OHIO REVISED CODE SECTION 2923.55: OFFICIAL IMMUNITY IN THE RIOT SITUATION

Ohio Revised Code section 2923.55 reads as follows:

> Police officers, special police officers, sheriffs, deputy sheriffs, highway patrolmen, other law enforcement officers, members of the organized militia, members of the armed forces of the United States, and firemen, when engaged in suppressing a riot or in dispersing or apprehending rioters and after an order to desist and disperse has been issued pursuant to section 2923.51 of the Revised Code, are *guiltless* of killing, maiming, or injuring a rioter as a consequence of the use of such force as is necessary and proper to suppress the riot or disperse or apprehend rioters. This section does not relieve a member of the organized militia or armed forces of the United States from prosecution by court martial for a military offense (Emphasis supplied).

Section 2923.55 exempts law enforcement officials from liability for killing, maiming or injuring rioters. Officials engaged in suppressing a riot or in dispersing or apprehending rioters receive this statutory immunity. The conditions for immunity are that an order to desist and disperse must have been given so that it could reasonably be heard and the killing, maiming, or injuring must have occurred by using necessary and proper force.

The belief that deadly force is applicable to prevent a felony, or to prevent a public disturbance has an historical, as opposed to a necessarily rational, basis. It springs from an old common law rule which was applied in England when practically all felonies were capital crimes.[1] At that time it was felt that deadly force could properly be used whenever a felony was committed. Force has since been used to prevent riots or similar breaches of the peace; however, its use has been limited to situations where it reasonably appears that the riot can be prevented in no other way, and only then if the force used is not deadly.[2]

Section 2923.55 replaced section 3761.15 of the Revised Code which provided that law enforcement officials suppressing a riot were guiltless for killing or injuring persons resisting arrest.[3] Thus, the repealed section was really a resisting arrest statute whereas section 2923.55 does not require any particular resistance on the part of rioters.

The legislature, in enacting this new section, seems to have been prompted by a fear of recurring riots. This led to the belief that giving the police more support for prompt action would effectively control riots.

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[1] 1 E. HARPER & F. JAMES, THE LAW OF TORTS § 3.19 (1956); [hereinafter cited as Harper and James]. *See also* R. PERKINS, CRIMINAL LAW 882 (1957); Perkins, *Some Weak Points in the Model Penal Code*, 17 HAST. L.J. 3, 5, 6 (1966).

[2] Harper and James, § 3.19. *See also* Comment, *Justification For the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566, 577-585 (1961).

[3] 29 [1953] Laws of Ohio 144 § 8 (expired 1968).

It was perhaps felt that the swift use of force was the only sure way to insure riot control.[4] The legislature probably intended to extend protection and assurance for police during these situations by enabling them to protect themselves and be guiltless for the results. Paralleling the belief that the swift use of force would stop a riotous situation before it could develop, was the idea that this use of force would also deter others from rioting.

Without falling prey to speculation and conjecture, it is helpful to consider the probable effects of the section. From an optimistic point of view, it is hoped that the section will aid in riot control and riot prevention. This indeed may occur. However, many argue that wider latitudes for police use of force may lead to more disturbances. Many riotous situations have precipitated from police efforts to control offensive behavior. This is not unexpected, since very few police departments carefully formulate policies on the proper circumstances for the use of a firearm.[5] What distinguishes an ordinary arrest from one that ignites riotous behavior has often been a blatant exhibition of force.[6] A riotous situation is not one in which human behavior is readily predictable. Those involved, both as rioters and as law enforcement officers, tend to become panicky. The result of panic is often overexuberant action and even hysteria. Evidence of this hysteria was provided by a study which found that the typical person shot as a looter did not have a criminal record, and often was a woman or child.[7] Behavior which leaves such shocking results is a strain upon community relations and unfortunately provides a motive for serious disturbances.[8] Thus, encouraging the use of force may increase the occurrence of riot-provoking incidents.[9]

Section 2923.55 may also increase the likelihood that the policeman's

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[4] THOMAS J. WHELAN, MAYOR OF JERSEY CITY, NEW JERSEY, REPORT ON LAW AND ORDER BEFORE THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, at 7 (1967), as printed by the Ohio Legislative Service Comm'n. *See also* Wilson, *Civil Disturbances and The Rule of Law*, 58 J. CRIM. L., C. & P. S., 155 (1967).

[5] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: TASK FORCE ON POLICE 189 (1967) [hereinafter cited as Task Force on Police]; *see also* Chapman and Crockett, *Gunsight Dilemma: Police Firearms Policy*, POLICE 154 (May-June 1963). Concerning a departmental policy on force, *see* R. Miller, REPORT OF AD HOC COMMITTEE OF OHIO STATE UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS INVESTIGATION OF ALLEGATIONS OF POLICE BRUTALITY TO STUDENTS DURING EMPLOYEE STRIKE, OCTOBER 4, 5, 6, 1967. [Unpublished, available at The College of Law, The Ohio State University].

[6] HOWARD R. LEARY, POLICE COMMISSIONER, NEW YORK, NEW YORK, REPORT ON LAW ENFORCEMENT BEFORE THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS (1967), as printed by the Ohio Legislative Service Comm'n., at 1.

[7] REPORT ON RIOT CONTROL TECHNIQUES TO THE HOUSE JUDICIARY COMMITTEE OF OHIO GENERAL ASSEMBLY, October 13, 1967, as printed by the Ohio Legislative Service Comm'n at 14 [hereinafter cited as Report on Riot Control Techniques].

[8] TASK FORCE ON POLICE *supra* note 5, at 187.

[9] *Hearings on H.R. 421 Before the Senate Committee of the Judiciary*, 90th Cong., 1st Sess., 134 (1968).

role in our society will be misplaced. The policeman's role is to initiate the legal process. This function is based upon a need for protection from criminals seeking to endanger society in some way. Such a role is primarily protective, and not designed to make our police public avengers who are to seek out and destroy all whom they believe endanger society. Our system of justice divides various functions of the legal process among several groups. The prosecution has the function of charging suspects with conduct it has determined is violative of the law. The jury has the function of deciding whether that conduct is factually proven in a court of law. The judge has the function of expressing what conduct does in fact violate the law. Admittedly, the law has determined that in certain situations it is necessary for the policeman to act for the entire legal system—even the executioner. However, this should be the exception and not the rule. It is undesirable for our police to infringe upon the duties and responsibilities delegated to other groups in the legal process. Section 2923.55 may lead a policeman to take on the role of judge, jury, and executioner by encouraging the use of force likely to cause serious bodily harm or death. A sadistic policeman might tend to be more abusive due to this supposed mandate.[10] Unfortunately, the heaviest brunt of this abuse would fall on those living in the ghetto.[11]

There are structural problems with section 2923.55. The wording is rather general as to the use of force. It is hoped that this generality does not indicate that the legislature's belief was that suppressing a riot was enough in itself to justify using deadly force.[12] An example of this generality is the use of the word "guiltless," the meaning of which is not clear.

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[10] Comment, *Kill or Be Killed?: Use of Deadly Force in the Riot Situation*, 56 CALIF. L. REV. 829, 845 (1968). [hereinafter cited as *Kill or Be Killed*].

[11] R.W. Conant, *Civil Disobedience*, AMERICAN SCHOLAR 422 (1968); *see also* Rainwater, *Open Letter on White Justice and The Riots*, TRANSACTION 26 (1967).

This situation has been determined to be a trait of the recent riots. Police contact in the ghetto is commonplace. Specifically, ". . . an integral element in every riot was strain between the police and members of the Negro community." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 116 (1967).

Unfortunately, the brunt of the force may also come from sources other than police. There is evidence showing that the ghetto resident sees the legal system itself as merely another oppressor.

> . . . the population is preyed upon by the racketeer, the vice lord, the bondsman, the unethical attorney, and a peculiar jurisprudence, based on hundreds of years of ingrained prejudice, which today still lacks the compassion and understanding to deal with a culturally deprived minority in a humane manner.

Leary, *The Role of the Police In Riotous Demonstrations*, 40 NOTRE DAME LAW. 499, 500-1 (1965); *see also* J. Hundley, *The Dynamics of Recent Ghetto Riots*, 45 J. URBAN L. 627, 630 (1968); V. J. Rinella, *Police Brutality and Racial Prejudice: A First Close Look*, 45 J. URBAN L. 773 (1968); REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 300-1 (1967).

For an analysis of the discretion the police have *see* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

[12] *Kill or Be Killed*, *supra* note 10, at 836.

Whether it includes immunity from civil as well as criminal liability cannot easily be determined. Many states have provisions which grant immunity to public officials for injuries to others while suppressing a riot. Some use the term "guiltless" and are simply expressed, while others require some kind of resistance from the suspect before injuring or killing him would be covered. Some emphasize that necessary and proper means must have been employed by the official. This brings out another distinction in the Ohio provision. Section 2923.55 requires that "such *force* as is necessary and proper," (emphasis added), be used by an official to be exempt. The provisions of other states do not use the word "force." This may indicate that other means are not included within the Ohio section. Using "means" rather than "force" would appear to suggest a feeling that more desirable methods are available than just force.

Some "guiltless" provisions have been repealed. New Hampshire repealed its provision and did not enact a similar exemption at all. The Virginia legislature repealed its section and enacted one to replace it. Although it uses the word "guiltless," the new Virginia section has a positive approach. The first line reads as follows:

> Every endeavor must be used, both by the sheriff or other officers and by the officer commanding any other force, which can be made consistently with the preservation of life . . . .[13]

A Connecticut exemption provision expressly includes ". . . all civil or criminal liability therefor."[14] The Judiciary Committee of the House of Representatives recommended to the General Assembly that relief from both criminal and civil liability be enacted.[15] But, in its final form, the Act contained the word "guiltless" instead. The choice of the word seems to be the result of compromise. It was the word used in the repealed immunity section involving resisting arrest.[16] A definitive interpretation of this legislative compromise awaits adjudication.

Another structural problem with section 2923.55 is a lack of definiteness concerning the words "riot" and "rioters." The section does not define riot, nor does it refer to another section for a definition. Even the common law definition of riot may apply. Although all Ohio criminal

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[13] VA. CODE ANN. § 18.1-254.9 (Supp. 1968).

[14] CONN. GEN. STAT. ANN. § 53-171 (Supp. 1969).

[15] Report of the Standing Committee pursuant to H.R. No. 157 to the House of Representatives, 107th GENERAL ASSEMBLY, February 1, 1968.

[16] A current example of a provision requiring some type of resistance, although much more precise and limited than the former Ohio provision, reads as follows:

> If any of the persons so unlawfully assembled shall be killed, maimed or otherwise injured, in consequence of resisting the judges or others in dispersing and apprehending them. . .such judges [etc.]. . .shall be held guiltless; *Provided*, such killing . . .shall take place in consequence of the use of necessary and proper means to disperse or apprehend any such persons so unlawfully assembled. [emphasis original] NEB. REV. STAT. § 28-807 (1964).

law is statutory,[17] when a common law word is used in a criminal statute, the common law definition can be included in the statute.[18] Sections 2923.52 and 2923.53 define the offenses "riot in the second degree" and "riot in the first degree." Whether section 2923.55 applies during the conduct of riot one, riot two, both, common law riot, or other circumstances, is not clear.

Thus far, the discussion has been rather negative. Perhaps, the subject matter makes this necessarily so, but there is a positive side. That side is to suggest what should be done to place section 2923.55 in a proper perspective in our society and to avoid the possible dangers referred to earlier. This involves responsible interpretation and application of the section by legal agencies. Certain guidelines may be helpful in constructing appropriate actions.

Section 2923.55 is not an open-ended provision eliminating police responsibility. The legislature provided certain limitations. A very important limitation was the use of the words "such force as is necessary *and proper*" (emphasis added). As recommended and initially presented to the House of Representatives, section 2923.55 did not include the words "and proper." The addition of the words seems to indicate that in the legislature's judgment, necessary force had to be limited. Proper force is necessarily a limitation upon the use of necessary force. To what extent it is actually a limitation depends, in part, upon whether our law enforcement officials and our courts define "proper" in an enlightened way. The guidelines which follow are intended as an aid in defining the word "proper."

It is hoped that all police departments will formulate written policies which clearly limit the use of deadly force to situations of the most compelling need.[19] First, deadly force should never be used upon mere suspicion that a crime has been committed or that a fleeing person has committed a crime.[20] Emphasizing this policy would help to prevent the irresponsible use of force which frequently occurs in the tensions of a riot where survival instincts tend to prevail over rationality.[21]

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[17] State v. Cimpritz, 158 Ohio St. 490, 492, 110 N.E.2d 416, 417 (1953).

[18] Mitchell v. State, 42 Ohio St. 383, 386 (1884).

The common law definition is, as stated in Corpus Juris Secundum:

> . . .a tumultuous disturbance of the peace by three or more persons assembled and acting with a common intent, either in executing a lawful private enterprise in a violent and turbulent manner to the terror of the people, or in executing an unlawful enterprise in a violent and turbulent manner. 77 C.J.S., *Riot* §1 (1952).

See also R. PERKINS, CRIMINAL LAW 346 (1957).

[19] TASK FORCE ON POLICE, *supra* note 8, at 189.

[20] *Id.*

[21] Report on Riot Control Techniques, *supra* note 7, at 3. *See also* Leary, *The Role of the Police in Riotous Demonstrations*, 40 NOTRE DAME LAW. 499 (1965); V.J. Rinella, *Police Brutality and Racial Prejudice: A First Close Look*, 45 J. URBAN L. 773, 776 (1968); H.W. McGee, Jr., *Arrests in Civil Disturbances: Reflections on the Use of Deadly Force in Riots*, 22 RUTGERS L. REV. 716 (1968).

Second, the police departments should emphasize that an officer must reasonably believe that the force he uses will not create substantial risks to innocent persons.[22] A major concern is to prevent innocent persons from being harmed, and a police officer should be highly selective in using force. A police policy which stressed that using deadly force was only proper when risks to innocent persons would not be increased would greatly enhance the protective role of the law enforcement officer. This suggested guideline, in particular, touches the heart of the police function in our society.

Third, it should be made known that deadly force should be restricted to the apprehension of offenders who, while committing a crime, have used or threatened the use of deadly force. This guideline should include the policy that the use of deadly force is restricted to situations where the officer believes there is a substantial risk that the suspect will use deadly force upon others if he is not apprehended immediately.[23] Practical use of this policy will emphasize that the officer should not use deadly force to prevent escape unless he reasonably believes that the fleeing suspect will be a threat to use deadly force upon others if allowed to escape.[24] Whereas, the second guideline was concerned with whether innocent persons would face an increased risk of harm by the policeman's use of force, this guideline refers to the risk of harm imposed upon innocent persons by the fleeing suspect. It should be made clear that if a fleeing suspect does not meet this specification, society's interest is better served by permitting the escape. The escape of one sufficiently unlikely to cause a substantial threat to innocent persons is more desirable than to misplace the protective role of the policeman.[25]

These guidelines[26] should be applied together if they are to be effective. It is hoped that they will be of assistance in the formulation of realistic and practical policies concerning the use of force in riotous situations, and in the interpretation of section 2923.55 by the courts.

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For specific proposals concerning proper training and approach techniques to increase police riot control effectiveness, *see* REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 484-527 (Bantam ed., 1967); Leary, *supra* this note, at 503.

For a brief summary of riot causation and its implications for law enforcement, *see* J. R. Hundley, Jr., *The Dynamics of Recent Ghetto Riots*, 45 J. URBAN L. 627, 638 (1968).

[22] MODEL PENAL CODE §3.07(2)(b)(*iii*), (Proposed Official Draft, 1962). *See also*, *Kill or Be Killed*, *supra* note 10, at 852.

[23] Task Force on Police, *supra* note 8, at 189.

[24] *Kill or Be Killed*, *supra* note 10, at 850.

[25] *Id.* at 845.

[26] These guidelines are not meant to be exclusive. *See* TASK FORCE ON POLICE, *supra* note 5. Also, these guidelines are not directed to police departments to the exclusion of the courts and the legislatures. Similar proposals would be a recommended basis for the enactment of a statute on the use of force by police, generally, as well as in the riot situation. *See also*, *Kill or Be Killed*, *supra* note 23.