CRIMINAL JUSTICE

The Arts of Arrest

On their way home one night last fall, two Chicago cops heard a passerby yell that two "crazy men" were around the corner. The crazy men turned out to be a couple of tipsy young Puerto Ricans; the cops drew their pistols and ordered one of the youths to drop the broken beer bottle he was carrying. According to the cops, the bottle carrier answered by yelling, "Come and get it, coppers!" In the dustup that followed, he slashed Patrolman Thomas De Sutter's face. De Sutter, who was also accidentally shot in the foot by his partner, Patrolman Raymond Howard, had to spend 23 days in the hospital.

The two Puerto Ricans, Jesse Rodriguez and Simon Suarez, went to jail, charged with aggravated battery. Last week they were set free because Judge George N. Leighton ruled that they had acted in "self-defense."

The decision incensed Chicago cops, and state legislators angrily talked impeachment. But Judge Leighton, a Negro, a noted former criminal lawyer, and a *magna* Harvard Law graduate, stood his ground. He insisted that "a policeman has no right to pull a gun unless he knows a felony is being committed." Carrying a broken beer bottle is no crime, said Leighton. Besides, "How do we know that these men, who are unable to speak English, said what these officers say they said?" Ruled Judge Leighton: "The right to resist unlawful arrest is a phase of self-defense."

Unhealthy Resistance. The reasonable answer would seem to be: submit now and sue later for false arrest. It is legal to resist illegal arrest in 47 states, but the right goes back to a day when armed citizens combatted weak police to avoid harsh imprisonment. Today the equation is so changed that it rarely pays to resist.

The law says that arrest is "taking a person into custody that he may be held to answer for a crime." The Fourth Amendment, which bans "unreasonable searches and seizures," sets an arrest standard of "probable cause," meaning sufficient evidence to convince a prudent man that an offense has been or is being committed. In short, arrest for mere suspicion is unconstitutional—though it is so widely practiced in crime-ridden slum areas that about 100,000 such arrests a year are openly listed in the FBI's *Uniform Crime Reports*.

Unwittingly Unlawful. Arrest is almost always lawful when police produce a judge-signed warrant specifying the charges, which the person arrested is entitled to read. Local police, however, rarely have the opportunity to use arrest warrants. Unlike federal agents, they confront hit-run crimes that leave little time for investigation to nail down probable cause. Typically, local police arrest first, then question suspects to build cases.

Even so, arrest without a warrant is perfectly constitutional when police reasonably believe that a felony has been committed and that the person to be arrested committed it. Police may also arrest anyone for misdemeanors that constitute a "breach of the peace" committed in their presence. (Threatening someone with a broken bottle would qualify in most courts.) But other kinds of misdemeanors generally require warrants. And because felonies may be confused with misdemeanors, police sometimes unwittingly make unlawful arrests.

The mistake can be fatal; it is legal for a cop to use all necessary force, even to kill a fleeing felon; but his power to use force is much more limited in the case of a fleeing misdemeanant. There comes a point when the arrester may be subject to murder charges—and when the arrestee is entitled to shoot back in self-defense.

Search for Balance. To bypass such complexities of arrest, some states have invented "pre-arrest detention." This device was designed to permit police to act on "reasonable suspicion" rather than the higher standard of "reasonable belief." Delaware, Rhode Island and New Hampshire have adopted the Uniform Arrest Act, which allows a policeman to stop, question, detain and frisk any person "whom he has reasonable ground to suspect" of having committed a crime. Unless there is probable cause for actual arrest, the person must be released after two hours.

This amounts to "investigative arrest"—already widespread in many states. But knowledgeable lawyers say the practice may flunk a Supreme Court test. As a compromise, New York's new "stop and frisk" law imitates the Uniform Arrest Act—except that suspects may not be detained if the frisk or questioning fails to yield probable cause for actual arrest.

Before the stop and frisk law was passed, a thief could sometimes beat arrest in New York even if a cop caught him carrying concealed loot—unless the cop reasonably believed beforehand that a theft had been committed. But even the new New York law is not necessarily constitutional. If detention really means arrest, then it must meet the standards of probable cause. And recent Supreme Court decisions indicate that state courts must exclude evidence seized during searches accompanying arrests made without probable cause. In short, a search cannot be justified by its fruits alone.

Relaxed Standards. The Supreme Court, though, is well aware of public cries that "the pendulum has swung too far in favor of criminals." And to redress the balance, the court may devise more relaxed standards. As the court said in 1960: "What the Constitution

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When in doubt, submit—and sue later.

forbids is not all searches and seizures, but unreasonable searches and seizures." As an instance, the court in 1963 upheld the right of California police to make an arrest and search after they entered a narcotics peddler's room with a passkey but without a warrant.

Those who yearn to see New York's law upheld avidly quote the court's California decision: "The states are not precluded from developing workable rules to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that the rules do not violate the Constitution's proscription of unreasonable searches and seizures."

Of Families & Fools

Few constitutional phrases are expanding faster than the Sixth Amendment's guarantee that every criminal defendant shall "have the assistance of counsel for his defense." In 1963, the Supreme Court extended that right to all defendants in all state criminal trials (*Gideon* v. *Wainwright*). In 1964, the Court ruled that a suspect is entitled to a lawyer as soon as the police start grilling him in the station house (*Escobedo* v. *Illinois*). Lower courts are now catching on fast. Items:

▶ In New York, the State Supreme Court's Appellate Division reversed a murder conviction and ordered a new trial because a man had not been allowed to see his family before confessing to the police. Richard Taylor, 25, had no lawyer when police questioned him in the fatal shooting of a Harlem bill collector. Taylor said that police also denied his request to see his relatives. Found guilty and sentenced to life, Taylor appealed. Even if a suspect does not "rationalize his reasons for asking for his family," ruled the court, "we must assume that he makes such request to obtain help; and he is entitled to have the benefit of their advice, which may include the retention of counsel for him." In short, a suspect's request to see his family may be the only way to protect his right to counsel.

▶ In Brooklyn, ex-Convict George Maldonado had apparently never heard of the old legal maxim that "the man who defends himself has a fool for a client." "Your Honor, I don't feel that this man, in eight or ten minutes, can defend me," Maldonado protested, after a court had assigned a Legal Aid Society lawyer to handle his latest trial for burglary. "I want to act as my own attorney." The judge refused the request. Maldonado wound up in Sing Sing prison. But U.S. District Judge Charles H. Tenney granted Maldonado a conditional writ of habeas corpus on the ground that "one of the most fundamental prerequisites of a fair trial is the right of the accused to defend himself either in person or by counsel of his own choosing." Failing the latter, said Tenney, a defendant's right to be his own lawyer is "unquestionably protected" by the U.S. Constitution.