰

The common law rule that an official in excess of his authority could be resisted by physical force was recognized in England by 1710.¹¹ The reason for the rule was that an unlawful arrest was so provocative that it

7. Comment, *Criminal Law—Arrest—The Right to Resist Unlawful Arrest*, 7 NAT. RESOURCES J. 119, 120 (1967).

8. 546 S.W.2d at 763.

9. 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 216 (1957).

10. *State v. Ford*, 344 Mo. 1219, 130 S.W.2d 635 (1939). The arresting officer must inform the arrestee under what authority he acts as required by § 544.180, RSMo 1969. There is no requirement that an officer identify himself and announce his mission. See *Ker v. California*, 374 U.S. 23 (1963). Failure to inform the arrestee under what authority the officer acts would not undermine the legality of the arrest provided that the officer's authority is apparent and the arrestee has a good idea for what he is being arrested. See *Montgomery v. United States*, 403 F.2d 605 (8th Cir. 1968), cert. denied, 396 U.S. 859 (1969); *State v. Brothers*, 445 S.W.2d 308 (Mo. 1969).

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

would raise heat of passion in a reasonable man.¹² It would justify an assault or reduce murder to manslaughter.¹³ However, the right was not unqualified. If there was no provocation, there was no right to resist. A mere technical defect causing the arrest to be unlawful was not sufficient reason for resistance with physical force.¹⁴ If some time had passed since the arrest, resistance was unjustified as the provocation would subside upon reflection.¹⁵ The rule which emerged allowed reasonable resistance to a patently unlawful arrest¹⁶ but not to an arrest which was valid on its face. American courts adopted the English rule, although there was a tendency to find any defect in the process as justifying resistance.¹⁷ On those occasions when American courts attempted to apply the "patently unlawful/valid on its face" distinction, the results were often inconsistent.¹⁸

Missouri courts have recognized the right to resist an unlawful arrest.¹⁹ The same tendency can be seen in Missouri as in other American jurisdictions—to accord automatic recognition to the right to resist if the arrest was unlawful. The provocative nature of the process usually was not closely examined. A distinction was not generally drawn between an

12. Moreland, *The Use of Force in Effecting or Resisting Arrest*, 33 NEB. L. REV. 408, 423 (1954).

13. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1129 (1969).

14. *The Queen v. Davis*, 1 Leigh 8 C.C.C. 64 (Carmarthen Assizes 1861); 1 J. TURNER, RUSSELL ON CRIME, 508-611 (11th ed. 1958). Davis was charged with the murder of a constable who was executing a warrant which contained some technical defects. The court held that if the process was not facially defective and was issued by a court or magistrate having jurisdiction in the case, the killing of a minister of justice in the execution of the warrant would be murder although there may have been error or irregularity in the proceeding previous to issuing the process.

15. 1 J. TURNER, *supra* note 14, at 508. For an example of resistance some time after the initial arrest, see *State v. Ross*, 492 S.W.2d 792 (Mo. 1973), where the defendant, after the booking procedure was finished and while being transported to a cell, struck an officer with his fist.

16. Chevigny, *supra* note 13, at 1131. See *Hopkin Huggett's Case*, 84 Eng. Rep. 1082 (K.B. 1666) (impressment of a soldier); *The Queen v. Tooley*, 2 Ld. Raym. 1296, 92 Eng. Rep. 349 (K.B. 1710) (arrest on suspicion of being disorderly); *The King v. Thompson*, 168 Eng. Rep. 1193 (K.B. 1825) (arrest for refusal to finish work); *The King v. Curvan*, 168 Eng. Rep. 1213 (K.B. 1826) (arrest on suspicion of making an insult). Chevigny notes that in all the above cases there probably was no underlying offense upon which the arrest could be made. *Id.*

17. *Id.*

18. See Annot., 10 A.L.R.3d 1146 (1966). The cases are not in harmony as to when process is void on its face. An extreme case held that the defense of resisting an unlawful arrest would be available when the arrest warrant did not have a seal. *State v. Weed*, 21 N.H. 262 (1850).

19. See *Kansas City v. Mathis*, 409 S.W.2d 280 (K.C. Mo. App. 1966); *City of St. Louis v. Penrod*, 332 S.W.2d 34 (St. L. Mo. App. 1960).

arrest "valid on its face" and one "patently unlawful." However, even though Missouri courts tended to recognize automatically the right to resist an unlawful arrest, the defense has been most readily recognized when the circumstances of the arrest were singularly provocative.²⁰

The *Nunes* court interpreted *State v. Briggs* as changing the common law rule in Missouri and abrogating the right to resist an unlawful arrest.²¹ However, the decision in *Briggs* actually was consistent with prior Missouri case law. The defendant in *Briggs* contended that his arrest was unlawful since the ordinance he allegedly violated was unconstitutional. The court did not consider the validity of the ordinance violated;²² they instead reasoned that to permit persons to resist arrest physically and then to be excused if they successfully question the constitutionality or validity of a statute or ordinance would "lead to chaos and would be intolerable."²³ It must be noted that the circumstances of this arrest were not provocative. In fact, the court specifically held that the arrest was lawful; there was evidence²⁴ that the defendant committed a mis-

20. Chevigny, *supra* note 13, at 1143-49. Chevigny noted characteristics of particularly provocative unlawful arrests: (1) face-to-face disputes arising out of a "stop and frisk" or from orders to "keep moving"; (2) the absence of an offense under which the arrestee could be charged; (3) knowledge by the arresting officer that the complaint is false; (4) the existence of personal animosity between the arrestee and the arresting officer; and (5) an arrestee who has been repeatedly arrested. The last two categories often are present in an unlawful arrest. *E.g.*, *Kansas City v. Mathis*, 409 S.W.2d 280 (K.C. Mo. App. 1966). In *Mathis* the defendant had been repeatedly arrested by the same officer on charges of vagrancy and prostitution. The court found the arrest unlawful because there were no reasonable grounds to support it but did not comment on the particularly provocative circumstances. The court stated that "[a]ny unlawful interference with the fundamental right of personal liberty may be resisted. Accordingly, every person has a right to resist an unlawful arrest." *Id.* at 286.

In *City of St. Louis v. Penrod*, 332 S.W.2d 34 (St. L. Mo. App. 1960) the defendant was arrested on suspicion of attempted child molestation. The arresting officer's reason for the arrest was that the defendant frequented public bathrooms and did not provide him requested identification. The defendant testified to a previous confrontation with the arresting officer. The court found no reasonable grounds to support the arrest. It did not comment on the provocative circumstances but nonetheless found that the defendant "had the right to use such force as was reasonably necessary to prevent" his unlawful arrest. *Id.* at 39.

21. 546 S.W.2d at 762. The court stated: "*Briggs* merely departs from the common law rule which allows resistance to an unlawful arrest by the use of reasonable force. . . . *Briggs* means that a citizen may not use force to resist any arrest, lawful or unlawful. . . ."

22. 435 S.W.2d at 364-65.

23. *Id.* at 365.

24. The evidence showed that the owners of a local tavern summoned the arresting officers after several fights had broken out in the bar. When the officers arrived the owner pointed at the defendant, whose clothes were mussed up and disorderly, his eyes bloodshot, and his speech slurred. There was no evidence of a prior police harassment or animosity toward the defendant, nor did it appear that at the time of his arrest the defendant knew or was concerned with whether he had been arrested unlawfully or under a valid ordinance.

deamemeanor in the officer's presence.²⁵ Under Missouri case law prior to *Briggs* the right to resist would not arise under these circumstances.

The present status of Missouri law as to whether there still is a right to resist an unlawful arrest is in conflict. Until the *Nunes* decision, the cases clearly and repeatedly recognized the right to resist an unlawful arrest.²⁶ *State v. Briggs* is consistent with prior case law. The *Nunes* decision is authority for the proposition that the common law defense is no longer recognized in Missouri. However, the language in *Nunes* concerning the abrogation of the right to resist is dictum.²⁷ Moreover, in at least four cases Missouri courts have declined to adopt the *Nunes* court's interpretation of *State v. Briggs* as abrogating the defense.²⁸

25. Section 80.410, RSMo 1969, provides that a town marshal shall have the right to arrest without process for violation of a city ordinance committed in his presence.

26. See cases cited note 19 *supra*.

27. *Nunes* was affirmed because the defendant failed to elicit evidence showing a basis for an instruction on self defense. 546 S.W.2d at 764. The defendant never alleged that he was resisting an unlawful arrest. In fact, among other things, the defendant requested an instruction on resistance to process. Hence, he was not contending that his arrest was unlawful but rather that he had resisted a lawful arrest.

State v. Rodriguez, 484 S.W.2d 203 (Mo. 1972), further confuses the case law as to the right to resist. While being arrested, the defendant struck one of the arresting officers. He was prosecuted and convicted for striking a police officer in the performance of his duties in violation of § 557.215, RSMo 1969. The defendant asked for an instruction that would require a finding that the arresting officer had reasonable cause to make the arrest in order to be "in the performance of his duties." The court stated that it was not necessary to make such a finding to decide that the officer was engaged in the performance of his duties. This indicates that even if an officer is making an unlawful arrest, he can still be in the performance of his duties. This effectively negated the defendant's right to resist an unlawful arrest. However, the defendant in *Rodriguez* did not specifically raise the defense. The same question was raised in *State v. Bradley*, 515 S.W.2d 826 (Mo. App., D.K.C. 1974), and the court, citing *Rodriguez*, came to the same conclusion. Cf. *District of Columbia v. Carter*, 409 U.S. 418 (1972) (District of Columbia Circuit held that a police officer making an unlawful arrest was acting under color of state law for § 1983 purposes. *Carter v. Carlson*, 447 F.2d 358 (1971). On appeal, the Supreme Court did not reach this question because it held that the District of Columbia was not a state or territory within the meaning of 42 U.S.C. § 1983 (1973)).

28. Other Missouri courts have not interpreted *Briggs* as abrogating the common law rule. The Missouri Supreme Court has had two opportunities to do so. In *State v. Bennett*, 468 S.W.2d 23 (Mo. 1971), the defendant was arrested for disorderly and insulting conduct. In *State v. Brothers*, 445 S.W.2d 308 (Mo. 1969), a case factually analogous to *Briggs*, the defendant was arrested for fighting in public and disturbing the peace. Both defendants contended that their arrests were unlawful because no misdemeanor had been committed in the officers' presence. If the common law rule had been changed by *Briggs*, the question of the lawfulness of the arrests would have been irrelevant. Nonetheless, the court considered the defendants' contentions but found both arrests lawful and affirmed. *Briggs* was not cited in *Bennett* nor was it cited in a footnote to *Brothers*

Even though present case law is conflicting as to the existence in Missouri of a right to resist an unlawful arrest, the statute is now clear. In its last legislative session, the General Assembly adopted section 575.150 of the new Criminal Code, which makes it a crime to resist or interfere with an arrest if the arrestee knows that a law enforcement officer is making the arrest. The common law defense of resisting an unlawful arrest is specifically eliminated.²⁹ The right of self defense against the unreasonable and excessive force by an arresting officer was not affected by the statute. This provision is not effective until January 1, 1979, so until that time, Missouri case law will determine the rights of an arrestee subject to an unlawful arrest. The new statutory provisions align Missouri with the increasing number of states that have abrogated the right to resist an unlawful arrest.³⁰ The rule in these jurisdictions is that

where the court stated that "the theory of a right to resist physically an illegal arrest is waning, and has been severely criticized and rejected by persuasive authorities." 445 S.W.2d at 310 n.1. In *State v. Bradley*, 515 S.W.2d 826 (Mo. App., D.K.C. 1974), the defendant contended that because his arrest was without a warrant he had a right to resist the allegedly unlawful arrest. The Kansas City District of the Missouri Court of Appeals closely examined the legality of the arrest and found competent evidence to support it. If *Briggs* had abrogated the defense of resisting an unlawful arrest, the lawfulness of the arrest in *Bradley* would have been irrelevant. In *City of St. Louis v. Treece*, 502 S.W.2d 432 (Mo. App., D. St. L. 1973), the defendant went to the aid of his wife and son who were allegedly being unlawfully arrested. The court held that there was no right to resist an illegal arrest by a third person on another person's behalf. The court relied on *United States v. Vigil*, 431 F.2d 1037 (10th Cir. 1970), *cert. denied*, 401 U.S. 918 (1971). On the basis of *Briggs*, which the court did not cite, *Treece* should have been an a fortiori case. If the arrestee has no right to resist an unlawful arrest, a third person should not have such a right that he can exercise in favor of another. It is thus evident that Missouri courts have not treated *Briggs* as changing the common law rule. *Briggs* is actually consistent with the English approach in that it held there to be no right to resist when the circumstances of arrest were not provocative.

29. Section 575.150, RSMo (effective January 21, 1979) provides:

1. A person commits the crime of resisting or interfering with arrest if, knowing that a law enforcement officer is making an arrest, for the purpose of preventing the officer from effecting the arrest, he:

(1) resists the arrest of himself by using or threatening the use of violence or physical force or by fleeing from the officer; or,

(2) interferes with the arrest of another person by using or threatening the use of violence, physical force or physical interference. . . .

(3) It is no defense . . . that the law enforcement officer was acting unlawfully in making the arrest. However, nothing in this section shall be construed to bar civil suits for unlawful arrest.

30. Before 1977, forty-two states recognized the right to resist an unlawful arrest. Four states have changed the common law rule by statute. *See* R.I. GEN. LAWS § 12-7-10 (1956); N.H. REV. STAT. ANN. § 594:5 (1955); DEL. CODE ANN. tit. 11, § 1905 (1953); CAL. PENAL CODE § 835(a) (West 1965). Four states have changed the common law rule by judicial decision. *See* *Miller v. State*, 462 P.2d

when a person knows he is being arrested by an officer of the law, he cannot physically resist unless it is necessary to protect his physical well-being.³¹

The reasons for recommending the abandonment of the common law rule are grounded on the assumption that such a change will lead an arrestee to "challenge the validity of arrest[s] in courts rather than on the streets."³² From an historical perspective, it is argued that the unavailability of bail often led to lengthy pre-trial detainment in overcrowded, disease-ridden jails, and that an arrestee had good reason to resist an unlawful arrest. At present, because of better jail conditions, improved police methods, prompt arraignment, the setting of bail,³³ administrative remedies, and injunction and civil damages, it simply is not practical to resist physically an unlawful deprivation of one's liberty.³⁴ Further, the defense of resisting an unlawful arrest cannot accomplish its purpose of preventing the arrest because the defense is only raised in a criminal trial, after the arrest has taken place.³⁵ Another

421 (Alaska 1969); *People v. Carrol*, 133 Ill. App. 2d 78, 272 N.E.2d 822 (1971); *State v. Koonce*, 89 N.J. Super. 169, 214 A.2d 428 (App. Div. 1965).

31. See Annot., 44 A.L.R.3d 1071, 1087 (1972). The statutes abrogating the common law right to resist an unlawful arrest have been upheld as constitutional in the face of a challenge that the right to resist an unlawful arrest has a constitutional basis. See Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626 (1970). Chevigny, *supra* note 13, at 1138-39, argues that reasonable resistance to an unlawful arrest should be legitimated in order to protect first amendment freedoms. Otherwise, it might be easy to curb the exercise of free speech in the form of protest demonstrations by alleging that demonstrators are resisting arrest. Chevigny also argues that due process protects against punishment for violating an arbitrary police order which is very similar to an arrest. See *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) (reversed conviction for obstructing the sidewalk by refusing to move when so ordered). Chevigny also finds constitutional dimensions to the right to resist in *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968) (per curiam). A Tulane law student was charged with resisting arrest and breach of the peace. The student claimed that the charges resulted from an unlawful arrest. Although the Supreme Court dismissed the writ of certiorari as improvidently granted, Chief Justice Warren "intimated that the right to resist an unlawful 'seizure of the person' may be basic to the fourth amendment." *Id.* at 608 (Warren, C.J., dissenting). Chevigny, *supra* note 13, at 1129. *But see* Note, *supra*, at 638 (suggestion that the cases relied on by Chevigny for support of a constitutional right to resist "offer little support for even so modest an assertion").

32. Note, *supra* note 31, at 637.

33. Comment, *supra* note 7, at 121-22.

34. Chevigny, *supra* note 13, at 1134-35.

35. *Id.* at 1137. Chevigny notes that "the existence of other rights does not depend upon whether it is prudent for the individual to assert them."

A frequently asserted reason for recommending the abandonment of the rule has been that it is primarily the guilty who resist an unlawful arrest. See Comment, *supra* note 7, at 124. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942) asserts that only "guntoting hoodlums and gangsters" will use the right to resist arrest. This assertion is not supported by the Missouri cases. *E.g.*, *Kansas*

reason for abrogating the common law defense is that in the context of an arrest two legally sanctioned uses of force conflict.³⁶ An arrestee who has a good faith belief that he is being unlawfully arrested may resist. At the same time, the law requires an officer who is making an arrest to be the aggressor. He must press forward to overcome all resistance to bring the arrestee under physical restraint.³⁷ If the defense is recognized, both parties may be authorized to use sufficient force to overcome the other. An escalation of the clash would be likely, with potentially dangerous consequences for the arrestee, the officer, and bystanders.³⁸

The root of this conflict originates in two subjective determinations of the lawfulness of the arrest—that by the arrestee and that by the arresting officer. An innocent man may be lawfully arrested provided there is reasonable cause supporting the arrest; a guilty man may be unlawfully arrested. However, the reasonable grounds supporting the arrest are very likely known only to the arresting officer, and in many situations the arrestee has no sure method of determining the legality of his arrest.³⁹

All of these reasons assume that changing the legal rule will cause arrestees to reflect on the consequences of resisting arrest and choose the more practical alternative of litigation of the issue of lawfulness.⁴⁰ However, the decision to resist is not deliberate or reflective. The consequences, if foreseen at all, are considered only momentarily and then in the heat of passion.⁴¹ Changing the defense is unlikely to deter physical violence between the police and arrestees. The question is not whether the arrestee can be certain that he is being arrested unlawfully; usually, he cannot. Nonetheless, if unlawfully arrested, one should not be punished for resisting the arrest if sufficiently provoked.⁴²

The statutes eliminating the defense of resisting an unlawful arrest, as well as case law to the same affect, have ignored the reason for existence of the defense—provocation. Similarly, the American rule governing application of the defense, still observed in a majority of states, operates automatically if the arrest is unlawful, and thereby ignores the provocative circumstances of the arrest as much as recent statutes which flatly prohibit the defense. Hence, in some American jurisdictions, application of the rule would work automatically in favor of one who is not actually

City v. Mathis, 409 S.W.2d 280 (K.C. Mo. App. 1966) (defendant arrested for prostitution and vagrancy); City of St. Louis v. Penrod, 332 S.W.2d 34 (St. L. Mo. App. 1960) (defendant arrested on suspicion of child molestation).

36. Comment, *supra* note 7, at 125.

37. See State v. Ford, 344 Mo. 1219, 130 S.W.2d 635 (1939).

38. Comment, *supra* note 7, at 125.

39. *Id.* at 124-25.

40. Note, *supra* note 31, at 637.

41. *Id.*

42. Chevigny, *supra* note 13, at 1139.

incensed by the illegality of the arrest. If the arrest is illegal because of some technical defect unknown to the arrestee, he should not be allowed to use this fortuity to vent possibly pre-existing malice.⁴³

Among the English, the American, and the *Nunes*/statutory approaches to resisting arrest, the English common law rule is preferable. However, although the distinction between a patently unlawful arrest and an arrest valid on its face can be useful as a guide to determining provocation, it should not be controlling. It is urged that the rule of reasonable provocation should be applied to determine whether the defense of resistance to unlawful arrest is available. If the arrest was unlawful, if a reasonable man would have been provoked to resistance by its unlawfulness, and if the defendant was, in fact, so provoked, he should be able to raise the defense. The practical effect of such a rule as contrasted with the *Nunes*/statutory approach can be illustrated by examining the facts of *Kansas City v. Mathis*.⁴⁴ In that case the defendant was arrested because she had "a reputation of being a prostitute."⁴⁵ The arresting officer was well known to the defendant; he had arrested her for prostitution on several previous occasions. At the time of her arrest, the defendant was working as a waitress in a hotel. When she saw the arresting officer, she ran outside and shortly thereafter was apprehended. At that time she began to struggle and attempted to get away from the arresting officer. She was eventually tried and convicted in municipal court for obstructing and resisting an officer.⁴⁶ The arrest was clearly unlawful and the court of appeals so held.⁴⁷ Under a rule of reasonable provocation, if it would be reasonable for a person to be provoked to resistance when arrested for prostitution while lawfully employed as a waitress, and if this person was, in fact, so provoked, the defense would be available. Under the *Nunes*/statutory approach, the defense of resisting arrest would not be available under these circumstances. The arresting

43. It has been suggested that there are two different social policies underlying the right to resist an unlawful arrest. One is based on protecting the liberty of the individual citizen against unlawful enforcement of the law. See *People v. Scalisi*, 324 Ill. 131, 154 N.E. 715 (1926). The other underlying policy is based upon the doctrine of provocation. See *State v. Burnett*, 354 Mo. 45, 188 S.W.2d 51 (1945) (murder of town marshal making an illegal arrest reduced to manslaughter). Jurisdictions which ground the right to resist upon protecting the liberty of the individual citizen are more likely to reduce murder to manslaughter automatically without examining the existence *vel non* of provocative circumstances. In Moreland, *The Use of Force in Effecting or Resisting Arrest*, 33 NEB. L. REV. 408 (1954), the author concludes that the preferable and majority rule is that murder, when committed resisting an unlawful arrest, is not automatically reduced to manslaughter unless the defendant was subjectively filled with the heat of passion.

44. 409 S.W.2d 280 (K.C. Mo. App. 1966).

45. *Id.* at 285.

46. *Id.* at 282.

47. *Id.* at 287.