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Notes: Maryland's Common Law Right to Resist Unlawful Arrest: Does It Really Exist?

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MARYLAND'S COMMON LAW RIGHT TO RESIST UNLAWFUL ARREST: DOES IT REALLY EXIST?

I. INTRODUCTION

> Civility is not a tactic or a sentiment. It is the determined choice of trust over cynicism, of community over chaos.[1]

During the nineteenth and twentieth centuries, almost every state, including Maryland,[2] adopted the right to resist unlawful arrest.[3] Since that time, however, the majority of states abolished the rule, claiming that it promotes violence.[4] Ironically, the act once recognized by most American jurisdictions as an individual's right is now considered a criminal violation.[5]

Contrary to this modern trend, Maryland refuses to abolish the rule, and emphatically upheld the right to resist an unlawful, warrantless arrest in *State v. Wiegmann*.[6] Nevertheless, other Maryland court decisions severely limit this right.[7] What remains, therefore, is an opinion purporting to uphold a right that, in reality, has been practically extinguished by other case law.[8]

Regarding this debate, some commentators argue that the right to resist an unlawful arrest is protected under the Fourth Amendment's prohibition of "unreasonable" seizures.[9] Alternatively, many jurists claim that the right, originally created for the protection of citizens,

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1. President George W. Bush, Inaugural Address (January 20, 2001), *available at* http://www.whitehouse.gov/press/inaugural-address.html.
2. *See* Sugarman v. State, 173 Md. 52, 56-57, 195 A. 324, 326 (1937).
3. *See* discussion *infra* Part II.B.
4. *See* Andrew P. Wright, *Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?*, 46 DRAKE L. REV. 383, 388 (1997); *see also infra* Part III; note 66 and accompanying text.
5. As of 1998, seventeen states legislatively eliminated the common law right to resist unlawful arrest. *See* State v. Hobson, 577 N.W.2d 825, 835 n.19 (Wis. 1998); *see also infra* note 66.
6. 350 Md. 585, 714 A.2d 841 (1998).
7. *See* discussion *infra* Part V.B.
8. *See* discussion *infra* Part V.B, VI.C.
9. *See* 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. U. L. REV. 1, 47 (1999).

conflicts with the public policy of modern society by endangering the safety and lives of police officers, arrestees, and innocent bystanders.[10]

For more than twenty years, Maryland courts acknowledged the latter argument and criticized the common-law right.[11] These same courts, however, still refuse to abolish the rule, calling instead upon the Maryland Legislature for action.[12] Yet, the Legislature has failed to act.[13] The courts have responded to the Legislature's inaction by imposing numerous limitations on the rule's application.[14] As a result, the right to resist arrest is upheld only in very limited situations.[15] Accordingly, it is time for the courts to end the debate on the legality of the right to resist arrest.

This Comment explores the right to resist arrest in Maryland. Part II discusses the history of the common-law right to resist arrest,[16] its origin,[17] and its transformations from eighteenth century England to twenty-first century America.[18] Part III explains the recent trend among states to abrogate the rule.[19] Part IV provides a basic overview of the general requirements of a lawful arrest in Maryland.[20] Part V discusses Maryland courts' position on the right to resist arrest,[21] and the limitations placed on the rule.[22] Part VI focuses on recent Maryland decisions[23] and predicts the significant impact they may have on the future of the common-law right to resist unlawful arrest in Maryland.[24] Part VII examines the constitutional considerations often associated with the right to resist unlawful arrest.[25] Finally, Part VIII

10. *See Hobson*, 577 N.W.2d at 837.
11. *See* Rodgers v. State, 280 Md. 406, 418-21, 373 A.2d 944, 950-52 (1977).
12. State v. Wiegmann, 350 Md. 585, 607, 714 A.2d 841, 851 (1998) ("We believe this change is best left to the Legislature . . ."). *But see Hobson*, 577 N.W.2d at 834 ("When a rule of law thwarts social policy rather than promotes it, it is the obligation of a common-law court to undo or modify a rule that it has previously made.").
13. *See Wiegmann*, 350 Md. at 606, 714 A.2d at 851.
14. *See infra* Part V.B.
15. *Wiegmann*, 350 Md. at 606, 714 A.2d at 851 (upholding the right of a litigant to resist an arrest that was made pursuant to a master's instruction); *see also infra* Part VI.A.
16. *See infra* notes 27-32 and accompanying text.
17. *See infra* notes 33-55 and accompanying text.
18. *See infra* notes 56-64 and accompanying text.
19. *See infra* notes 65-118 and accompanying text.
20. *See infra* notes 119-64 and accompanying text.
21. *See infra* notes 171-76 and accompanying text.
22. *See infra* notes 177-265 and accompanying text.
23. *See infra* notes 268-318 and accompanying text.
24. *See* discussion *infra* Part VI.C.
25. *See infra* notes 337-54 and accompanying text.

concludes that, given the rationales and implications of recent court decisions, the Court of Appeals of Maryland must clarify its rationale for sustaining the common-law right to resist arrest or abolish it completely, thereby ending the confusion surrounding this volatile issue.[26]

II. HISTORY OF THE RIGHT TO RESIST ARREST

The common-law right to resist unlawful arrest dates back to the seventeenth century.[27] Both English and American courts believed that the deprivation of liberty resulting from an unlawful arrest created such a provocation so as to justify resistance by physical force.[28] This remained the prevalent view in most American jurisdictions until the mid-twentieth century.[29]

A turning point in the evolution of the rule came in 1962, when the American Law Institute promulgated a version of the Model Penal Code, abrogating the rule.[30] Thereafter, many states responded by reexamining the judicial origins of the rule, attempting to find a modern justification for upholding the right to resist arrest.[31] Failing to find a modern justification, a number of states concluded that the

26. *See infra* Part VIII.

27. *See* State v. Hobson, 577 N.W.2d 825, 829-30 (Wis. 1998) (discussing the origin of the common-law privilege to resist an unlawful arrest).

28. *Id.* at 829. If a person being unlawfully arrested harmed the arresting officer, the fact that an arrest was unlawful was a defense to criminal prosecution. *Id.* For example, the right to resist an unlawful arrest was a partial defense to a murder charge where a suspect killed the arresting officer. *Id. See also* Hopkin Huggett's Case, 84 Eng. Rep. 1082 (K.B. 1666); The Queen v. Tooley, 2 Ld. Raym. 1296, 92 Eng. Rep. 349 (K.B. 1710); John Bad Elk v. United States, 177 U.S. 529, 535 (1900).

29. Some commentators suggested that the adoption of the Uniform Arrest Act in 1941 and the Model Penal Code in 1962 initiated the trend to eliminate the common-law right to resist an unlawful arrest. *See* Hemmens & Levin, *supra* note 9, at 13.

30. The Model Penal Code made it a misdemeanor to resist a lawful arrest. Uniform Laws Annotated, Model Penal Code § 242.2 (1999). Further, section 3.04 of the Model Penal Code provides that the use of force is not justified to resist an arrest made by a known peace officer even if the arrest is unlawful. Model Penal Code § 3.04(2)(a)(i) (Tentative Draft No. 9, 1958).

31. *See Hobson*, 577 N.W.2d at 829 (reviewing the history giving rise to the rule and questioning whether public policy is best served by continuing to recognize the rule).

motivations underlying the rule's creation no longer existed in society.[32]

A. *English Law*

The right to resist arrest originated in English common law more than 300 years ago.[33] The common law established the right in response to the terrible injustices that accompanied arrest in eighteenth century England.[34] Prisoners were kept in irons, subjected to physical torture, and kept in filthy rooms in close proximity to disease.[35] A quarter of the people in English prisons died every year due to the horrible conditions.[36]

In *Hopkin Huggett's Case,*[37] a constable attempted to force a man into the army.[38] The defendant, and others who witnessed the attempted impressment, killed the constable.[39] The defendant was charged with murder, but the court reduced the charge from murder

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32. *See* Sam B. Warner, *The Uniform Arrest Act,* 28 VA. L. REV. 315, 330 (1942). Arguing that the right to resist an unlawful arrest has no place in modern society, Warner explained:

> [Our law regarding arrests] not only antedates the modern police department, but was developed largely during a period when most arrests were made by private citizens, when bail for felonies was usually unattainable, and when years might pass before the royal judges arrived for a jail delivery. Further, conditions in the English jails were then such that a prisoner had an excellent chance of dying of disease before trial. Today, with few exceptions, arrests are made by police officers, not civilians . . . . When a citizen is arrested, his probable fate is neither bail nor jail, but release after a short detention in a police station.

Id. (citation omitted).

33. *See* State v. Valentine, 935 P.2d 1294, 1299-1302 (Wash. 1997) (discussing the history of the common-law right to resist an unlawful arrest).

34. A person unlawfully arrested in eighteenth century England did not enjoy the pretrial procedural rights that arrestees are granted today, including the right to appointed counsel, liberal bonding policies, prompt arraignment, and preliminary hearing. Wright, *supra* note 4, at 388 (citing City of Columbus v. Fraley, 324 N.E.2d 735, 739 (Ohio 1975)).

35. *Id.* (citing Sam B. Warner, *The Uniform Arrest Act,* 28 VA. L. REV. 315, 330 (1942)); Sam B. Warner, *Investigating the Law of Arrest,* 26 A.B.A. J. 151-52 (1940)).

36. *Valentine,* 935 P.2d at 1300 n.10 (citing THE GENTLEMAN'S MAG. & HIST. CHRON., Jan. 1759, at 17).

37. 84 Eng. Rep. 1082 (K.B. 1666).

38. *See* Rodgers v. State, 280 Md. 406, 411, 373 A.2d 944, 947 (1977) (discussing *Hopkin Huggett's Case*).

39. *Id.*

to manslaughter, finding that the defendant was justifiably provoked by the illegal arrest.[40] The court explained:

> [I]f a man be unduly arrested or restrained of his liberty by three men, althou' he be quiet himself, and do not endeavor any rescue, yet this is a provocation to all other men of England, not only his friends but strangers also for common humanity sake, as my Lord Bridgman said, to endeavor his rescue.[41]

Thus, the court created the right to resist arrest as a defense, applicable not only to the victim of the arrest, but also to other citizens witnessing an illegal arrest.[42]

Fifty years later, English courts reaffirmed *Hopkin Huggett's* holding in *The Queen v. Tooley*.[43] In *Tooley*, observers confronted a constable attempting to arrest a woman for disorderly conduct.[44] The constable summoned the assistance of another citizen, who was subsequently killed by one of the onlookers.[45] Again, the court reduced the murder charge to manslaughter, stating, "[a] man ought to be concerned for Magna Charta and the laws, and if anyone against the law imprison a man, he is an offender against Magna Charta."[46] Although English courts only reduced charges from murder to manslaughter, thereafter, the courts uniformly ruled that the provocation of an illegal arrest was sufficient to excuse entirely the assault made by the arrestee.[47]

Two hundred years after the *Hopkin Huggett's* decision, English courts began curtailing the right to resist arrest, finding that it did not apply to an arrest based on a defective warrant.[48] For example, the court in *The Queen v. Davis*[49] held that it was murder to kill an officer executing an invalid warrant due to a procedural error, as long as the process was not defective "in the frame of it."[50] Suggesting a concern

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40. *Id.*
41. *Id.*
42. *See* Hemmens & Levin, *supra* note 9, at 8.
43. 2 Ld.Raym. 1296, 92 Eng. Rep. 349 (Q.B. 1710).
44. *Rodgers*, 280 Md. at 411, 373 A.2d at 947 (citing The Queen v. Tooley, 2 Ld.Raym. 1297, 92 Eng. Rep. 349 (Q.B. 1710)).
45. *Id.*
46. *Id.*
47. *See id.* at 412, 373 A.2d at 947.
48. *See Rodgers*, 280 Md. at 412, 373 A.2d at 948 (citing The Queen v. Davis, 1 Leigh & Cave, C.C.Res. 64 (1861)).
49. 1 Leigh & Cave, C.C.Res. 64 (1861).
50. *Id.* at 75. The warrant in *Davis* was proper in form but lacked the requisite collateral documentation. *Rodgers*, 280 Md. at 412-13, 373 A.2d at 948. The English appellate court affirmed the assault conviction arising from the defendant resisting arrest. *Id.*

for the well-being of the arresting officer, the court acknowledged that an officer unaware of the defect, still had a duty to execute the warrant.[51] Thereafter, English courts distinguished between a legal process that is "valid on its face,"[52] which must be obeyed, and one that is "patently unlawful,"[53] which was "'such a provocation to the citizen that the criminal element in his resistance is reduced, if not removed entirely.'"[54] Therefore, in practice, obvious defects in a warrant justified resistance, whereas technical defects did not.[55]

B. American Jurisdictions

The United States Supreme Court recognized the common-law right to resist unlawful arrest as early as 1895 in *Brown v. United States*,[56] and reaffirmed this right five years later in *Elk v. United States*.[57] This right soon became the established American rule, broadly recognized throughout the nineteenth and twentieth centuries.[58] American courts also adopted the English warrant rule—excus-

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51. *Rodgers*, 280 Md. at 413, 373 A.2d at 948 ("'[A]lthough there may have been error or irregularity in the proceeding . . . the officer must at his peril pay obedience to it.'") (quoting *Davis*, 1 Leigh & Cave, C.C.Res. at 75); *see also* Hemmens & Levin, *supra* note 9, at 12 ("[A]n officer acted at his peril if he knowingly made an unlawful arrest, while the officer was afforded some degree of protection when simply following orders.").
52. *Rodgers*, 280 Md. at 413, 373 A.2d at 948.
53. *Id.*
54. *Id.* (quoting Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1131 (1969)).
55. *See* Hemmens & Levin, *supra* note 9, at 13.
56. 159 U.S. 100 (1895). In *Brown v. United States*, the Court held that failing to instruct a jury that the right to resist unlawful arrest could mitigate murder to manslaughter was reversible error. *Id.* at 102-03.
57. 177 U.S. 529 (1900). In *Elk v. United States*, Elk, a police officer, was asked to come to the police station because another man witnessed him shooting a gun into the air. *Id.* at 530-31. There were no witnesses and the police did not have a warrant for Elk's arrest. *Id.* at 532. When the officers attempted to arrest Elk, he shot and killed one of them. *Id.* at 533. The Court reversed Elk's murder conviction, explaining that in a situation where an officer is killed during an attempted arrest that is resisted, "the law looks with very different eyes . . . [if] the officer had the right to make the arrest, from what it does . . . if the officer had no such right. What might be murder in the first case might be nothing more than manslaughter in the other . . . ." *Id.* at 537-38.
58. *See* Rodgers v. State, 280 Md. 406, 412, 373 A.2d 944, 947 (1977); *see also* Max Hochandael & Harry W. Stege, *Criminal Law: The Right to Resist an Unlawful Arrest: An Out-Dated Concept?*, 3 TULSA L.J. 40, 46-47 (1966) (noting that as of 1966 the right to resist unlawful arrest was recognized in forty-

ing resistance to an arrest made pursuant to a warrant, only if the warrant contained a "fatal defect."[59] The view among courts, however, differed significantly as to what type of defect would render process void and excuse resistance to it.[60]

Within thirty years of the *Elk* decision, signs of opposition to the right to resist unlawful arrest first appeared.[61] Scholars and courts began examining the policy considerations underlying the origin of the right.[62] Many argued that, with the implementation of modern criminal procedure and civil remedies, the fundamental reasons for resisting arrest disappeared.[63] Moreover, the application of "self-help" as a remedy was criticized as inappropriate and dangerous in an "urbanized society."[64] Consequently, the sentiment among courts and legislatures against the common-law rule continued to grow.

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five of the fifty states). For a sample of these jurisdictions, *see id.* at 47 n.54 (citing State v. Eddington, 386 P.2d 20 (Ariz. 1963); Finch v. State, 112 S.E.2d 834 (Ga. 1960); People v. Smith, 43 N.E.2d 420 (Ill. App. 1942); State v. Goering, 392 P.2d 930 (Kan. 1964); State v. Miller, 91 N.W.2d 138 (Minn. 1958); State v. Parker, 378 S.W.2d 274 (Mo. 1964); Walters v. State, 403 P.2d 267 (Okla. Ct. App. 1965); King v. State, 99 S.W.2d 932 (Tex. App. 1936)).

59. *Rodgers*, 280 Md. at 413, 373 A.2d at 948; *see also supra* notes 51-55 and accompanying text.

60. *See Rodgers*, 280 Md. at 413-14, 373 A.2d at 948 (noting that the issue has been one of considerable appeal to writers and scholars). A New Hampshire court gave several examples of warrant defects sufficient to excuse resistance, including warrants where the proper seal was not affixed, where the name of the executing sheriff was inserted after issuance, and where warrants were executed outside the proper jurisdiction. *Id.* (citing New Hampshire v. Weed, 21 N.H. 262, 268-69 (1850)). Nonetheless, according to the court in *Rodgers*, *United States v. Thompson* held that a warrant charging an act committed outside the proper jurisdiction was void; however, if it were issued within the proper jurisdiction, an officer was bound to execute it and the defendant had no right to resist the arrest. *Rogers*, 280 Md. at 413, 373 A.2d at 948 (holding that if a warrant "purports to have been issued within [the magistrate's] jurisdiction" the defendant may not lawfully resist the arrest) (citing United States v. Thompson, 28 Cas. 89 (C.C. 1823)(No. 16,484)).

61. *See* R.M.R., Note, *Resistance to Illegal Arrest*, 23 MICH. L. REV. 62 (1924).

62. *See generally* State v. Valentine, 935 P.2d 1294 (Wash. 1997); New Jersey v. Koonce, 214 A.2d 428 (N.J. Super. Ct. App. Div. 1965); Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 330 (1942); Hochandael & Stege, *supra* note 58.

63. *Valentine*, 935 P.2d at 1301 ("Not only has criminal procedure advanced to protect the rights of the accused, jails themselves are no longer the pestilential death traps they were in eighteenth-century England.").

64. *Koonce*, 214 A.2d at 436.

III. THE MODERN TREND – ABOLISHING THE RIGHT TO RESIST

The modern trend among most jurisdictions has been to eliminate the common-law right to resist arrest.[65] As of 2001, thirty-nine states abolished the right – twenty-three by statute and sixteen by judicial decision.[66] These changing views are based largely on policy consider-

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65. *See Valentine*, 935 P.2d at 1302 (noting the trend toward resolution of disputes in court).

66. The following twenty-three states substantially eliminated the right to resist an unlawful arrest through legislative enactment: ALA. CODE § 13A-3-28 (1994); ARK. CODE ANN. § 5-54-103 (Michie 1997); CAL. PENAL CODE § 834a (West 1985); COLO. REV. STAT. § 18-8-103(2) (1999); CONN. GEN. STAT. ANN. § 53a-23 (West 1994); DEL. CODE ANN. tit. 11, § 464(d) (1995); FLA. STAT. ANN. § 776.051(1) (West 1992); HAW. REV. STAT. § 710-1026(1) (1993); ILL. COMP. STAT. ANN. 5/7-7 (West 1993); IOWA CODE ANN. § 804-12 (West 1994); KAN. STAT. ANN. § 21-3217 (1995); KY. REV. STAT. ANN. § 520.090(1) (Michie 1990); MONT. CODE ANN. § 45-3-108 (1999); NEB. REV. STAT. § 28-1409(2) (1995); N.H. REV. STAT. ANN. § 594:5 (1986); N.Y. PENAL LAW § 35.27 (McKinney 1998); N.D. CENT. CODE § 12.1-05-03(1) (1997); OR. REV. STAT. § 161.260 (1990); 18 PA. CONS. STAT. ANN. § 505(b)(1)(ii) (West 1998); R.I. GEN. LAWS § 12-7-10 (1994); S.D. CODIFIED LAWS § 22-11-5 (Michie 1998); TEX. PENAL CODE ANN. §9.31(b)(2) (West 1994); VA. CODE ANN. § 18.2-460(8) (Michie 1996); *see also* Hemmens & Levin, *supra* note 9, at 24 n.208.

Judicial decisions in the following sixteen states have also substantially eliminated the right to resist an unlawful arrest: Miller v. State, 462 P.2d 421, 427 (Alaska 1969) (holding that whether an arrest is legal or illegal should be determined by the court and not by a "trial by battle in the streets"); State v. Hatton, 568 P.2d 1040, 1046 (Ariz. 1977) (questioning whether there is a blanket right to resist, the court held that there was no right to resist an illegal arrest); State v. Richardson, 511 P.2d 263, 268 (Idaho 1973) (stating that the modern trend does not favor a resort to violence in the case of an illegal arrest, the court held that if an individual has reasonable grounds to believe that he is being arrested he has a duty not to resist); State v. Thomas, 262 N.W.2d 607, 611 (Iowa 1978) (holding that an individual has a duty to refrain from using a weapon or force in resisting an arrest regardless of whether a legal basis exists for the arrest); State v. Austin, 381 A.2d 652, 655 (Me. 1978) (stating that statutory language does not justify the use of force against a police officer merely because the individual reasonably believes the arrest is illegal); Commonwealth v. Moreira, 447 N.E.2d 1224, 1227 (Mass. 1983) (holding that because of expanded protection of legal rights, an individual may be required to submit to an unlawful arrest); *In re* Welfare of Burns, 284 N.W.2d 359, 360 (Minn. 1979) (holding that an individual may not resist a search on the grounds that it is illegal); State v. Nunes, 546 S.W.2d 759, 766 (Mo. Ct. App. 1977) (stating that the Legislature has determined that strik-

ing an officer is a more serious offense than mere obstruction); State v. Koonce, 214 A.2d 428, 434 (N.J. Super. Ct. App. Div. 1965) (noting that both the Uniform Arrest Act and the Model Penal Code recommend abolishment of the common-law right to resist an unlawful arrest); State v. Doe, 583 P.2d 464, 467 (N.M. 1978) (noting that the societal interest in settling disputes orderly outweighs any individual interest in resisting an arrest); City of Columbus v. Fraley, 324 N.E.2d 735, 740 (Ohio 1975) (stating that an arrestee's resistance of a police officer is outweighed by society's interest in securing liberty and prevention of death or harm to participants and third parties); State v. Gardiner, 814 P.2d 568, 573 (Utah 1991) (stating that since Utah's Legislature abolished all common-law crimes and adopted specific defenses, the failure to enact a general right to resist illegal arrest precludes the court from applying the common-law rule); State v. Blaine, 341 A.2d 16, 20 (Vt. 1975) (noting that no authorities were pointed to which claimed that illegality, even if it existed, justified respondent's actions); State v. Valentine, 935 P.2d 1294, 1304 (Wash. 1997) (finding that, although an unlawfully arrested person has a right to use reasonable and proportional force to resist attempts to inflict injury upon the person during the course of an arrest, that person may not use force against arresting officers if faced only with the loss of freedom); Wisconsin v. Hobson, 577 N.W.2d 825, 826 (Wis. 1998) (holding that Wisconsin no longer recognized the common-law privilege to forcibly resist an unlawful arrest in the absence of unreasonable force); Roberts v. State, 711 P.2d 1131, 1134 (Wyo. 1985) (affirming the defendant's conviction under the resisting arrest statute where the arresting officer unwittingly relied upon an invalid warrant in making the arrest).

The remaining eleven states have not substantially eliminated the right to resist an unlawful arrest: Jones v. State, 529 S.E.2d 644, 646 (Ga. App. 2000) (allowing a person to refuse arrest if that person reasonably believes that the degree of resistance used is necessary to defend against the officer's use of unlawful or excessive force); Adkisson v. State, 728 N.E.2d 175, 179 (Ind. App. 2000) (finding insufficient evidence to convict the defendant for resisting arrest where the officer unlawfully enters a defendant's residence to effect a misdemeanor criminal arrest); State v. Stowe, 635 So. 2d 168, 176 (La. 1994) (finding "the right to personal liberty is one of the fundamental rights guaranteed to every citizen, and any unlawful interference with it may be resisted"); State v. Wiegmann, 280 Md. 585, 607, 714 A.2d 841, 851 (1998) (declining to abolish the longstanding, common-law privilege of permitting persons to resist an illegal, warrantless arrest); City of Detroit v. Smith, 597 N.W.2d 247, 249 (Mich. App. 1999) (finding that the right to resist an unlawful arrest is, "in essence, a defense to the charge of resisting arrest, because the legality of the arrest is an element of the charged offense"); Brendle v. City of Houston, 759 So. 2d 1274, 1284 (Miss. App. 2000) (holding that the offense of resisting arrest presupposed a lawful arrest, and thus a person has a right to use reasonable force to resist an unlawful arrest); Batson v. State, 941 P.2d 478, 483 (Nev. 1997) (allowing a person to rightfully resist unlawful arrest and excessive force);

ations.[67] For example, many jurisdictions viewed the rule as anachronistic and dangerous, claiming it promoted violence.[68] Several courts quoted Judge Learned Hand in their debate over whether to abrogate the rule. "'The idea that you may resist peaceful arrest . . . because you are in debate about whether it is lawful or not, . . . [is] not a blow for liberty but on the contrary, a blow for attempted anarchy.'"[69]

The proposition that self-help causes graver consequences than an unlawful arrest is a valid concern.[70] It is highly unlikely that a suspect can effectively escape or deter an arrest unless the suspect responds with equal or greater force.[71] Thus, courts attempted to end what amounted to "street justice" by eliminating the right and encouraging dispute resolution through the judicial process.[72]

A. State v. Valentine

The Supreme Court of Washington addressed the public policy concerns surrounding the right to resist arrest in *State v. Valentine*.[73] In *Valentine*, the police stopped the defendant for failing to use a turn

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State v. Sanders, 281 S.E.2d 7, 15 (N.C. 1981) (stating that "a person indeed has the right to resist an unlawful arrest by the use of force, as in self-defense, to the extent that it reasonably appears necessary to prevent unlawful restraint of his liberty"); State v. Robertson, 5 S.E.2d 285, 285 (S.C. 1939) (stating that a "person has a right to 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"); State v. Isibor, 1997 WL 602945, at *3 (Tenn. Crim. App. 1997) (finding a defendant *may* be guilty of resisting arrest even if the arrest is unlawful) (emphasis added); State v. Gum, 69 S.E. 463, 464 (W. Va. 1910) (observing that if an attempted arrest is unlawful, the party arrested may use reasonable and proportionate force to effect an escape, however, a person escaping arrest cannot use superior force or a deadly weapon if that person has no reason to fear a greater injury than a mere unlawful arrest).

67. *See* State v. Valentine, 935 P.2d 1294, 1302 (Wash. 1997) ("[C]ourts . . . have set out many cogent and compelling reasons for consigning the common law rule to the dustbin of history."); *see also* Wright, *supra* note 4, at 388 n.49.

68. *See, e.g.*, State v. Thomas, 262 N.W.2d 607, 610 (Iowa 1978) (holding that a person may not resist an arrest made by a person whom the arrestee knows, or should know, is a police officer, regardless of the lawfulness of the arrest).

69. Rodgers v. State, 280 Md. 406, 418, 373 A.2d 944, 950-51 (1977) (quoting 1958 Proceedings, American Law Institute, at 254); *see also* State v. Hobson, 577 N.W.2d 825, 835 (Wis. 1998).

70. *See* People v. Curtis, 450 P.2d 33, 36-37 (Cal. 1969).

71. *See Thomas*, 262 N.W.2d at 611.

72. *See* Evans v. City of Bakersfield, 27 Cal. Rptr. 2d 406, 412 (1994).

73. 935 P.2d 1294 (Wash. 1997).

signal and ordered him out of his car.[74] When the defendant refused to sign a citation, the officer informed the defendant that he would be placed under arrest for failure to cooperate.[75] The defendant subsequently opened his car door and attempted to reach inside when officers grabbed him and ordered him to stay out of the car.[76] A fight ensued when the defendant punched one of the officers.[77] The officers eventually subdued the defendant, who was later charged and convicted of assault.[78]

In a plurality opinion affirming Valentine's conviction,[79] the court held that a person who is being unlawfully arrested may not use force against the arresting officer if that person is faced only with a loss of liberty.[80] The court recognized the erosion over time of the "theoretical footings" underlying the original right to resist unlawful arrest.[81] Accordingly, the court utilized the principle of *stare decisis*[82] to abrogate the out-dated rule.[83]

As the court noted, unlike the era forcing the creation of the common-law right,[84] persons arrested today are provided with rights and

74. *Id.* at 1295. The defendant was initially observed by police as a "suspicious subject [standing] on the corner." *Id.* The police followed the defendant once he got into his car. *Id.*

75. *Id.* The arresting officer had cited the defendant on two prior occasions for front license plate violations. *Id.* at 1295 n.2. Defendant responded to the officer's request for license and registration by saying, "you . . . cops are just harassing me. I'm Black [sic], and I'm tired of the harassment." *Id.* at 1295.

76. *Id.* at 1295.

77. *Id.* A nurse supervisor at the jail refused to admit the defendant because of his injuries; he was taken to the hospital where he signed the citation. *Id.* at 1296.

78. *Id.* at 1295-96.

79. Judge Sanders dissented and Judge Madsen concurred in the dissent. *Id.* at 1306-21.

80. *Id.* at 1304.

81. *Id.* at 1298.

82. *Stare decisis*, Latin meaning "to stand by things decided," is the doctrine of precedent under which it is necessary for courts to follow earlier judicial decisions when the same points arise again in litigation. *See* BLACKS LAW DICTIONARY 1414 (7th ed. 1999).

83. *Valentine*, 935 P.2d at 1298 ("Reconsidering cases . . . 'enables the law under stare decisis to grow and change to meet the ever-changing needs of an ever-changing society . . . .'") (quoting State *ex rel.* Washington State Fin. Comm. v. Martin, 384 P.2d 833 (1963)). *But see* State v. Wiegmann, 350 Md. 585, 607, 714 A.2d 841, 851 (1998) (applying *stare decisis* as a basis for upholding the common-law right to resist an unlawful arrest).

84. *Valentine*, 935 P.2d at 1299-1301; *see also supra* Part II.A.

protections against unreasonable treatment.[85] Thus, the *Valentine* court suggested that because the reasons originally giving rise to a right to resist unlawful arrest were extinct,[86] there no longer remained a logical basis for recognizing the right.[87]

Moreover, the *Valentine* court addressed the dangers associated with self-help remedies, pointing out that in today's society police are sometimes required to use lethal force for self-protection.[88] Resisting arrest, therefore, can lead to serious injury or death of the arrestee, police officer, or innocent bystanders.[89] Concluding that the common-law right to resist unlawful arrests increased the chance of someone being killed or injured, the court found the rule "outmoded in our modern society."[90]

In deciding whether to abrogate the rule, the court also considered an individual's right to liberty.[91] The court acknowledged that society has an important interest in protecting its citizens' right to be free of unreasonable searches and seizures.[92] Nonetheless, the court found such societal interest outweighed by the state's interest in discouraging violence.[93] Resistance made matters worse by creating violence where it would not have existed otherwise.[94] In its final analysis, the *Valentine* court justified the elimination of the rule by reasoning that a loss of liberty can be vindicated through the court system,[95] while a loss of life or serious injury cannot.[96]

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85. *Valentine*, 935 P.2d at 1301 (recognizing that a defendant's rights to reasonable bail, to appointed counsel, and to "prompt judicial determination of probable cause" were not available in 1709).
86. *Id.* at 1301-02.
87. *Id.* ("[T]he right to resist developed when the procedural safeguards which exist today were unknown.") (quoting State v. Hatton, 568 P.2d 1040, 1045 (Ariz. 1977)).
88. *Id.* at 1303-04 (quoting State v. Westlund, 536 P.2d 20, 25 (Wash. 1975)).
89. *Id.*
90. *Id.* at 1303.
91. *Id.*
92. *Id.* at 1302 (citing Evans v. City of Bakersfield, 27 Cal. Rptr. 2d 406, 412 (1994)).
93. *Id.* The court explained, "[w]hile society has an interest in securing for its members the right to be free of unreasonable searches and seizures, society also has an interest in the orderly resolution of disputes between its citizens and the government." *Id.* (citing United States v. Ferrone, 438 F.2d 381, 390 (3d Cir. 1971)).
94. *Id.* at 1304 (citing State v. Westlund, 536 P.2d 20, 25 (Wash. 1975)).
95. *Id.* The most notable civil remedies for those arrested unlawfully are actions brought under 42 U.S.C. § 1983 and state causes of action for false imprisonment. *See* Wright, *supra* note 4, at 393-99.
96. *Valentine*, 935 P.2d at 1304.

B. State v. Hobson

Since the *Valentine* decision, the Supreme Court of Wisconsin abolished Wisconsin's common-law right to resist unlawful arrest.[97] In *State v. Hobson*,[98] police unlawfully arrested Ms. Hobson when she refused to allow them to question her five-year-old son about a stolen bicycle.[99] A young boy reported to police that he saw Ms. Hobson's son riding his sister's stolen bicycle.[100] When a police officer went to Ms. Hobson's house to question her son about the incident, Ms. Hobson became a "bit irritated" and refused to let the officer speak to her son.[101] The officer told Ms. Hobson that he would have to take her son to the police station and explained that she could come along.[102] Ms. Hobson responded by raising her voice and swearing at the officer.[103] When backup officers arrived, they attempted to handcuff Ms. Hobson, informing her that she was under arrest.[104] Ms. Hobson then became "combative" and struck one of the officers in the face.[105] Even after she was "taken to the ground," Ms. Hobson continued to fight and kick the officers.[106]

The police charged Ms. Hobson with obstructing an officer, disorderly conduct, resisting arrest, and causing intentional bodily harm to a peace officer.[107] At an evidentiary hearing, the trial court dismissed the charges against Ms. Hobson finding no probable cause for her arrest.[108] Moreover, the court acknowledged Ms. Hobson's common-law right to resist unlawful arrest.[109] The State appealed, seeking a reversal of the trial court's dismissal of the battery charge,[110] and requesting the appellate court to abolish the right to resist unlawful arrest.[111]

Similar to *Valentine*, the court in *Hobson* traced the evolution of the common-law rule.[112] The court posed the question whether public

97. State v. Hobson, 577 N.W.2d 825, 838 (Wis. 1998).
98. 577 N.W.2d 825 (Wis. 1998).
99. *Id.* at 827-28.
100. *Id.* at 827.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 828.
106. *Id.* at 827.
107. *Id.*
108. *Hobson*, 577 N.W.2d at 827.
109. *Id.* at 828.
110. *Id.* at 826.
111. *Id.*
112. *See id.* at 829-31.

policy would be better served by continuing to recognize the right or by abrogating it.[113] Deciding to abolish the rule, the court recognized its obligation to undo or modify a rule of law that "thwarts social policy rather than promote[s] it," even when the legislature fails to do so.[114]

Similar to the analysis of other courts abrogating the rule,[115] the *Hobson* court emphasized both the danger created by the rule, and its lack of any modern justification.[116] Further, the court highlighted the safeguards currently available to protect citizens from police misconduct, including civil remedies and the police department's internal review and disciplinary procedures.[117] Ultimately, the court held that although an unlawful arrest temporarily deprives a citizen's liberty, the law of our civilized society permits only a civilized form of redress.[118]

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113. *Id.* at 834.

114. *Id.*

115. *See* Commonwealth v. Moreira, 447 N.E.2d 1224, 1227 (Mass. 1983) (stating "[i]n this era of constantly expanding legal protection of the rights of the accused in criminal proceedings, an arrestee may be reasonably required to submit to a possibly unlawful arrest and to take recourse in the legal processes available to restore his liberty"); State v. Koonce, 214 A.2d 428, 436 (N.J. Super. Ct. App. Div. 1965) ("The concept of self-help is in decline. It is anti-social in an urbanized society. It is potentially dangerous to all involved. It is no longer necessary because of the legal remedies available.").

116. *Hobson*, 577 N.W.2d at 835 ("Unhealthy conditions in jails have decreased, while the physical risks of resisting arrest have increased.").

117. *Id.* at 836. Ms. Hobson invoked one of these protections by filing a claim against the police department under 42 U.S.C. § 1983. *Id.* Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

118. *Hobson*, 577 N.W.2d at 837 ("Justice can and must be had in the courts, not in the streets.").

IV. MARYLAND'S LAW ON ARREST IN GENERAL

Under Maryland law, the right to resist arrest applies only in situations involving an *unlawful* arrest.[119] When an arrest is lawful or made pursuant to a warrant, resistance is considered a criminal offense rather than a right.[120] Maryland classifies resisting lawful arrest as a common-law misdemeanor[121] and an obstruction of justice.[122] Thus, the difference between being protected by a right and being charged with a crime may be determined by the lawfulness of the arrest.

A. *Lawful Arrest In General*

Absent a controlling federal statute, the legality of an arrest depends on the state law where the arrest was made.[123] To effectuate a lawful arrest under Maryland law, the arresting officer must act under a duly issued warrant or possess probable cause to make the arrest.[124]

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119. *See* Monk v. State, 94 Md. App. 738, 745, 619 A.2d 166, 170 (1993) ("[A] citizen may resist an unlawful, warrantless arrest"); Matter of Nawrocki, 15 Md. App. 252, 264 n.8, 289 A.2d 846, 853 n.8 (1972) ("[I]t is the duty of the citizen to submit to lawful arrest.").

120. *See* Okwa v. Harper, 360 Md. 161, 171, 757 A.2d 118, 123 (2000) (explaining that the defendant jumped up and down and tried to break free after being arrested for disorderly conduct); Cooper v. State, 128 Md. App. 257, 263, 737 A.2d 613, 615-16 (1999) (stating that the defendant punched police officers when they attempted to arrest him for cocaine possession).

121. *See* Preston v. Warden of Md. House of Corr., 225 Md. 628, 629, 169 A.2d 407, 408 (1961) ("[R]esistance to an officer of the law in the performance of his duties constitutes an offense at common law . . . and is an offense in this State.").

122. *See* CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 593 (14th ed. 1981); ROCAIN M. PERKINS & RONALD BOYCE, CRIMINAL LAW 553-56 (3d ed. 1982). Resistance constitutes a crime, however, only when it is in response to an actual arrest or an attempted arrest. *See* State v. Blackman, 94 Md. App. 284, 306, 617 A.2d 619, 630 (1992) (refusing to extend the right to resist arrest to illegal frisks); Barnhard v. State, 86 Md. App. 518, 526-28, 587 A.2d 561, 565-66 (1991) (refusing to extend the right to resist arrest to illegal detentions). In addition, a lawful arrest must be made by a law enforcement officer with the power to arrest. *See* Lyles v. State, 10 Md. App. 265, 268-70, 269 A.2d 178, 180-81 (1970).

123. *See* Cole v. United States, 678 A.2d 554 (D.C. 1996); Howard v. State, 112 Md. App. 148, 158, 684 A.2d 491, 496 (1996) (quoting Stanley v. State, 230 Md. 188, 191, 186 A.2d 478, 480 (1962)); Hutchinson v. State, 38 Md. App. 160, 166, 380 A.2d 232, 235 (1977).

124. *See* Baziz v. State, 93 Md. App. 285, 292, 612 A.2d 296, 300 (1992) (holding that an arrest made pursuant to reasonable suspicion of drug activity is unlawful because reasonable suspicion is a less demanding standard than probable cause, which is required to make such an arrest).

An arrest made without a warrant must meet certain statutory requirements.[125] Generally, a police officer may make a warrantless arrest of any person who commits or attempts to commit any felony or misdemeanor in the presence of or within the view of the officer.[126] Even if a warrantless arrest satisfies the statutory requirements, an arrest that violates the arrestee's constitutional rights will be deemed unlawful.[127]

In Maryland, a "lawful arrest" occurs when a police officer, having probable cause to believe that a suspect committed a crime, physically restrains the suspect or subjects the suspect to the officer's custody and control.[128] An arrest does not require the suspect to be formally charged with a crime,[129] nor does it require the officer to possess the

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125. For the purposes of arrests made without a warrant, Section 594B of Article 27 of the Maryland Annotated Code outlines the authority of police officers, federal law enforcement officers, the State Fire Marshall, Prince George's County Fire Department, correctional employees and parole and probation employees. *See* MD. ANN. CODE art. 27, § 594B (Supp. 2000). *See also Lyles*, 10 Md. App. at 270, 269 A.2d at 181 (vacating the defendant's conviction for resisting arrest because the State was unable to establish beyond a reasonable doubt that the security guard was a "police officer" at the time of the defendant's arrest).

126. Section 594B is categorized into subsections (a) through (r); the first six sections specify under what circumstances an officer is justified in making a warrantless arrest:

> (a) Arrest for crime committed in presence of officer (felony or misdemeanor); (b) Arrest for crime apparently committed in presence of officer (felony or misdemeanor); (c) Arrest for crime committed generally (felony attempted or committed, whether or not in the officer's presence or view); (d) Arrest for incidence of domestic abuse; (e) Additional circumstances for warrantless arrest; (f) List of offenses governing applicability of subsection (e).

MD. ANN. CODE art. 27, § 594(B)(a)-(f) (Supp. 2000).

127. *See* Stokes v. Maryland, 362 Md. 407, 410, 412 n.7, 765 A.2d 612, 613, 615 n.7 (2001) (holding that the officer did not have requisite reasonable articulable suspicion to stop and search the suspect based on a description that the perpetrator was a black male wearing a black tee shirt); Ashton v. Brown, 339 Md. 70, 123, 660 A.2d 447, 473 (1995) (holding that the arrest made pursuant to an unconstitutional curfew ordinance was unlawful even though officer had probable cause).

128. *See* State v. Evans, 352 Md. 496, 515, 723 A.2d 423, 432 (1999). Judge Raker explained the act of an arrest is "not some Platonic ideal whose existence can be recognized only upon its perfection" but "[r]ather, it is a simple concept more readily perceivable." *Id.* at 516 n.15, 723 A.2d at 432 n.15.

129. "[F]ormally charging a suspect is not a *sine qua non* to a lawful arrest in Maryland." *Id.* at 515, 723 A.2d at 432 (emphasis added).

intent to prosecute the suspect.[130] Accordingly, if an officer with probable cause detains a person suspected of criminal activity but subsequently releases him, the person has been legally arrested.[131]

B. The Arrest Warrant

Under Maryland law an arrest warrant[132] authorizes an officer to make an arrest.[133] A valid arrest warrant must be based on probable cause.[134] Consequently, if an officer obtained a warrant but failed to possess sufficient information or evidence to establish probable cause for the arrest, an arrest based on that warrant is illegal.[135] Additionally, a warrant has no legal effect beyond the boundaries of the state.[136]

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130. *Evans*, 352 Md. at 514-15, 723 A.2d at 431-33. The court acknowledged "whether the officer intends that a detention lead to a prosecution has no bearing on whether an arrest has occurred." *Id.* at 514, 723 A.2d at 431.

131. In *Evans*, defendants were stopped, questioned, searched and released as part of an undercover drug operation, only to be formally charged at a later date. *Id.* at 499-506, 723 A.2d at 424-27. *See also infra* Part VI.B.

132. The Constitution of Maryland provides:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grevious [*sic*] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

MD. CONST. DECL. OF RTS., art. 26.

133. Nestor v. State, 243 Md. 438, 445, 221 A.2d 364, 368 (1966) (observing that an arrest warrant authorizes an officer to enter the premises of the arrestee in order to effectuate the arrest).

134. A judicial officer may issue an arrest warrant if there is probable cause to believe that the defendant committed the offense charged in the charging document or if an indictment has been filed against the defendant. MD. CODE ANN., CTS. & JUD. PROC. § 4-212 (1999). For a further discussion of probable cause, see discussion *infra* Part IV.C.

135. *See* Ott v. State, 325 Md. 206, 215, 600 A.2d 111, 115 (1992) (observing that the "collective knowledge rule" attributes the knowledge of inaccurate information of one officer to all those in the police force); *see also* Merrick v. State, 283 Md. 1, 19, 389 A.2d 328, 338 (1978) (holding that hearsay information in a warrant application was credible and sufficient to establish probable cause for arrest).

136. *See* Berigan v. State, 2 Md. App. 666, 668-669, 236 A.2d 743, 744 (1968) (holding that a warrant of arrest issued in Maryland may not lawfully be executed in the District of Columbia).

The validity of a warrant, however, does not determine whether there exists a right to resist an arrest.[137] Although an arrest made pursuant to a defective warrant is illegal as a matter of law,[138] Maryland courts hold that a person is not legally justified to resist the arrest.[139] Thus, a person may be found guilty of resisting arrest even though the defective warrant invalidated the initial charge.[140]

C. *Probable Cause*

Absent a duly issued warrant, an arrest must generally be supported by probable cause.[141] Probable cause arises when an officer has "adequate reason to suspect the 'probability of criminal activity.'"[142] A rather intangible notion, probable cause is "a non-technical conception of a reasonable ground for belief of guilt, requiring less evidence for such belief than would justify conviction but more evidence than that which would arouse a mere suspicion."[143] Strict legal standards including proof beyond a reasonable doubt or preponderance of the evidence are not factors in the determination of probable cause.[144]

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137. *See* Rodgers v. State, 280 Md. 406, 421, 373 A.2d 944, 952 (1977) (holding that one may not resist an arrest made pursuant to a defective warrant); *see also infra* Part V.B.2.

138. *See Rogers*, 280 Md. at 407, 373 A.2d at 945.

139. *Id.* at 421, 373 A.2d at 952.

140. *Id.* at 407-09, 373 A.2d at 945-46 (finding that the charge of assault via telephone was invalid, but upholding the resisting arrest charge).

141. *See* Stanford v. State, 353 Md. 527, 532, 727 A.2d 938, 941 (1999) (holding that the police lacked probable cause to detain or arrest the petitioner where there was no evidence he had been in the apartment, for which a "no-knock" search and seizure warrant was issued); Ryon v. State, 29 Md. App. 62, 79-80, 349 A.2d 393, 404 (1975) (holding that hearsay information received by an officer from a confidential source claiming that the defendant was responsible for the death of her husband did not establish probable cause for a warrantless arrest).

142. Malcolm v. State, 314 Md. 221, 232-33, 550 A.2d 670, 675-76 (1988) (holding that officers had probable cause to conduct a warrantless search of a truck based on the tip by an informant that the defendant manufactured and distributed PCP, police corroboration of the tip, and other facts surrounding the investigation).

143. Doering v. State, 313 Md. 384, 403, 545 A.2d 1281, 1290 (1988) (asserting that probable cause is founded on "'the factual and practical considerations of everyday life on which reasonable [people] . . . act'") (quoting Brinegar v. United States, 338 U.S. 160, 175-76 (1949)).

144. *See* Illinois v. Gates, 462 U.S. 213, 235 (1983). The Court held that an anonymous tip in the form of a letter indicating the defendant's criminal drug activity, which the police verified, sufficiently established probable cause for the issuance of an arrest warrant. *Id.* at 241-46.

Rather, probable cause is a concept that requires less than certainty, but more than possibility.[145]

Further, an arrest that violates a suspect's constitutional rights is not justified by the existence of probable cause.[146] In *Ashton v. Brown*,[147] officers arrested the defendants pursuant to the city's juvenile curfew ordinance, which was unconstitutional.[148] The court acknowledged that neither the federal nor state constitutions permitted a governmental body to base an arrest on an unconstitutional statute.[149] Even if the officers had probable cause to believe the defendants violated a statute, the court held that if the statute itself is unconstitutional or is "unconstitutionally applied, no constitutional rights have been violated."[150] Thus, the court deemed the arrests unlawful.[151]

D. In the Presence or View of an Officer

In Maryland, "[a] police officer who has probable cause to believe that a felony or misdemeanor is being committed in the *officer's presence or within the officer's view*, may arrest without a warrant any person whom the officer may reasonably believe to have committed such offense."[152] When a person commits a crime in the presence of an officer, the ensuing arrest is legal and cannot be justifiably resisted.[153] To be considered in the presence of an officer, the crime does not

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145. *See* Yeagy v. State, 63 Md. App. 1, 11, 491 A.2d 1199, 1203-04 (1985) (finding probable cause for a search warrant based on a single drug sale to an undercover officer although the defendant had refused to sell on other occasions).

146. *See* Ashton v. Brown, 339 Md. 70, 96-98, 660 A.2d 447, 460-61 (1995). *Cf.* Brown v. State, 78 Md. App. 513, 521, 553 A.2d 1317, 1321 (1989) (holding that when police stopped and searched every person leaving a specified geographic area, they not only "violate[d] the Constitution, they ignored it").

147. 339 Md. 70, 660 A.2d 447 (1995).

148. *Id.* at 97-98, 660 A.2d at 460-61. The ordinance prohibited children from occupying public places or establishments at nighttime except for children attending activities supervised by a "bona fide organization." *Id.* at 80-81, 660 A.2d at 452. The court found the term "bona fide organization" unconstitutionally vague, making it impossible to distinguish between lawful and unlawful conduct. *Id.* at 92-93, 660 A.2d at 458.

149. *Id.* at 97, 660 A.2d at 460.

150. *Id.* at 98, 660 A.2d at 461.

151. *Id.* ("[A]n arrest which is inconsistent with these constitutional guarantees is an unconstitutional arrest.").

152. MD. ANN. CODE art. 27, § 594B(b) (Supp. 2000) (emphasis added).

153. *See* Williams v. State, 204 Md. 55, 64, 102 A.2d 714, 718 (1954) (upholding assault charges of a woman who assaulted a police officer when the officer came to investigate an argument between her and a cab driver).

necessarily have to take place immediately within the officer's vision.[154] The term "presence" denotes an officer's perception of a crime through sight, sound and smell.[155] In making a determination of probable cause, the officer "can act upon all the facts and appearances before him."[156]

The Court of Appeals of Maryland examined the definition of "within an officer's presence" in *Davids v. State*.[157] The court defined an officer's presence as:

> Where some evidence of the commission of a [crime] reaches an officer through his senses, and it is augmented by other strongly persuasive facts in his possession, all of which is sufficient to convey virtual knowledge to any normal mind that the [crime] is then being committed, he may act upon such information as being tantamount to actual knowledge that the [crime] is being committed.[158]

In *Davids*, a police officer made a warrantless arrest after finding race betting slips on a table in the back room of a tavern.[159] A subsequent search of a man who emerged out of the back room uncovered two

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154. *See* Davids v. State, 208 Md. 377, 382, 118 A.2d 636, 638 (1955).

155. *See* Robinson v. State, 229 Md. 503, 507-08, 184 A.2d 814, 817 (1962) (holding that a misdemeanor was not committed in the officers' presence where the officers observed the defendant, who was suspected of selling lottery tickets, tell a gas station operator that he did not take numbers on the street); *Davids*, 208 Md. at 384, 118 A.2d at 638-39 (1955) (finding that the crime did not occur in officers' presence).

156. *Davids*, 208 Md. at 383, 118 A.2d at 638.

157. 208 Md. 377, 381-82, 118 A.2d 636, 637 (1955) (holding that police had a right to search a tavern without a warrant but were not authorized to search the patrons upon a mere suspicion that they committed a crime).

158. *Id.* at 383, 118 A.2d at 637-38. *See also* Ingle v. Commonwealth, 264 S.W. 1088, 1091 (Ky. 1924) (holding that a sheriff properly determined that the crime of possessing and transporting whiskey was being committed in his presence when he smelled liquor, saw fruit jars in a horse's saddlebags, and observed empty jars on the ground next to the defendant); Silverstein v. State, 176 Md. 533, 538, 6 A.2d 465, 467 (1939) (holding that an officer was justified in believing a violation of the gambling laws occurred when he entered a public building, heard someone shout "watch out," and saw a clerk quickly drop a book behind a counter).

159. *Davids*, 208 Md. at 381, 118 A.2d at 637. The court noted that under the Maryland alcoholic beverages law, an establishment that sells alcohol is subject to a warrantless search; however, the statute does not authorize officers to search patrons found within. *Id.* at 381-82, 118 A.2d at 637 (citing Mason v. Wrightson, 205 Md. 481, 488, 109 A.2d 128, 131 (1954)).

race betting slips and some cash.[160] The court held that the arrest and subsequent search were illegal because the officer could not have determined that a misdemeanor occurred in his presence.[161]

The *Davids* court concluded that because the officers found the betting slips, it was understandable that they would suspect the appellant's involvement with bookmaking.[162] Nonetheless, the race betting slips, alone, were not sufficient to show that the defendant actually committed a crime in their presence.[163] An arrest without a warrant, therefore, cannot be made upon mere suspicion or belief that a crime has been committed.[164]

V. THE RULE IN MARYLAND: A LIMITED RIGHT TO RESIST

The original common-law right to resist arrest, adopted by Maryland in the early twentieth century, authorized "reasonable" resistance to unlawful arrests. Accordingly, courts interpreted the rule to prohibit the use of excessive force against an arresting officer.[165] However, courts subsequently limited its application.[166] The right does not sanction resistance to every "unreasonable" search and seizure as protected under the Fourth Amendment.[167] First, this right applies only to an arrest, a type of seizure, but does not apply to an unlawful detention.[168] Second, Maryland law allows resistance only if the arrest is both unlawful and warrantless.[169] Third, the right to resist does not

160. *Id.* at 381, 118 A.2d at 637. The validity of a conviction is not usually affected by the legality of an arrest, unless the State uses the evidence against the suspect. *See* Hawkins v. State, 237 Md. 395, 397, 206 A.2d 557, 558 (1965).

161. *Davids*, 208 Md. at 384, 118 A.2d at 639.

162. *Id.* at 383, 118 A.2d at 638.

163. *Id.* at 384-85, 118 A.2d at 639; *see also* Livingston v. State, 317 Md. 408, 413, 564 A.2d 414, 417 (1989) (holding that two seeds found on the front-seat car floor, without more, was insufficient to arrest the rear passenger for possession of marijuana).

164. *Davids*, 208 Md. at 384, 118 A.2d at 638.

165. *See* Jenkins v. State, 232 Md. 529, 534, 194 A.2d 618, 621 (1963).

166. *See* discussion *infra* Part V.B.

167. *See* discussion *infra* Part V.B.3-4.

168. *See* discussion *infra* Part V.B.3.

169. Further, Maryland law recognizes a person's right to defend against excessive force used to make an arrest, regardless of whether the arrest is lawful or unlawful. MD. CRIM. PATTERN JURY INSTRUCTIONS § 4:27, Cmt. (1999). Police force is considered excessive if it goes beyond the force reasonably necessary, under the circumstances, for a reasonable police officer to discharge his or her official duties. *See* Wilson v. State, 87 Md. App. 512, 519-21, 590 A.2d 562, 565-66 (1991) (holding that the officer used excessive

extend to an unlawful frisk by the police.[170] Thus, a person is only authorized by Maryland law to resist the unlawful conduct of the police in very limited situations.

A. *The Original Right as Adopted*

In 1937, the Court of Appeals of Maryland adopted the right to resist an unlawful arrest.[171] In *Sugarman v. State*,[172] a police officer, without reasonable justification, unlawfully arrested a suspect for failure to produce identification.[173] The court characterized an officer making an illegal arrest as acting "contrary" to the officer's police duties.[174] The court stated that "such conduct can only be regarded as a trespass against the person whom [the officer] illegally arrests."[175] Thus, the court held that a person unlawfully arrested may use reasonable means to escape, only to the extent such force is reasonably necessary.[176]

B. *Judicially Imposed Limitations*

Since Maryland adopted the right to resist an unlawful arrest, courts have criticized the rule.[177] Despite their outward opposition, Maryland courts refused to abrogate the rule, claiming that such abrogation is solely a legislative function.[178] The Maryland Legislature, however, has yet to respond to the court's mandate.[179] Thus, the courts managed to circumvent legislative inaction by imposing judicial limitations on the rule's application.[180] Consequently, a right that

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force when he struck a car theft suspect over the head several times with a flashlight).

170. *See* discussion *infra* Part V.B.4.

171. Sugarman v. State, 173 Md. 52, 57, 195 A. 324, 326 (1937).

172. 173 Md. 52, 195 A. 324 (1937).

173. *Id.* at 54-55, 195 A. at 325. The officer admitted he did not see the man do anything "wrong" or "unethical" but took him to the station under a "general charge of investigation." *Id.* On the way to the station, the man broke away from the officer and attempted to escape, but was eventually caught by the police and arrested a second time. *Id.* at 55, 195 A. at 325. The court found that the original arrest was illegal, thereby giving the man a right to resist it. *Id.* at 56, 195 A. at 326.

174. *Id.* at 57, 195 A. at 326.

175. *Id.*

176. *Id.*

177. *See* Jordan v. State, 17 Md. App. 201, 207, 300 A.2d 701, 704 (1973) (recognizing the criticisms of the right to resist arrest in modern society).

178. *See* State v. Wiegmann, 350 Md. 585, 606, 714 A.2d 841, 851 (1998).

179. *See id.*

180. *See* discussion *infra* Part V.B.1-4.

originally was implemented to protect citizens from police misconduct has been rendered virtually powerless by subsequent judicial decisions.[181]

1. No Right to Use Excessive Force

In Maryland, the common-law rule provides that a person may use any *reasonable* means to escape an unlawful arrest to the extent such force is reasonably necessary under the circumstances.[182] However, a person subject to an illegal arrest may never use *excessive* force to resist.[183] A person using excessive force to resist arrest may be subject to assault charges even if the arrest is subsequently found to be unlawful.[184]

The court of appeals addressed the excessive force issue in *Jenkins v. State*.[185] In *Jenkins*, two people approached police officers and reported that a man in a green Chevrolet was "acting in a peculiar manner."[186] One officer spotted a vehicle fitting the description and followed it.[187] When the second officer attempted to stop the vehicle, the vehicle accelerated, forcing the officer to jump out of the way.[188] A car chase ensued in which the defendant's car collided with a police cruiser and forced another patrol car off the road, before it eventually flipped over, and back onto its wheels.[189] The police seized several items from the defendant's car, which were later identified as stolen goods from a local tavern.[190] The police charged the defendant with breaking and entering with intent to commit a felony and grand larceny.[191]

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181. *See In re* Jason Allen D., 127 Md. App. 456, 491, 733 A.2d 351, 369 (1999) (finding that the right to resist an unlawful arrest in Maryland is a very limited right).

182. *See* Jenkins v. State, 232 Md. 529, 534, 194 A.2d 618, 621 (1963); Williams v. State, 204 Md. 55, 64, 102 A.2d 714, 718 (1954); Sugarman v. State, 173 Md. 52, 57, 195 A. 324, 326 (1937); Halcomb v. State, 6 Md. App. 32, 41, 250 A.2d 119, 124 (1969); Jones v. State, 4 Md. App. 616, 621-22, 244 A.2d 459, 462 (1968).

183. *Jenkins*, 232 Md. at 534, 194 A.2d at 621.

184. *See* Sharp v. State, 231 Md. 401, 404, 190 A.2d 628, 630 (1963); Kellum v. State, 223 Md. 80, 85, 162 A.2d 473, 476 (1960).

185. 232 Md. 529, 194 A.2d 618 (1963).

186. *Id.* at 530, 194 A.2d at 619.

187. *Id.*

188. *Id.*

189. *Jenkins*, 232 Md. at 531, 194 A.2d at 619-20.

190. *Id.* at 531-32, 194 A.2d at 620.

191. *Id.* at 532, 194 A.2d at 620.

The defendant argued that the police had no justification for initially pursuing him as they received insufficient information.[192] The court found that although the officers may not have been justified in their initial investigation,[193] they were justified in arresting the defendant after he began driving recklessly.[194] The court explained that even if the arrest was unlawful, the defendant's reckless driving amounted to resisting arrest by excessive force.[195]

In *Jones v. State*,[196] a simple traffic stop for speeding escalated into a dangerous encounter.[197] After being stopped by police for speeding, Jones got out of his car and began yelling in the officer's ear so loudly that the officer could not understand what Jones was saying.[198] The officer unsuccessfully asked Jones to calm down several times, and attempted to arrest him for disorderly conduct.[199] Jones then attacked the officer, taking his gun and pistol-whipping him across the forehead prior to leaving the scene.[200]

The defendant argued that his arrest was illegal because his actions did not constitute disorderly conduct.[201] The court rejected this argument, holding that even if the arrest were unlawful, Jones could only use *reasonable force* to effectuate his escape.[202] In this situation, Jones had ample opportunity to escape, but chose instead to return and strike the officer with the pistol before leaving the scene.[203] Accordingly, the court concluded that Jones' use of excessive force was sufficient to support the conviction.[204]

2. No Right to Resist an Arrest Made Pursuant to a Defective Warrant

In *Rodgers v. State*,[205] the court of appeals limited the common-law right to resist arrest, holding that the right does not extend to an illegal arrest made pursuant to a warrant duly issued by a judicial of-

192. *Id.* at 534, 194 A.2d at 621.
193. *Id.* at 535, 194 A.2d at 622.
194. *Id.*
195. *Id.*
196. 4 Md. App. 616, 244 A.2d 459 (1968).
197. *Id.* at 618-21, 244 A.2d at 460-62.
198. *Id.* at 619, 244 A.2d at 461.
199. *Id.*
200. *Id.* at 620-21, 244 A.2d at 461.
201. *Id.* at 621, 244 A.2d at 462.
202. *Id.* at 621-22, 244 A.2d at 462.
203. *Id.* at 621, 244 A.2d at 462.
204. *Jones*, 4 Md. App. at 622, 244 A.2d at 462.
205. 280 Md. 406, 373 A.2d 944 (1977).

ficer.[206] In *Rodgers*, two officers attempted to serve Barry Rogers with an arrest warrant.[207] Initially Rodgers appeared to cooperate, but he suddenly resisted, knocking one officer to the ground and slashing his arm with a razor blade.[208] Once subdued, the police charged Rogers with resisting arrest and possession of a deadly weapon.[209]

The warrant in question charged Rodgers with unlawfully assaulting Lillie Clark, "via telephone."[210] The State conceded that no such charge existed in Maryland; therefore, the warrant was defective, and the arrest was illegal as a matter of law.[211] On appeal, the defendant argued that because his arrest was unlawful, he was entitled to use reasonable force to resist.[212]

The *Rodgers* court based its holding on *State v. Wright*,[213] a factually similar case decided by a North Carolina court. In *Wright*, the court held that the defendants were not entitled to resist an arrest made pursuant to a *capias*,[214] even though the *capias* charged a crime not recognized by North Carolina law.[215] Similar to *Rodgers*, the defendants in *Wright* alleged that the *capias* was defective and void as it lacked an indictable offense.[216] In its analysis, the *Wright* court distinguished between an officer acting without a warrant and one acting under the direction of the court.[217] With regard to the latter, the officer serving the *capias* should be protected even if the *capias* were, for some rea-

206. *Id.* at 415-21, 373 A.2d at 949-52. The court observed, "[w]e cannot believe that the General Assembly . . . could have intended that citizens arrested pursuant to such a warrant be free to dispute its validity by doing violence to the officer serving the judicial process." *Id.* at 421, 373 A.2d at 952.

207. *Id.* at 407, 373 A.2d at 945.

208. *Id.* at 408, 373 A.2d at 945.

209. *Id.* at 408, 373 A.2d at 945-46.

210. *Id.* at 407, 373 A.2d at 945 (noting that the defendant verbally threatened to physically harm Ms. Clark over the telephone).

211. *Id.*

212. *Id.* at 409, 373 A.2d at 946. The court criticized the defendant's argument and noted, "he is attempting to justify his use of force . . . by pointing out a defect in a warrant that neither he nor the arresting officers saw until after the arrest had taken place." *Id.* at 421, 373 A.2d at 952.

213. 162 S.E.2d 56 (N.C. 1968).

214. A *capias* is defined as: "[t]he general name for several species of writs, the common characteristic of which is that they require the officer to take a named defendant into custody." BLACK'S LAW DICTIONARY 208 (6th ed. 1990).

215. *Wright*, 162 S.E.2d at 62. The *capias* issued by the Clerk of the Recorder's Court recited for "failure to comply with a court order." *Id.*

216. *Id.*

217. *Id.* ("When an officer attempts to make an arrest without a warrant and in so doing exceeds his lawful authority, he may be resisted . . . . But when an

son, invalid.[218] The court reasoned that "[it] would be monstrous" to require an officer to determine the legal sufficiency of every subpoena served, and moreover, jeopardize "the life of every officer in the land."[219] Thus, the *Wright* court clearly denounced the use of violent resistance in favor of judicial resolution.[220]

The *Rodgers* court similarly distinguished between a warrantless arrest and an arrest made pursuant to a defective warrant.[221] When the defect in a warrant is due to an error made by the court, the officer is blameless, and therefore should not be subjected to violence.[222] However, resistance is justified when the warrant defect is so glaring that any person of ordinary intelligence would know that the warrant is invalid.[223] Recognizing the State's public policy to discourage violence,[224] the court observed that resisting arrest causes graver consequences to both the officer and the citizen than does the unlawful arrest itself.[225] The court concluded, therefore, that the appropriate redress for one illegally arrested pursuant to a defective warrant without a glaring error, is to seek a remedy in court.[226]

3. No Right to Resist an Unlawful Stop

The Court of Special Appeals of Maryland further restricted the application of the common-law right to resist unlawful arrest in *Barnhard v. State*,[227] holding that there is no right to resist a stop by a police officer, even if it is illegal.[228] Subsequently, the court of appeals affirmed the decision.[229]

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officer is acting under authority of process of a court, a different situation exists.").

218. *Id.*

219. *Id.* (quoting State v. Jones, 88 N.C. 671, 671 (1883)).

220. *Id.* ("[D]efendant[s] . . . should have submitted to the arrest and raised the question of validity of the process in an orderly way in a court having power to make a judicial determination of the matter.").

221. Rodgers v. State, 280 Md. 406, 419, 373 A.2d 944, 951 (1977).

222. *Id.* (concluding that when an officer serving process of the court is blameless, "to sanction resistance to arrest under these circumstances would be to invite the very destruction of the entire judicial process . . .").

223. *Id.* at 417, 373 A.2d at 950.

224. *Id.* at 419, 373 A.2d at 951.

225. *Id.* at 420, 373 A.2d at 951-52 (explaining that "'self-help as a practical remedy is anachronistic . . .'") (quoting People v. Curtis, 450 P.2d 33, 36 (Cal. 1969)).

226. *Id.* at 421, 373 A.2d at 952.

227. 86 Md. App. 518, 587 A.2d 561 (1991).

228. *Id.* at 528, 587 A.2d at 566.

229. *See* Barnhard v. State, 325 Md. 602, 616, 602 A.2d 701, 708 (1992).

In *Barnhard*, uniformed police officers responded to a stabbing report at a Montgomery County bar.[230] Upon arrival, the officers encountered the defendant blocking the entrance.[231] The defendant moved aside after shouting obscenities at the officers.[232] After conducting an initial investigation, the officers questioned the defendant about the stabbing.[233] When the defendant refused to give his name and address,[234] an officer responded "if he doesn't give us his name we're going to take him into custody."[235] At that point, the defendant became confrontational and threatened to kill an officer.[236] The officers attempted to arrest the defendant for disorderly conduct, but he resisted the arrest, and a fight ensued.[237] The police eventually subdued the defendant and charged him with resisting arrest.[238]

Although the court of appeals rendered an opinion in this case, the rationale of the court of special appeals remains particularly noteworthy. The lower appellate court based its decision on two main ideas: (1) that recognizing a right to resist a temporary detainment encourages violence;[239] and (2) that a stop is less intrusive on a person's liberty than the intrusion accompanying an arrest.[240]

Supporting its first contention, the court of special appeals in *Barnhard* applied the same underlying rationale as *Rodgers*,[241] explaining that upholding a right to resist a stop would subject officers to "attack in every instance, when during the course of their investigation, they temporarily detain someone."[242]

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230. *Id.* at 604, 602 A.2d at 702.
231. *Id.*
232. *Id.* at 605, 602 A.2d at 702-03.
233. *Id.* at 605, 602 A.2d at 703.
234. *Id.* at 606, 602 A.2d at 703.
235. *Id.*
236. *Id.*
237. *Id.* at 606-07, 602 A.2d at 703.
238. *Id.* at 607, 602 A.2d at 703.
239. *Barnhard*, 86 Md. App. 518, 527-28, 587 A.2d 561, 566 (1991) (noting that much of the underlying rationale in *Rodgers* for restricting the right to resist arrest is applicable here).
240. *Barnhard*, 86 Md. App. at 528, 587 A.2d at 566.
241. *See* Rodgers v. State, 280 Md. 406, 419-20, 373 A.2d 944, 951 (1977) (stating that the prohibition against resisting unlawful arrest is based on a policy of promoting the safety of officers and citizens).
242. *Barnhard*, 86 Md. App. at 527-28, 587 A.2d at 566.

In support of its second contention,[243] the court cited *Terry v. Ohio*.[244] In *Terry*, the United States Supreme Court distinguished the requisite suspicion necessary for an officer to arrest a person from that needed merely to stop a person.[245] The *Terry* Court, however, made the distinction between a stop and an arrest for the sole purpose of determining the "reasonableness" of a seizure under the Fourth Amendment, ultimately finding that an investigatory stop was reasonable if supported by reasonable, articulable suspicion, whereas a reasonable arrest required probable cause.[246]

The *Barnhard* court did not directly address the issue of requisite suspicion. However, the court implied that the stop was reasonable under the *Terry* standard, concluding that it was a "momentary detention of a material witness," which is legal, even where the police do not suspect the person of wrongdoing.[247] Finding that such an investigation is necessary for effective policing, the court of special appeals adopted the reasoning relied upon in *Watkins v. State*:[248]

> Where a crime may have been committed and a suspect or important witness is about to disappear, it seems irrational to deprive the officer of the opportunity to "freeze" the situation for a short time, so that he may make inquiry and arrive at a considered judgment about further action to be taken.[249]

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243. *Id.* at 528, 587 A.2d at 566.

244. 392 U.S. 1, 26-27 (1968) (asserting that an investigatory stop by a police officer is permissible if the officer has a reasonable suspicion that criminal activity is afoot); *see also infra* Part VII.B.

245. *Terry*, 392 U.S. at 26-27.

246. *Id.* Maryland courts agree with *Terry*, finding the justification for making an arrest carries a heavier burden than that required for conducting an investigatory stop. *See, e.g.*, Anderson v. State, 282 Md. 701, 707, 387 A.2d 281, 285 (1978) ("'The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so.'") (quoting Sibron v. New York, 392 U.S. 40, 64 (1968)); State v. Smith, 345 Md. 460, 465, 693 A.2d 749, 751 (1997) ("[A] police officer may briefly detain an individual for purposes of investigation if the officer has a reasonable, articulable suspicion that that individual is involved in criminal activity.") (citing Terry v. Ohio, 392 U.S. 1, 21-24, (1968)).

247. *Barnhard*, 86 Md. App. at 529, 587 A.2d at 566.

248. 288 Md. 597, 428 A.2d 270 (1980).

249. *Barnhard*, 86 Md. App. at 529, 587 A.2d at 566 (quoting *Watkins*, 288 Md. at 605, 420 A.2d at 274), in turn quoting A.L.I., *A Model Code of Pre-Arraignment Procedure* § 110.2, at 272 (Commentary 1975)).

The *Barnhard* court also used *Terry* as a foundation for invalidating the right to resist an illegal stop.[250] The lower appellate court explained that a "stop, while an intrusion on liberty, is slight compared to the deprivation of freedom that results from an arrest."[251] Applying that logic, the court concluded that the "provocation" resulting from an illegal arrest was more pronounced than that resulting from an illegal stop.[252] Resistance to a stop therefore, is unjustified regardless of the stop's legality.[253] The court embraced the *Terry* doctrine, protecting a citizen from all unreasonable seizures, yet the court did not recognize the right of a citizen to resist an unreasonable seizure falling short of a full arrest, such as a stop.[254]

4. No Right to Resist an Unlawful Frisk

Maryland further limited the common-law right to resist an illegal arrest in *State v. Blackman.*[255] In *Blackman,* officers were in the process of executing an arrest warrant in Baltimore City, when the defendant entered a house.[256] One officer recognized the defendant as a drug dealer from the neighborhood.[257] Another officer recognized him as someone who he unsuccessfully served with an arrest warrant a few weeks prior.[258] The police detained the defendant while trying to ascertain the status of the arrest warrant.[259] During the defendant's detainment, an officer approached the defendant and attempted to frisk him for weapons.[260] At that point, the defendant shoved the officer and began to run, but the police caught and arrested the defendant for assault and battery.[261]

The court of special appeals held that the common-law right to resist an unlawful arrest did not extend to an illegal frisk of a citizen.[262] Again, the court stressed the policy concerns outlined in *Rodgers* and in *Terry,* and recognized the general trend away from violent self-help.[263] In balancing the interests involved in an officer's decision to

250. *Id.* at 528, 587 A.2d at 566.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. 94 Md. App. 284, 617 A.2d 619 (1992).
256. *Id.* at 289, 617 A.2d at 621.
257. *Id.* at 289-90, 617 A.2d at 621.
258. *Id.* at 290, 617 A.2d at 621-22.
259. *Blackmun,* 94 Md. App. at 290, 617 A.2d at 621.
260. *Id.* at 291, 617 A.2d at 622.
261. *Id.* at 292, 617 A.2d at 623.
262. *Id.* at 306, 617 A.2d at 630.
263. *Id.* at 306-11, 617 A.2d at 629-32.

frisk a suspect, the court concluded that an error made by the officer which inconvenienced and offended the citizen is far less damaging than an error resulting in the officer's death.[264] Although the frisk involved in *Blackman* was found to be lawful, the court ultimately held that there is no right to resist even an unlawful frisk.[265]

VI. IMPACT OF RECENT MARYLAND DECISIONS

Despite the judicial limitations imposed on the right to resist an unlawful warrantless arrest,[266] Maryland claims to uphold the right in limited circumstances.[267] Recent judicial decisions, however, make it virtually impossible to identify when such situations arise.

A. Right to Resist an Arrest Made Pursuant to a Master's Unauthorized Order

In *State v. Wiegmann*,[268] the court of appeals upheld the common-law rule when officers made an arrest pursuant to a master's unauthorized order.[269] The court held that because a master lacks the authority to issue an arrest warrant, an arrest made pursuant to a master's instruction is unlawful.[270] In the case, during a contempt hearing, a domestic master determined that Kevin Joseph Wiegmann was in contempt for failure to pay court-ordered child support.[271] When the courtroom officers attempted to handcuff Wiegmann, he resisted and was charged with battery and resisting arrest.[272]

Relying on the rationale of *Rodgers*,[273] the trial court found that Wiegmann's arrest was analogous to an arrest made pursuant to a defective warrant,[274] thereby defeating his right to resist.[275] As a result, the trial court refused to instruct the jury regarding a person's right to resist an illegal, warrantless arrest.[276] The court of special appeals vacated the trial court's decision and ordered that on remand, the jury

264. *Id.* at 303, 617 A.2d at 628.
265. *Id.* at 306, 617 A.2d at 630.
266. *See* State v. Wiegmann, 350 Md. 585, 601-04, 714 A.2d 841, 849-50 (1998) (listing states that have modified the rule, either judicially or legislatively).
267. *See id.*
268. 350 Md. 585, 714 A.2d 841 (1998).
269. *Id.* at 588, 714 A.2d at 842.
270. *Id.*
271. *Id.*
272. *Id.* at 590, 714 A.2d at 843.
273. *See* discussion *supra* Part V.B.2.
274. *Wiegmann*, 118 Md. App. 317, 345-49, 702 A.2d 928, 942-43 (1997).
275. *Id.*
276. *Id.* at 349, 702 A.2d at 944 (noting that Maryland Rule 4-325 requires the trial court to give correct instructions on the applicable law).

should be instructed that the arrest was unlawful and that Wiegmann had the right to use reasonable force to resist it.[277]

The court of appeals also disagreed with the decision of the trial court,[278] and held that the arrest was unlawful because a master has neither express nor implied authority to command that an arrest be made.[279] The court further found that the trial court erred in accepting the State's alternative argument, which equated Wiegmann's warrantless arrest with an arrest made pursuant to a defective warrant.[280] Emphasizing that a "judicially authorized warrant is the cornerstone of the Fourth Amendment,"[281] the court concluded that making such an analogy "denigrates the importance of the warrant to our constitutional framework."[282]

In addition, the court of appeals considered whether Maryland should follow the modern trend of other jurisdictions abolishing the common-law right to resist arrest.[283] In its analysis, the court recognized the policy concerns of other courts, including the efforts to stop the use of violence against police officers.[284] The court further acknowledged Maryland's own trend toward discouraging violence by declining to extend the right to resist an arrest made under a duly issued warrant, unlawful *Terry* stops, and illegal frisks.[285] In balancing the issues of public policy and citizens' rights, however, the court was clearly concerned that abolishing the rule would leave citizens with only limited remedies – release from prison followed by a civil action, such as false imprisonment.[286] The court considered such remedies to be "inadequate."[287]

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277. *Id.*

278. State v. Wiegmann, 350 Md. 585, 590, 714 A.2d 841, 843 (1998).

279. *Id.* at 590, 714 A.2d at 843.

280. *Id.* at 600-01, 714 A.2d at 848 (declining to accept the analogy between a warrantless arrest and a defective warrant issued by an officer of the court because a master does not have the authority to issue a warrant).

281. *Id.* at 601, 714 A.2d at 849.

282. *Id.* at 601, 714 A.2d at 848-49 ("[W]ithout a warrant from a judge, 'simple good faith on the part of the arresting officer is not enough . . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, . . .'") (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)).

283. *Wiegmann*, 350 Md. at 605-06, 714 A.2d at 851.

284. *Id.* at 602, 714 A.2d at 849; *see* discussion *infra* Part V.B.2-4.

285. *Wiegmann*, 350 Md. at 602, 714 A.2d at 849.

286. *Id.* at 606, 714 A.2d at 851.

287. *Id.*

Similar to the courts' rationales in *Valentine* and *Hobson*, the *Wiegmann* court based its decision on the principle of *stare decisis*.[288] Ironically, the *Wiegmann* court cited the principle as support for upholding the common-law rule,[289] whereas the *Valentine* and *Hobson* courts used it as a basis for overturning it.[290] Finally, the court of appeals questioned whether the rule had become "'unsound in the circumstances of modern life,'"[291] but declined to settle the matter, stating that it was an issue for the state legislature to decide.[292]

B. State v. Evans *and the New Definition of "Arrest"*

The court of appeals recently dealt an indirect but significant blow to Maryland's common-law right to resist unlawful arrest in *State v. Evans*.[293] The court redefined the meaning of "arrest" in Maryland.[294] As a result of *Evans*, an arrest does not require the arresting officer to possess an intent to prosecute the suspect, nor does it require that the suspect be formally charged with a crime.[295] Thus, a suspect detained and released may still be considered as having been arrested under Maryland law.[296]

In *Evans*, the court consolidated two factually similar cases for the purposes of determining what constitutes an arrest under Maryland law.[297] Both cases dealt with similar undercover operations, con-

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288. *Id.* at 604-607, 714 A.2d at 850-52.

289. *Id.* at 605, 714 A.2d at 850-51.

290. *See supra* notes 80, 112-13 and accompanying text.

291. *Wiegmann*, 350 Md. at 605, 714 A.2d at 851 (quoting Gaver v. Harrant, 316 Md. 17, 29, 557 A.2d 210, 216 (1989), quoting in turn Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 459, 456 A.2d 894, 903 (1983)). The *Harrison* court noted that the court is permitted to change the common-law rule if it has become unsound in modern life or is "no longer suitable to our people." *Harrison*, 295 Md. at 459, 456 A.2d at 903.

292. *Wiegmann*, 350 Md. at 607, 714 A.2d at 851-52.

293. 352 Md. 496, 723 A.2d 423 (1999). The *Evans* court held that the defendants' detentions constituted arrests under Maryland law, even though the police did not subject the defendants to the formal criminal charging process at the time of the original detentions. *Id.* at 530, 723 A.2d at 439. Having validly arrested the defendants under Maryland law, the police officers properly conducted searches incident to the arrests. *Id.*

294. *Id.* at 514-16, 723 A.2d at 431-32.

295. *Id.*

296. *See id.* at 515, 723 A.2d at 432 (recognizing that for a detention to be considered an arrest, the police must have probable cause to believe the suspect committed a felony and must either physically restrain the suspect *or* subject the suspect to police custody or control).

297. *Id.* at 499-500, 723 A.2d at 424-25. The second case included in the consolidated decision was *State v. Sykes-Bey*. *Id.* at 496, 723 A.2d at 423.

ducted by the Baltimore City Police Department, to combat street-level drug transactions.[298] In each of the operations, undercover officers attempted to buy illegal drugs from suspected dealers in Baltimore City.[299] For example, once the police completed the drug transaction, the officers searched, photographed, verified the suspects' identification, gave the suspects a receipt for any money seized, and subsequently released the suspects.[300] Neither of the suspects were taken to the police station or formally charged at the time of their detentions.[301] Instead, the Baltimore City Police later conducted a "mass sweep" of arrests once the operation concluded.[302] In *Evans*, both defendants were indicted approximately one month after they were initially detained.[303]

The *Evans* court analyzed the definition of "arrest" to determine whether the searches of the defendants were justifiable under the "search incident to arrest" rule.[304] Although the police had sufficient probable cause to arrest the defendants,[305] both defendants argued that they were not actually arrested, thereby rendering the subsequent searches unconstitutional.[306] The question presented to the court was whether the defendants' detainment by the police constituted an arrest under Maryland law.[307]

Both defendants were convicted of drug offenses in the Circuit Court for Baltimore City.[308] The court of special appeals reversed the convictions,[309] holding that the trial court erred in denying defendants' motions to suppress because the detention did not constitute an arrest, and the subsequent searches were therefore unconstitu-

298. *Id.* at 500-03, 723 A.2d at 425-26. The operations were known as "Operation Mid-East" in the *Evans* case and "Operation Midway" in the *Sykes-Bey* case. *Id.*

299. *Id.* at 501-04, 723 A.2d at 425-26.

300. *Id.* at 500-05, 723 A.2d at 425-27.

301. *Id.* at 502-05, 723 A.2d at 426-27.

302. *Id.* at 500, 723 A.2d at 425.

303. *Id.* at 500-05, 723 A.2d at 424-27.

304. *Id.* at 511, 732 A.2d at 430. According to the rule, an officer has the authority to search a suspect incident to a lawful arrest. *See* United States v. Robinson, 414 U.S. 218, 224 (1973).

305. *Evans*, 352 Md. at 511-12, 732 A.2d at 430 (stating that probable cause existed in both Operation Mid-East and Operation Midway to believe that Evans and Sykes-Bey committed a number of possible drug-related felonies).

306. *Id.* at 508-10, 723 A.2d at 429.

307. *Id.* at 511, 723 A.2d at 430.

308. *Id.* at 503-06, 723 A.2d at 426-27.

309. *Id.* at 506, 723 A.2d at 428.

tional.[310] That court opined that under Maryland law and according to the United States Supreme Court, an arrest must be "custodial" in nature for a search to be incidental to that arrest.[311] Additionally, the court of special appeals found that the officer must possess an actual subjective intent to arrest the suspect and communicate that intent to the suspect.[312]

The court of appeals reversed the decision of the lower appellate court,[313] holding that an officer need not formally charge a suspect or possess an intention to prosecute in order to effectuate a lawful arrest.[314] Rather, under Maryland law, a lawful arrest has only two requirements: (1) the police must have probable cause to believe the suspect committed a crime;[315] and (2) the suspect must either be physically restrained or otherwise subjected to the officer's custody and control.[316] Accordingly, even though the officers testified that they did not arrest the defendants at the time of the incident, the court ultimately determined that both defendants were lawfully arrested under Maryland law,[317] thereby rendering the subsequent searches consistent with the Fourth Amendment.[318] Thus, the *Evans* court essentially transformed what was considered to be a mere detention in the eyes of the court of special appeals, into an arrest.

C. *Effects on the Right to Resist an Unlawful Arrest*

Over the last sixty years, Maryland courts redefined the right to resist an unlawful arrest into a remote and somewhat obscure privilege to which very few suspects are entitled.[319] This became exceedingly clear in the court of appeals' decision in *State v. Wiegmann.*[320] In *Wiegmann,* the court reaffirmed the common-law right to resist an unlawful, warrantless arrest, while acknowledging the limitations imposed upon the rule due to safety considerations.[321]

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310. *Id.*
311. *Id.* at 507, 723 A.2d at 428.
312. *Id.*
313. *Id.* at 514, 723 A.2d at 431.
314. *Id.* at 514-15, 723 A.2d at 431-32.
315. *Id.* at 515, 723 A.2d at 432.
316. *Id.*
317. *Id.* at 499, 723 A.2d at 424.
318. *Evans,* 352 Md. at 499, 723 A.2d at 424.
319. *See* State v. Wiegmann, 350 Md. 585, 606-07, 714 A.2d 841, 851-52 (1998) (upholding the right in a very unusual situation where a master unlawfully instructed deputies to arrest a litigant).
320. *See supra* Part V.
321. *See Wiegmann,* 350 Md. at 601-02, 714 A.2d at 849.

The justification the court used to uphold the right in *Wiegmann* is in direct conflict with the underlying rationales of *Rodgers*, *Barnhard*, and *Blackman*.[322] Concern for an officer's safety, as well as the safety of others, has been the common thread running throughout the cases abrogating the rule or limiting its application, including the *Barnhard* and *Blackman* decisions.[323] The paramount justification for the *Rodgers* holding, which declined to extend the right to resist arrests to arrests made pursuant to a warrant, was to protect an officer making an unlawful arrest "through no fault of his [own]."[324] The officers in *Wiegmann* did just that—arrested the defendant through no fault of their own.[325]

Nonetheless, the *Wiegmann* court refused to equate the master's invalid instruction to arrest the defendant with an execution of a defective warrant, reasoning that such an analogy would denigrate the importance of the Fourth Amendment.[326] The integrity of the Fourth Amendment, however, was never an issue in the *Rodgers* decision.[327] If the Fourth Amendment's integrity had been at issue, the court would have upheld a right to resist warrants lacking probable cause, as required by the Fourth Amendment.[328] On the contrary, the *Rodgers* court permitted resistance only when the defect in the warrant is "so glaring and palpable" that a "person of ordinary intelligence" would probably detect it.[329] Thus, the distinguishing factor giving rise to a right to resist an arrest is not the actual validity of the warrant but rather the appearance of validity.[330]

The *Wiegmann* court plainly stated that the instruction given by the master to arrest the defendant appeared valid and that the officers believed the master possessed the authority to order an arrest.[331] In-

322. *See supra* notes 221-26, 239-54, 263-65 and accompanying text.

323. *See supra* notes 221-26, 239-42, 263-65 and accompanying text; *see also supra* notes 86-94 and accompanying text.

324. Rodgers v. State, 280 Md. 406, 418, 373 A.2d 944, 951 (1977).

325. *Wiegmann*, 350 Md. at 601, 714 A.2d at 848 (acknowledging that the deputies "honestly believed that [the Master] had the authority to order them to take respondent into custody").

326. *Id.* at 601, 714 A.2d at 848-49.

327. *See generally* Rodgers v. State, 280 Md. 406, 373 A.2d 944 (1977).

328. *See* discussion *infra* Part VII.

329. *Rodgers*, 280 Md. at 417, 373 A.2d at 950 (citing Lewin v. Uzuber, 65 Md. 341, 4 A. 285 (1886)).

330. *See id.* at 414, 373 A.2d at 944 ("[I]f a process . . . appears to have been issued by a court or magistrate . . . the officer is protected . . . .") (citing New Hampshire v. Weed, 21 N.H. 262, 269 (1850)).

331. In *Wiegmann*, the court stated that "[e]xperienced deputies such as those involved in the unfortunate events leading to this case believed the master had such authority. Indeed, the master's inappropriate attempt in this case

deed, "appearances of judicial authority a master may evoke by wearing a judge's robe and sitting behind the judge's bench" was of great concern to the court.[332] Yet, the opinion downplayed the "deputies' good faith belief" and safety concerns so that the appropriate role of a judicial master may be strictly limited.[333] Thus, while the *Rodgers* court focused on protecting police officers, the *Wiegmann* court focused on protecting judicial integrity.[334]

Less than a year after *Wiegmann*, the *Evans* court muddled the distinction between a detention and an arrest, making it nearly impossible for a person to determine the moment of actual arrest.[335] Previously, in *Barnhard v. State*, the court of special appeals based its decision limiting the application of the right to resist on the difference between a stop and an arrest, emphasizing that while a stop results in a "slight" intrusion, it does not compare to the "deprivation of freedom" that results from an arrest.[336] Thus, the idea that a person can walk away from a detention but cannot walk away from an arrest was evidently an underlying factor in the *Barnhard* court's decision to limit the right.

Further, it is anomalous that the lawfulness of the right to resist arrest hinges on whether an arrest or detention actually occurred, yet a detention absent formal charges may also constitute an arrest. Under this new analysis, there is no right to resist an arrest and no right to resist a detention that constitutes an arrest. As a result of *Evans*, the *Barnhard* rationale is now insignificant.

VII. CONSTITUTIONAL CONSIDERATIONS

A. The Right Against Unreasonable Searches and Seizures

The Fourth Amendment of the United States Constitution protects citizens from "unreasonable searches and seizures."[337] It requires that searches and seizures be made pursuant to a warrant based on proba-

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to 'sentence' petitioner and the master's 'acting as a judge,' in our view, may have provoked the affray that then resulted." *Wiegmann*, 350 Md. at 599 n.5, 714 A.2d at 848 n.5.

332. *Id.* at 600, 714 A.2d at 848.

333. *Id.*

334. *See id.* at 599-600, 714 A.2d at 848 ("[M]asters should not freely don judicial robes . . .").

335. *See generally* discussion *supra* Part VI.B.

336. Barnhard v. State, 86 Md. App. 518, 528, 587 A.2d 561, 566 (1991).

337. U.S. CONST. amend. IV ("[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."). This guarantee has been made applicable to the states. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

ble cause.[338] These protections, however, also extend to situations where the officer does not have a warrant.[339] In addition, the Constitution does not limit these safeguards to certain types of searches or seizures, but extends them to all searches and seizures that are "unreasonable."[340] The reasonableness of a search or seizure is assessed according to an objective standard—whether the facts available to the officer at the time of the intrusion would "warrant a man of reasonable caution in the belief that the action taken was appropriate."[341]

The United States Supreme Court held that an arrest, or full seizure, requires "*either* physical force *or*, where that is absent, *submission* to the assertion of authority."[342] A seizure that falls short of fulfilling the traditional definition of "arrest," such as an investigatory stop, still falls under the ambit of the Fourth Amendment.[343] Likewise, a frisk, or "pat down" of the outside of a person's clothing, although not a full search, nonetheless, constitutes a search for the purposes of Fourth Amendment protections.[344]

B. The Implications of Terry v. Ohio

In 1968, the United States Supreme Court created an exception to the Warrant Clause of the Fourth Amendment allowing police officers to effectuate lawful searches and seizures without a warrant in situations where obtaining a warrant is impractical because swift action is required.[345] In *Terry v. Ohio*, the Court held that an officer can make

338. The Warrant Clause of the Fourth Amendment provides: "[w]arrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

339. *See* Thomas Y. Davis, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 552 (1999).

340. Terry v. Ohio, 392 U.S. 1 (1968).

341. *Id.* at 22.

342. California v. Hodari D., 499 U.S. 621, 632 (1991) (emphasis added) (holding that a seizure does not occur if the subject does not yield to a show of authority).

343. *Terry*, 392 U.S. at 16.

344. *Terry*, 392 U.S. at 16-17.

345. *Id.* at 30-31 (finding that officers had the right to stop and frisk suspect who was walking back and forth in front of jewelry store, giving officers reasonable suspicion of a planned robbery); United States v. Brignoni-Ponce, 422 U.S. 873, 880-81 (1975) (allowing Border Patrol agents to stop persons reasonably suspected of being illegal immigrants to check for citizenship); Adams v. Williams, 407 U.S. 143, 146 (1972) (allowing officers to stop suspect based on reliable informant's tip that suspect may be armed and carrying illegal drugs); *see also Police Right to "Stop and Frisk,"* 82 HARV. L. REV. 178 (1968).

an investigatory stop based on reasonable, articulable suspicion that a crime is being committed regardless of probable cause.[346] The Court further held that, absent probable cause to arrest, an officer may conduct a limited search for weapons if the officer is justified in believing that the suspect is armed and dangerous.[347] Accordingly, if an officer fails to possess either a warrant or the requisite suspicion to justify the intrusion, the officer's actions will be in violation of the Fourth Amendment.[348]

There has been much discussion among scholars about whether the right to resist arrest is protected under the Fourth Amendment.[349] Despite this debate, the Supreme Court has not ruled on this issue.[350] Such a ruling, however, would have a profound effect on the right to resist an unlawful arrest in Maryland.

Maryland follows the Fourth Amendment guidelines as prescribed by the Supreme Court.[351] Accordingly, Maryland recognizes that all citizens are protected from *any* unreasonable search or seizure, whether it is an arrest, temporary detainment, or frisk.[352] The right to resist arrest in Maryland, however, applies only to one type of unlawful seizure—an arrest.[353] Maryland does not recognize a right to resist an investigatory or *Terry* stop, nor does it authorize resistance to an un-

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346. *Terry*, 392 U.S. at 30. The *Terry* Court emphasized that it was not retreating from its prior holdings mandating prior judicial approval of searches and seizures through the warrant procedure whenever practicable. *Id.* at 20. Rather, the Court dealt with the realm of "on-the-spot observations of the officer on the beat," which as a practical matter, cannot be subjected to the warrant procedure. *Id.*

347. *Id.* at 25-26.

348. *See* Anderson v. State, 282 Md. 701, 707, 387 A.2d 281, 285 (1978) (requiring officer to have "constitutionally, adequate, reasonable grounds" to act); *see also supra* note 142.

349. *See* Hemmens & Levin, *supra* note 9, at 17 n.143 (suggesting "there may be a constitutional basis for resisting not only unlawful arrest, but any on the street encounter that rises to the level of a 'seizure.'"); *see also* Wright, *supra* note 4, at 384-85.

350. *See* Wainwright v. New Orleans, 392 U.S. 598, 598 (1967) (dismissing writ of certiorari as improvidently granted in a case where the appellant argued that he had a Fourth Amendment right to resist the unlawful arrest); *see also* Hemmens & Levin, *supra* note 9, at 17.

351. "The protections of the Fourth Amendment are applicable to the State of Maryland through the Fourteenth Amendment." Cartnail v. State, 359 Md. 272, 283, 753 A.2d 519, 525 (2000) (citing Mapp v. Ohio, 367 U.S. 643, 655 (1961)).

352. *See id.*

353. *See* discussion *supra* Part V.B.3-4.

lawful search.[354] Thus, a ruling on this issue by the Supreme Court in favor of Fourth Amendment protection would significantly impact the status of the right to resist an unlawful arrest in Maryland.

VIII. CONCLUSION

The common-law right to resist an unlawful arrest was once a well-established right in American society.[355] Today, it seems to be a myth rather than a reality. Although the majority of jurisdictions overturned the rule,[356] Maryland claims to uphold it.[357] Due to the burdensome limitations placed on the rule by other court decisions, however, the situations that give rise to the right in Maryland are few.[358] The *Rodgers* decision eliminated the right to resist an arrest made pursuant to a warrant,[359] leaving only warrantless arrests subject to the rule.[360] Subsequently, the *Barnhard* and *Blackman* decisions eliminated the right to resist an officer's investigatory stop or frisk, both of which often precede an arrest.[361] Finally, the *Evans* decision narrowed the gap between what constitutes a detention and what constitutes an arrest.[362]

Although Maryland courts claim to uphold the right, the rationale behind any remaining protection afforded by the rule is unclear. For more than twenty years, Maryland courts have criticized the rule for promoting violence but nevertheless upheld it.[363] If the rule does promote violence in conflict with modern public policy, that policy is implicated whether the resistance is in response to an illegal search, an illegal detainment, or an illegal arrest. Violent self-help is no less antisocial and dangerous during resistance to an illegal arrest than it is during resistance to an illegal stop. It follows, therefore, that if the goal is to facilitate decent and peaceful behavior by all, the means to that goal should be applied uniformly.

Maryland courts cannot logically rely on the guarantee of the Fouth Amendment as a means to maintain the right to resist unlawful arrest where, as in Maryland, the right does not sanction resistance to all "unreasonable searches and seizures."[364] On the contrary, what re-

354. *See* discussion *supra* Part V.B.3-4.
355. *See* discussion *supra* Part II.B.
356. *See supra* note 66.
357. *See* discussion *supra* Part VI.A.
358. *See supra* note 319 and accompanying text.
359. *See* discussion *supra* Part V.B.2.
360. *See* discussion *supra* Part V.B.2.
361. *See supra* Parts V.B.3-4.
362. *See* discussion *supra* Part VI.B-C.
363. *See supra* notes 11-15 and accompanying text.
364. *See* discussion *supra* Part VII.

mains of the right under Maryland law, authorizes a citizen to resist only one type of illegal seizure and fails completely to recognize a right to resist an illegal search.[365] Thus, the rule does not provide protection from unlawful police conduct generally, but only on rare occasions.[366] Oddly, Maryland courts find support for upholding its limited version of the right in the same Supreme Court decisions, that uphold the protections of the Fourth Amendment.[367]

Finally, Maryland law makes it virtually impossible for a citizen to be in a position to determine whether the seizure is a detention or an arrest, whether it is legal or illegal, or whether the action gives rise to a right to resist arrest.[368] Ultimately, a court will always make such determinations.[369] The chance of a citizen effectively resisting arrest, absent the use of deadly weapons, is slim.[370] Thus, as explained by the *Valentine* court, eliminating the right to resist arrest "merely require[s] a person to submit peacefully to the inevitable and to pursue his available remedies through the orderly judicial process."[371]

Stephen P. Grossman,[372] a noted constitutional criminal law professor at the University of Baltimore School of Law, explained his view on the balance between crime control and a citizen's right to due process under the law.[373] He stated that crime control lies on one end of a continuum and due process lies on the other.[374] Keeping the system balanced requires that in order for us to gain a little of one, we have to give up a little of the other.[375] Abrogating the right to resist unlawful arrest in Maryland would set such a balancing system in motion. Perhaps it is time to encourage citizens to trust in the democratic system and judicial process that we have chosen to live by, even though

365. *See* discussion *supra* Part V.B.
366. *See* discussion *supra* Part V.B.
367. *See supra* notes 243-54 and accompanying text.
368. *See* Davis, *supra* note 339, at 639 (attributing the collapse of the right to resist unlawful arrest to the inability of innocent persons to appraise whether an officer was justified by probable cause); *see also* Alexandra W. Tauson, *Criminal Law—Resisting Arrest—Unlawful Arrest—The Pennsylvania Supreme Court Held That Resistance to an Arrest Found to be Unlawful Cannot Result in a Conviction for Resisting Arrest But Can Result in Conviction for Aggregated Assault*, 34 DUQ. L. REV. 755, 773 (1996).
369. *See infra* note 373-75 and accompanying text.
370. *See infra* note 373-75 and accompanying text.
371. State v. Valentine, 935 P.2d 1294, 1303 (Wash. 1997).
372. Steven P. Grossman, Dean Julius Isaacson Professor of Law, University of Baltimore School of Law.
373. *See* Steven P. Grossman, Remarks on Illegal Arrest in Maryland, Oct. 2000 (notes on file with the author).
374. *Id.*
375. *Id.*

at times that means giving up our liberty in order to maintain a civilized society. As eloquently summarized by the late Justice Potter Stewart:

> [I]n the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion . . . . [R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.[376]

Kimberly T. Owens

376. Walker v. City of Birmingham, 388 U.S. 307, 320-21 (1967).