

OK to Kill Law Enforcers in Self-Defense?

"Citizens may resist unlawful arrest to the point of taking an arresting officer's life if necessary." Plummer v. State, 136 Ind. 306. John Bad Elk v. U.S., 177 U.S. 529.

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The Right to Self-Defense

I have often wondered what it was like when communities were small, and everybody knew everybody. This thought occurred to me while I was driving through Tombstone, Arizona, site of the famous gunfight.

OK Corral

As was reported in the papers of the day (not television news), the Earps and Doc Holliday were walking down the street, knowing that the Clantons and Lowery were at the corral. These factions had been at odds with each other for years, and on this day there appeared to be a plan, for as the Earps and Doc walked by the Clantons, the Earps threw some hateful words out.

This, apparently, did not provoke the desired action, so Doc pulled his shotgun from under his coat, turned and fired. The Earps then joined in and only two of the others got away. Similarly, here in Waco, one faction, with color of law, was able to open up on the other in a devastating gunfight that left 9 dead. The color of law was sufficient, at least for the time being, to vindicate the aggressors. In both cases the side with color of law would have, if circumstances warranted, been given time off, with pay, while adjudication occurred. The other side would have been incarcerated until adjudication was

completed. Those with color of law would not be charged with a crime, but the others would be charged with serious crimes.

Waco Showdown

While I was here during the siege I ran across an interesting piece of Texas law. In the Texas Penal Code, 9.31 (C), reads as follows:

The use of force to resist arrest or search is justified:

(1) If, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest; and

(2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of greater force than necessary.

There must have been a reason for this law to have been passed, so I went back and reread the definition of:

liberty

1. Exemption from slavery, bondage, imprisonment, or control of another.

2. Freedom from external restraint or compulsion

(Webster's New Collegiate Dictionary).

LIBERTY - Freedom; exemption from extraneous control. The power of the will to follow the dictates of its unrestricted choice, and to direct the external acts of the individual without restraint, coercion, or control from other persons.

(Black's Law Dictionary -Third Edition)

It appears, then, that the right for each of us to walk freely, subject to not harming or injuring another person or his property is the concept of liberty that the Founding Fathers spoke of, and we have let our liberty be lost in a myriad of regulation, rule and control.

Police Power

What gives a "peace officer" the right to take a person's liberty, or property? Obviously the Texas legislators realized that excessive force could be used, unlawfully, justifying lawful retaliation. Perhaps they understood human nature and knew that personal bias might play a part when one person, operating under color of law, might exceed lawful exertion of force. Understanding that abuse of power might occur, isn't it possible that both time and extension of power might result in "law enforcement" officers exerting an authority that is beyond lawful authority?

Wondering how, and why, the scope of law enforcement may have changed, I began searching further and ran into an interesting account of a significant change that came as a result of a major trauma in the history of the United States of America. During World War II, especially with the troops being an occupation army after the armistices, there was a rather carefree attitude among those who thought they may never see home again.

To control the servicemen the Military Police had to impose arbitrary authority under the maritime jurisdiction that all soldiers were subject to. Meanwhile, back in the states, police officers approaching retirement during the war tended to stay on to help out in the war effort. As the MP's began returning stateside (literally tens of thousands of them) they began to fill the ranks of local law enforcement, filling in the gap made by those now retiring. The attitude of arbitrary enforcement was ingrained in the returnees, and, although tempered by training as they joined the local ranks, still became a prevalent attitude which began a change of servant to master.

The Upshot of Police Brutality – John Bad Elk

I looked further, in American's Bulletin, September 1993, and found an interesting article, portions of which follow: This fundamental premise was upheld by the Supreme Court of the United States in the case of when the court stated:

"...where the officer is killed in the course of the disorder which naturally accompanies an attempted arrest that is resisted, the law looks with very different eyes upon the transaction when the officer had the right to make the arrest, from what it does if the officer had no right. What might be murder in the first case might be nothing more than manslaughter in the other, or the facts might show that no offense had been committed. "

John Bad Elk v. U.S., 177 U.S. 529 (1900)

An arrest made with a defective warrant; or one issued without affidavit; or one that fails to allege a crime is without jurisdiction, and one who is being arrested may resist arrest and break away. If the arresting officer is killed by one who is resisting, the killing will be no more than involuntary manslaughter. In reviewing the case we find that:

"The court charged the jury:

"The deceased, John Kills Back, had been ordered to arrest the defendant; hence he had a right to go and make the attempt to arrest the defendant. The defendant had no right to resist him. .. In this connection I desire to say to you, gentlemen of the jury, that the deceased, being an officer of the law, had a right to be armed, and for the purpose of arresting the defendant [John Bad Elk] he would have the right to show his revolver. He would have had the right to use only so much force as necessary to take his prisoner, and the fact that he was using no more force than was necessary to take his prisoner would not be

sufficient justification for the defendant to shoot him and kill him. The defendant would only be justified in killing the deceased when you should find that the circumstances showed that the deceased had so far forgot his duties as an officer and had gone beyond the force necessary to arrest the defendant, and was about to kill him or to inflict great bodily injury upon him, which was not necessary for the purpose of making the arrest."

The jury, relying on these instructions, convicted John Bad Elk of murder and the case went to the higher court on error. The higher court stated:

"We think the court clearly erred in charging that the policeman had the right to arrest the plaintiff [John Bad Elk] in error, and to use such force as was necessary to accomplish the arrest, and that the plaintiff had no right to resist it. "

At common law, if a party resisted arrest by an officer without a warrant, and who had no right to arrest him, and if in the course of resistance the officer was killed, the offence of the party resisting arrest would be reduced from what would have been murder, if the officer had the right to arrest, to manslaughter...

So we can clearly see that something has happened that has had the effect of allowing us to be arrested (lose our liberty) by the design of a law enforcement officer when the Supreme Court has held that the officer has no right unless certain procedures (constitutional protections) are adhered to.

Perhaps we have been led to believe that law enforcement has superhuman rights. Perhaps the Founding Fathers, and those that followed recognized that no special privilege could be granted to normal humans who took a job that put them at risk. Perhaps arrest cannot be made, unless by indictment, properly obtained information or if a serious crime, not minor, is committed in the presence of the officer, and, perhaps not even in this last case unless property or lives are at stake.

As a general rule we have accepted the fact that we may shoot another person to protect our lives, property or money. But what is property or money if not a previous conversion of time. The time exerted to achieve the money or property surely had value. When someone attempts to "steal" that time prior to conversion are we not able to understand that even more is being taken away than when property is?

Just because a man is wearing a badge gives him no right to take from us what we would not allow to be taken by someone without a badge. Why have we come to a point that we accept authority, such as that which invaded Mt. Carmel Center, Waco, Texas, without question? However, when the matter comes to life or death we are willing to protect our property, by any means necessary, when just the property jeopardized.

Your Right to Resist Unlawful Arrest

"Citizens may resist unlawful arrest to the point of taking an arresting officer's life if necessary." Plummer v. State, 136 Ind. 306.

The Supreme Court of the United States upheld this premise in the case: John Bad Elk v. U.S., 177 U.S. 529. The Court stated:

"Where the officer is killed in the course of the disorder which naturally accompanies an attempted arrest that is resisted, the law looks with very different eyes upon the transaction, when the officer had the right to make the arrest, from what it does if the officer had no right. What may be murder in the first case might be nothing more than manslaughter in the other, or the facts might show that no offense had been committed."

"An arrest made with a defective warrant, or one issued without affidavit, or one that fails to allege a crime is within jurisdiction, and one who is being arrested, may resist arrest and break away. If the arresting officer is killed by one who is so resisting, the killing will be no more than an involuntary manslaughter." Housh v. People, 75 111. 491; reaffirmed and quoted in State v. Leach, 7 Conn. 452; State v. Gleason, 32 Kan. 245; Ballard v. State, 43 Ohio 349; State v. Rousseau, 241 P. 2d 447; State v. Spaulding, 34 Minn. 3621.

"When a person, being without fault, is in a place where he has a right to be, is violently assaulted, he may, without retreating, repel by force, and if, in the reasonable exercise of his right of self defense, his assailant is killed, he is justified." Runyan v. State, 57 Ind. 80; Miller v. State, 74 Ind. 1.

"These principles apply as well to an officer attempting to make an arrest, who abuses his authority and transcends the bounds thereof by the use of unnecessary force and violence, as they do to a private individual who unlawfully uses such force and violence." Jones v. State, 26 Tex. App. 1; Beaverts v. State, 4 Tex. App. 1 75; Skidmore v. State, 43 Tex. 93, 903.

"An illegal arrest is an assault and battery. The person so attempted to be restrained of his liberty has the same right to use force in defending himself as he would in repelling any other assault and battery." (State v. Robinson, 145 ME. 77, 72 ATL. 260).

"Each person has the right to resist an unlawful arrest. In such a case, the person attempting the arrest stands in the position of a wrongdoer and may be resisted by the use of force, as in self- defense." (State v. Mobley, 240 N.C. 476, 83 S.E. 2d 100).

"One may come to the aid of another being unlawfully arrested, just as he may where one is being assaulted, molested, raped or kidnapped. Thus it is not an offense to liberate one from the unlawful custody of an officer, even though he may have submitted to such custody, without resistance." Adams v. State, 121 Ga. 16, 48 S.E. 910.

"Story affirmed the right of self-defense by persons held illegally. In his own writings, he had admitted that 'a situation could arise in which the checks-and-balances principle ceased to work and the various

branches of government concurred in a gross usurpation.' There would be no usual remedy by changing the law or passing an amendment to the Constitution, should the oppressed party be a minority. Story concluded, 'If there be any remedy at all ... it is a remedy never provided for by human institutions.' That was the 'ultimate right of all human beings in extreme cases to resist oppression, and to apply force against ruinous injustice.'" From *Mutiny on the Amistad* by Howard Jones, Oxford University Press, 1987, an account of the reading of the decision in the case by Justice Joseph Story of the Supreme Court.

As for **grounds for arrest**: "The carrying of arms in a quiet, peaceable, and orderly manner, concealed on or about the person, is not a breach of the peace. Nor does such an act of itself, lead to a breach of the peace." Wharton's *Criminal and Civil Procedure*, 12th Ed., Vol.2: *Judy v. Lashley*, 5 W. Va. 628, 41 S.E. 197.

"When a person, being without fault, is in a place where he has a right to be, is violently assaulted, he may, without retreating, repel by force, and if, in the reasonable exercise of his right of self defense, his assailant is killed, he is justified." *Runyan v. State*, 57 Ind. 80; *Miller v. State*, 74 Ind. 1.

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And on the issue of actually **killing an arresting officer in self-defense**:

"Citizens may resist unlawful arrest to the point of taking an arresting officer's life if necessary." *Plummer v. State*, 136 Ind. 306. This premise was upheld by the Supreme Court of the United States in the case: *John Bad Elk v. U.S.*, 177 U.S. 529

The Natural & Common Law Right of Self Defense

"Common as the event may be, it is a serious thing to arrest a citizen, and it is a more serious thing to search his person; and he who accomplishes it, must do so in conformity to the law of the land. There are two reasons for this; one to avoid bloodshed, and the other to preserve the liberty of the citizen.

Obedience to the law is the bond of society, and the officers set to enforce the law are not exempt from its mandates." *Town of Blacksburg v. Bean* 104 S.C. 146. 88 S.E. 441 (1916); *Allen v. State*, 197 N.W. 808, 810-11 (Wis 1924)

"Where officers do not conform to the 'law of the land' they have no authority and the right to resist them exists. A Public Officer, as with a citizen, who unlawfully threatens life or liberty, is susceptible to be injured or killed; for by such acts 'they draw their own blood upon themselves' As stated in some cases, 'where a peace officer has no right to make an arrest without warrant he is a trespasser and acts at his own peril.'" 6A CJS., "Arrest" Section 16 page 30; A sheriff who "acts without process," or "under a process void on its face, in doing such act, he is not to be considered an officer but a personal trespasser." *Roberts v. Dean*, 187 So. 571, 575 (Fla. 1939)

"A person has a lawful right to resist an arrest by an unlawful authority, i.e., an officer without a valid warrant." *Franklin*, 118 Ga. 860, 45 S.E. 698 (1903)

"What of the resistance to the arrest? The authorities are in agreement that since the right of personal property is one of the fundamental rights guaranteed by the Constitution, any unlawful interference with it may be resisted and every person has a right to resist an unlawful arrest. * * * and, in preventing such illegal restraint of his liberty, he may use such force as may be necessary." *City of Columbus v. Holmes*, 152 N.W. 2d, 301, 306 (Ohio App. 1058)

"It is the law of self-defense and self-preservation that is applicable. One has an 'unalienable' right to protect his life, liberty or property from unlawful attack or harm." ... "It is not an offense to liberate one from the unlawful custody of an officer, even though he may have submitted to such custody without resistance." *Adarns v. State*, 121 Ga 163, 48 S.E. 910 (1904)

"An illegal arrest is an assault and battery. The person so attempted to be restrained of his liberty has the same right, and only the same right to use force in defending himself as he would in repelling any other assault and battery." *State v. Robinson*, 145 Me. 77, 72 Atl, 2nd.260, 262 (1950)

"A citizen illegally arrested "cannot initiate the use of force" and neither do "words alone justify an assault." However, "when the officer initiates the assault by physical contact, which is usually the case, and there is an unlawful arrest, the citizen has the right to protect his liberty to the extent of killing the officer." See *Green v. Kennedy*, 48 N.Y. Rep. 653, 654 (1871) and/or *Hicks v. Matthews*, 266 S.W. 2nd. 846, 849 (Tex. 1954)

"What rights then has a citizen in resisting an unlawful arrest? An arrest without warrant is a trespass, an unlawful assault upon the person, and how far one thus unlawfully assaulted may go in resistance is to be determined as in other cases of assault. Life and liberty are regarded as standing substantially on one foundation; life being useless without liberty, and the authorities are uninformed that where one is about to be unlawfully deprived of his liberty he may resist the aggressions of the officer, to the extent of taking the life of the assailant, if that be necessity to preserve his own life, or prevent infliction upon him of some great bodily harm." *State v. Gum*, 68 W. Va. 105, 69 S.E. 463, 464 (1910)

"It is the law that a person illegally arrested by an officer may resist that arrest, even to the extent of the taking of life if his own life or any great bodily harm is threatened. *State v. Rousseau*, 40 Wash. 2d, 92, 241 P. 2d. 447, 449 (1952); *Porter v. State*, 124 Ga. 297, 52 S.E. 283, 287 (1905); see also *State v. Mobley*, 240 N.C. 476, 83 S.E. 2d 100, 102 (1954); *Wilkinson v. State*, 143 Miss. 324, 108 So. 711, 712-13 (1926); *American Jurisprudence*, 2nd Ed., "Arrest", Section 94, pp. 778-780; *Thomas v. State*, 91 Ga. 204, 18 S.E. 305 (1892); *Presley v. State*, 75 Fla. 434, 78 So. 532, 534 (1918); *Burkhard v. State*, 83 Tex. Crim. 228, 202 S.W. 513; *Mullins v. State*, 196 Ga. 569, 27 S.E. 2d. 91 (1943); *Owens v. State*, 58 Tex. Crim. 261, 125 S.W. 405 (1910); *Caperton v. Commonwealth*, 189 Ky. 652, 655, 225 S.W. 481, 481 (1920)

"The United States Supreme Court, and every other court in the past deciding upon the matter, has recognized that "at common Law", a person had the right to "resist the illegal attempt to arrest him." *John Bad Elk v. United States*, 177 U.S. 529, 534-35 (1899)

Summary of Case Citations

1. *State v. Robinson*, 145 Me 77, 72 Alt. 2d 260, 262 (1950)
2. *State v. Gum*, 68 W. Va. 105
3. *State v. Rousseau*, 40 Wash. 2d. 92, 241, 242 P.2d 447, 449 (1952)
4. *State v. Mobley*, 240 N.C. 446, 83 S.E., 2d 100, 102 (1954)
5. *Wilkinson v. State*, 143 Miss. 324, 108 So. 711
6. *Thomas v. State*, 91 Ga. 204, 18 SE 305
7. *Presley v. State*, 75 Fla. 434, 78 So. 523
8. *Burkhardt v. State*, 83 Tex Crim 228, 202 S.W. 513
9. *Mullis v. State*, 196 Ga. 569, 27 SE 2d 91 (1943)
10. *Owen v. State*, 58 Tex Crim 261, 125 S.W. 405 (1910)
11. *Franklin*, 118 Ga. 860, 45 S.E. 698 (1903)
12. *Graham v. State*, 143 Ga. 440 85 S.E. 328, 331
13. *City of Columbus v. Holmes*, 152 N.W. 2d, 301, 306 (Ohio App. 1058)
14. *Adams v. State*, 121 Ga 163, 48 S.E. 910 (1904)
15. *Robertson v. State*, 198 S. W2d 633, 635-36 Tenn. (1947)
16. *Roberts v. Dean*, 187 So. 571, 575 Fla. 1939
17. *The State of Connecticut against Leach*, 7 Conn, Rep. 452 (1829)
18. *Housh v. The People*, 75 ILL Rep. 487, 491 (1874)
19. *Plummer v. The State*, 135 Ind. 308, 313, 334 N.E. 968 (1893)
20. *John Bad Elk v. U.S.* 177 U.S. 529 (1899)
21. *People v. Hevern*, 127 Misc. Rep. 141, 215 NY Supp 412
22. *U.S. v. Cerciello*, 86 NJL 309, 90 Atl.1112, (1914)
23. *U.S. v. Kelly*, 51 Fed 2d 263 (1931)
24. *Bednarik v. Bednarik*, 16 A 2d, 80, 90, 18 NJ Misc. 633 (1948)
25. *State v. Height*, 117 Iowa 650, 91 NW 935
26. *People v. Corder*, 244 Mich. 274, 221 NW 309
27. *Boyd v. U.S.*, 116 U.S. 616

28. State v. Newcomb, 220 Mo 54 119 SW 405
29. Town of Blacksburg v. Bean, 104 S.C. 146. 88 S.E. 441 (1916)
30. Allen v. State, 197 N.W. 808, 810-11(Wis 1924)
31. Adarns v. State, 121 Ga 163, 48 S.E. 910 (1904)
32. Green v.Kennedy,48 N.Y. Rep. 653, 654 (1871)
33. Hicks v. Matthews, 266 S.W. 2nd. 846, 849 (Tex. 1954)
34. Porter v. State, 124 Ga. 297, 52 S.E. 283, 287 (1905)
35. Mullins v. State,196 Ga. 569, 27 S.E. 2nd. 91 (1943)
36. Caperton v. Commonwealth, 189 Ky. 652, 655, 225 S.W. 481, 481 (1920)