

overlapping programs, often involving multiple agencies and diverse criteria. This results in confusion at the local level, in the waste of time, energy and resources, and often in the frustration of the *intent of Congress*.<sup>40</sup>

## VII. FUTURE OF WELFARE

Although neither federal nor state government has completely accepted the theory that support is an obligation upon society and a right for the individual, federal expansion of entitlement could be precipitated in the near future under the President's Welfare Reform Program. The future of the welfare system as a whole appears to be a completely open question. Regardless of the legislative enactments to come from the President's proposal, the initiative is moving away from the states, leaving them with little more than expense. Establishment of a national income floor might remove, by application of the Equal Protection Clause, the one drastic final option left to them—withdrawal from the jointly-funded program. Drawn between *Shapiro* and the new welfare reforms proposed, the state capitals must watch and wait.

EDWARD I. MEARS

### CRIMINAL LAW—ARREST—RESISTING AN UNLAWFUL ARREST PUNISHABLE AS A MISDEMEANOR UNDER CALIFORNIA PENAL CODE SECTION 834A. *People v. Curtis* (Cal. 1969).

The defendant was arrested on the street at night by a police officer in uniform. The officer was investigating a report of a prowler and had received a brief, general description of the suspect as a male Negro, about six feet tall, wearing a white shirt and tan trousers. The defendant matched this description. After telling the defendant that he was under arrest and would have to come with him, the officer reached for the defendant's arm. The defendant attempted to back away and a violent struggle ensued in which both men were injured. The defendant was subdued and taken into custody by several other officers. In the Superior Court, the defendant was acquitted of a charge of burglary, but was convicted of a battery upon a peace officer, a felony.<sup>1</sup> The Court

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40. See note 36, *supra* [emphasis supplied].

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1. CAL. PENAL CODE § 243 (West Supp. 1968):

A battery is punishable by fine of not exceeding one thousand dollars

of Appeal affirmed in part and reversed in part.<sup>2</sup> The Supreme Court of California *held*, reversed; a person may not use force to resist any arrest, lawful or unlawful, except to defend life and limb against excessive force; but if it is determined that the resistance was to a lawful arrest and was not justified, the defendant is guilty of a felony; and if the arrest is determined to be unlawful the defendant may be convicted only of a misdemeanor.<sup>3</sup> *People v. Curtis*, 70 Adv. Cal. 360, 450 P.2d 33, 74 Cal. Rptr. 713 (1969).

At common law, while there is no right to resist a lawful arrest, reasonable resistance could be made to an unlawful arrest and the use of excessive force in making an arrest—whether lawful or unlawful. The privilege to resist an unlawful arrest was based upon factors which have little application today. Historically, an arrest had certain consequences of long and arduous incarceration under primitive conditions with doubtful opportunity for early release and little or no remedy for the unfortunate victim if the arrest proved to be unlawful. Under modern law and judicial procedure the situation has changed. First, and foremost, the victim of an unlawful arrest does have a remedy at law. The statutory and judicially imposed safeguards are generally adequate to protect the innocent victim from more than temporary inconvenience. Second, since the early nineteenth century the development of modern police departments and methods has greatly increased the hazards of resisting arrest by a well-armed and equipped peace officer. Finally, in modern society the hazards to public welfare by permitting resistance to arrest have been increased.<sup>4</sup>

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(\$1,000), or by imprisonment in the county jail not exceeding six months or both. When it is committed against the person of a peace officer or fireman, and the person committing the offense knows or reasonably should know that the victim is a peace officer or a fireman engaged in the performance of his duties, and such peace officer or fireman is engaged in the performance of his duties, the offense shall be punished by imprisonment in the county jail not exceeding one year or by imprisonment in the state prison for not less than 1 nor more than 10 years.

2. 264 Adv. Cal. App. 179, 70 Cal. Rptr. 271 (1968).

3. Also at issue, but not discussed herein, was the contention by the defendant that the record of a constitutionally invalid prior conviction had been improperly admitted. The court held that the constitutionality of a prior conviction is to be determined by the court and not by the jury and that it is without significance that the issue arises during rather than before trial so long as the objection is raised before the case is submitted to the jury. For the appropriate means of making the determination, the court referred to the procedure outlined in *People v. Coffey*, 67 Cal. 2d 204, 217-18, 430 P.2d 15, 24, 60 Cal. Rptr. 457, 467 (1967).

4. For a detailed discussion of the history of the common law rule and its

Partly as a product of this change in the nature of society, the Uniform Arrest Act<sup>5</sup> was developed to modernize arrest procedures in keeping with current social and political conditions. This act took cognizance of the anomaly of the common law privilege in today's society by removing the right to use reasonable force to resist an unlawful arrest.<sup>6</sup>

Prior to 1957 the common law rule was recognized in California courts.<sup>7</sup> In that year, the legislature added Section 834a to the Penal Code, in consonance with the Uniform Arrest Act, providing that it is the duty of every citizen to refrain from resisting arrest by a "recognized" peace officer.<sup>8</sup> The wording of the California code provision varied from that of the Uniform Arrest Act, in omitting the phrase which prohibited resistance whether or not there was a legal basis for the arrest.

In 1961, section 834a of the California Penal Code was interpreted in *People v. Burns*<sup>9</sup> as extending the prohibition against resistance to both lawful and unlawful arrests. The court in *Burns*, drawing on the legislative history of section 834a found support in the avowed intent of the legislature.<sup>10</sup>

Prior to *Curtis*, this interpretation of section 834a had not received a thorough review by the Supreme Court of California. The court apparently approved *Burns* in *People v. Coffey*.<sup>11</sup> However, in *Coffey* reference was by footnote in a case which did not involve unlawful arrest and, therefore, can scarcely be considered as an unequivocal affirmation of the interpretation made by the *Burns* court. In *Curtis* the court reviews the interpretation of section 834a and specifically affirms the view that the section applies to both lawful and unlawful arrests.

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inappropriateness in modern society, *see, e.g.*, Comment, 7 NATURAL RESOURCES J. 119 (1967).

5. Warren, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

6. *Id.* at 345. Section 5 of the Uniform Arrest Act provides: "If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest."

7. *E.g.*, *People v. Spinoso*, 115 Cal. App. 2d 659, 665, 252 P.2d 409, 412 (1953).

8. CAL. PENAL CODE § 834a (West Supp. 1968): "If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest."

9. 198 Cal. App. 2d 839, 18 Cal. Rptr. 921 (1961).

10. *Id.* at 841-42, 18 Cal. Rptr. at 922-23.

11. 67 Cal. 2d at 221 n.18, 430 P.2d at 26 n.18, 60 Cal. Rptr. at 468 n.18.

The *Curtis* court follows the *Burns* reasoning in basing its decision on legislative intent.<sup>12</sup> It also (apparently) gives great weight to the fact that the *Burns* interpretation has had a long history of adoption.<sup>13</sup> The contention that the *Burns* interpretation violates the rights of the victim of an unlawful arrest is considered but rejected.<sup>14</sup> Overall, however, the *Curtis* court seems to be persuaded most strongly by stare decisis in concluding that section 834a applies to unlawful as well as lawful arrests.<sup>15</sup>

The opinion suggests that had the question of interpretation of section 834a been one of first impression, the court might have been persuaded to exclude unlawful arrest from the scope of section 834a.<sup>16</sup> This gives rise to the unsettling feeling that *Burns*, as affirmed by *Curtis*, might easily be subject to reversal in a future case where the determination rested solely on the interpretation of section 834a.

It must be admitted, at the very least, that the legislature adopted a peculiar way of signifying its intent by omitting the very words which would have extended section 834a to unlawful arrests without doubt or equivocation. Moreover, as the *Curtis* court recognizes but rejects,<sup>17</sup> the juxtaposition of section 834a with section 834<sup>18</sup> (which clearly relates only to lawful arrests) would, in most circumstances, be persuasive. Of course, if section 834a applies only to lawful arrests its purpose is obscure unless the legislature intended it merely as a codification of the common law rule.

Accepting the interpretation of section 834a as applying to unlawful as well as lawful arrest, the question then arises as to what crime is committed by the violation of section 834a. It does not establish a new substantive crime,<sup>19</sup> nor was it intended to do so in its original form in the Uniform Arrest Act.<sup>20</sup> In *Curtis*, the

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12. *E.g.*, REPORT OF THE SENATE INTERIM JUDICIARY COMMITTEE, Appendix to Journal of the Senate, vol. 1 at 435-36, 456 (1957).

13. 70 Adv. Cal. at 364, 450 P.2d at 35, 74 Cal. Rptr. at 715.

14. *Id.* at 365-66, 450 P.2d at 36, 74 Cal. Rptr. at 716-17.

15. *Id.* at 364, 450 P.2d at 35, 74 Cal. Rptr. at 715.

16. *Id.* at 364 n.2, 450 P.2d at 35 n.2, 74 Cal. Rptr. at 715 n.2.

17. *Id.* at 364-65 n. 1 & 2, 450 P.2d at 35 n.1 & 2, 74 Cal. Rptr. at 715 n.1 & 2.

18. CAL. PENAL CODE § 834 (West Supp. 1968): "An arrest is taking a person into custody, in a case and in a manner authorized by law. An arrest may be made by a peace officer or by a private person."

19. 70 Adv. Cal. at 367, 450 P.2d at 37, 74 Cal. Rptr. at 717.

20. *See*, Warren, *supra* note 5, at 330.

result of the violation was a battery and the appropriate charge would be that of battery as defined elsewhere in the Penal Code. At the time section 834a was adopted, section 243 of the Penal Code setting the punishment for battery established the offense as a misdemeanor.<sup>21</sup> At that time there would have been no problem such as in *Curtis*. Subsequent amendments to section 243 divided battery into two distinct offenses: first, the former misdemeanor ("simply battery") and second, the more serious offense of "felony battery" when committed against a peace officer.<sup>22</sup> Thus, the dilemma arises: is a violation of section 834a resulting in a battery to be punished under the simple battery provisions of section 243 or under the felony battery provisions?

The key to this dilemma as decided by the *Curtis* court lies in the statutory language "engaged in the performance of his duties".<sup>23</sup> The court points out that the peace officer's duty as embodied in section 243 had a logical predecessor in the duty concept of section 148.<sup>24</sup> The latter section has been a part of the Penal Code since 1872. It is well settled by the courts that the duty to arrest of section 148 applies only to lawful arrests.<sup>25</sup> It is consistent to adopt the same meaning for the duty concept of section 243. On this basis, the court reasons that "even if section 834a now makes it a *citizen's* duty not to resist an unlawful arrest, this change in the law in no way purports to include an unlawful arrest within the performance of an *officer's* duty."<sup>26</sup>

Applying this reasoning to the facts in *Curtis*, the court concluded that the arrest was unlawful in that the police officer lacked probable cause sufficient to justify an arrest. Applying the doctrine of *Terry v. Ohio*<sup>27</sup> and *People v. Mickelson*,<sup>28</sup> the court

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21. CAL. PENAL CODE § 243 (West 1955) as it existed in 1957: "A battery is punishable by fine of not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both."

22. Compare wording in notes 1 and 21, *supra*.

23. 70 Adv. Cal. at 366-67, 450 P.2d at 37, 74 Cal. Rptr. at 717.

24. CAL. PENAL CODE § 148 (West Supp. 1968).

Every person who wilfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or both such fine and imprisonment.

25. E.g., "An officer is under no duty to make an unlawful arrest." *Jackson v. Superior Court*, 98 Cal. App. 2d 183, 189, 219 P.2d 879, 883 (1950).

26. 70 Adv. Cal. at 367, 450 P.2d at 37, 74 Cal. Rptr. at 717.

27. 392 U.S. 1 (1968).

28. 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963).

conceded that the police officer did have sufficient grounds to detain and question the defendant.<sup>29</sup> The facts demonstrate, however, that an arrest was actually made. Being unlawful, the arrest did not fall within the *duty* of the officer. The offense committed by the defendant in resisting arrest was at most a simple battery rather than a felony battery committed against a peace officer in the performance of his duty. In so holding, the court specifically overruled cases which either held or implied a contrary view.<sup>30</sup> The cases overruled include not only cases under section 243 but also cases under other provisions of the Penal Code<sup>31</sup> which have similar dual punishment provisions since the same reasoning applies to all.

Two other statements by the court in *Curtis* are worthy of note. First, the court emphasizes the distinction, long recognized but frequently forgotten, between resisting an unlawful arrest and resisting the use of unreasonable force in effecting any arrest.<sup>32</sup> The latter is a separate and distinct right granted by other sections of the Penal Code<sup>33</sup> and is not abrogated by section 834a or by the reasoning in *Curtis*. Second, the court warns that the definition of the duty of a peace officer adopted for the purpose of the *Curtis* decision does not necessarily extend to all other provisions of the Penal Code.<sup>34</sup> Both Distinctions are important in attempting to apply the rule of *Curtis* to other fact situations.

It is clear from *Curtis* that under California law a citizen who resists arrest by a peace officer is chargeable with at least a misdemeanor whether or not there is a legal basis for the arrest. It is also clear that the mere act of resistance to a peace officer will not be escalated into a felony unless the arrest is lawful. A different situation exists where the circumstances are those of "detain and examine" rather than arrest. The Supreme Court of

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29. 70 Adv. Cal. at 370-71, 450 P.2d at 40, 74 Cal. Rptr. at 720.

30. *People v. Rhone*, 267 Adv. Cal. App. 711, 73 Cal. Rptr. 463 (1968); *Pittman v. Superior Court*, 256 Cal. App. 2d 795, 64 Cal. Rptr. 743 (1967); *People v. Hooker*, 254 Cal. App. 2d 878, 62 Cal. Rptr. 675 (1967); *People v. Beca*, 247 Cal. App. 2d 487, 55 Cal. Rptr. 681 (1966); *People v. Gaines*, 247 Cal. App. 2d 141, 55 Cal. Rptr. 283 (1966); *People v. Burns*, 198 Cal. App. 2d 839, 18 Cal. Rptr. 921 (1961).

31. 70 Adv. Cal. at 370 n.9, 450 P.2d at 39 n.9, 74 Cal. Rptr. at 719 n.9. Although not specifically mentioned by the court, the same reasoning would appear to apply to section 241 which also contains a dual provision.

32. *Id.* at 369, 450 P.2d at 38-39, 74 Cal. Rptr. at 718-19.

33. CAL. PENAL CODE §§ 692, 693 and 835a (West Supp. 1968).

34. 70 Adv. Cal. at 370 n.9, 450 P.2d at 39 n.9, 74 Cal. Rptr. at 720 n.9.

California previously held that section 834a applies only to *arrest* situations.<sup>35</sup> If the court's reasoning on "duty" can be slightly extended,<sup>36</sup> a justified detention and examination would seem to fall within the definition of "in the performance of his duty" for a peace officer. If so, section 834a is unnecessary since resistance in such circumstances would fall directly within the felony battery portion of section 243 (assuming that the result of the resistance is a battery). Another situation unresolved by *Curtis* is that in which resistance to a lesser restraint, such as detention and examination, could give rise to a more serious offense than resistance to an *unlawful* arrest.

A very troublesome problem is recognized by the *Curtis* Court but left unanswered. The rationale of section 834a as applied to unlawful arrest is tenable only if the victim has an adequate remedy at law. As the court admits, there is a remedy, but in reality it is often more illusory than real.<sup>37</sup> In an era when individual rights are receiving special attention, the improbability of pursuing this remedy to judgment is unfortunate. The *Curtis* decision would appear to compensate to a limited extent for the discrepancy between the existence of a remedy on one hand and small chance of recovery on the other.

LOUIS N. SAUNDERS, JR.

**FAMILY LAW—CHILD SUPPORT—MOTHER MUST GIVE SUPPORT PAYMENTS TO FATHER WHO IS IN CUSTODY OF CHILDREN WHEN NOT DOING SO WOULD RESULT IN AN INEQUITABLE SITUATION.** *Moore v. Moore* (Cal. App. 1969).

Jack Moore originally brought suit for divorce against his wife, Helen. Following a cross-complaint by Helen, the parties entered into a property settlement agreement. It was then stipulated that the complaint, the answer to the complaint, and the answer to the cross-complaint be withdrawn and default by Jack Moore be entered. This agreement was approved by the court in an interlocutory decree (July 23, 1962) and set forth in the judgment. Custody of the children (two girls and one boy) was

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35. *People v. Coffey*, 67 Cal. 2d 204, 221, 430 P.2d 15, 26, 60 Cal. Rptr. 457, 468 (1967).

36. This may be contrary to the court's warning, *supra*.

37. 70 Adv. Cal. at 366, 450 P.2d at 37, 74 Cal. Rptr. at 717.