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Introduction

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Introduction to the Symposium: RIOTS*

*Dean Joseph O'Meara***

"There is no grievance that is a fit object of redress by mob law." Abraham Lincoln as quoted by President Johnson. South Bend Tribune, March 29, 1968, at 1.

This is the tenth in our series of annual symposia, each dealing with a highly controversial problem of urgent national concern. Of these ten symposia, this is the third having to do with crime. The extent of our concern with this cancerous problem is demonstrated by that fact. My own belief is that the rising incidence of crime is our country's number one domestic problem.

It is all too easy to ascribe this ugly phenomenon to the ugly phenomena of poverty and unemployment among Negroes. The fact is that crime is increasing more rapidly in well-to-do neighborhoods than in the colored sections of our cities;¹ and, referring to "[t]he typical rioter in the summer of 1967," the National Advisory Commission on Civil Disorders found: "Economically his position was about the same as his Negro neighbors who did not actively participate in the riot."²

As for the riots, that plague of the 1960's, the first thing to say is that every effort should be made to prevent them.³ Once a riot has started, however, it is the *obligation* of the authorities to stop it. As President Eisenhower has said:

These riots are a growing danger to our nation and must be handled without temporizing. When the police cannot cope with the situation, there should be no hesitancy in calling out the National Guard. And the culprits, when their guilt is clear, must be dealt with as any other criminals, regardless of their race or their grievances against society. People simply must be taught that personal or social problems cannot be solved by violence and defiance of authority.⁴

There is no excuse for a riot that lasts for four or five days with the attendant injuries, loss of life, and damage to property. *A riot can be stopped before it is twenty-four hours old* and should be. Law and order are a precondition of civilized society.

Please note that what I have to say has to do only with riots — not with peaceful demonstrations. The march on Selma, the march on Washington — these were peaceful demonstrations inspired by a deep conviction of injustice. In no sense could they be characterized as riots. On the other hand, none

* In this paper I speak neither for the University of Notre Dame nor for the Notre Dame Law School but only for myself.

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1 See FBI, UNIFORM CRIME REPORTS FOR THE UNITED STATES — 1966, tables 6-7, at 92-94 (1967) (shows a higher rate of crime increase in suburban areas than in major cities).

2 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 128 (Bantam ed. 1968).

3 *Id.* at 2.

4 READER'S DIGEST, Aug., 1967, at 70.

of the riots in recent years was the product of a sense of injustice, as the Selma and Washington demonstrations were.

Some will disagree, of course, and point to Harlem, Watts, and other violent episodes. They were not race riots, they were *youth* riots.⁵ Those who challenge that assertion will have to explain the riots by young *white* people in Oregon, New Hampshire, Florida, Wisconsin, and on university campuses, beginning with the riot at that seed bed of youthful lawlessness, the University of California at Berkeley.⁶ For these young white rioters were not giving vent to a bottled-up sense of outraged justice. They were responding, I assume, to the pressures of the Age, but so are we all. To be sure, the most damaging riots have occurred in blighted areas inhabited by Negroes. Understandably, therefore, the focus is on them, and I accept that focus in the rest of what I have to say.

Four years of worsening riots are enough — riots which were not put down, mark you, but simply ran out of steam after four or five days of terror. Crime must be suppressed; riots must be put down and put down fast, as they can be. To accomplish that, however, requires stern measures and, so far, the officials of our city and state governments have been too timid to do what the situation requires. Timidity — official timidity — almost as great a problem as the riots.

It may be even a greater problem for, unless the rioting by young Negroes is stopped, inevitably the wild ones in the white community will respond in kind and that will mean the worst horror yet — guerrilla warfare between whites and blacks. Then no neighborhood will be immune, nobody will be safe. Peaceful people in quiet neighborhoods will be gunned down from passing cars; their homes will be fire-bombed in hit-and-run attacks. Every city in the land will become another Algiers — worse than Algiers, in fact, because the Algerians did not resort to burning. God forbid.

The message comes through loud and clear to all who do not close their ears: *Disarm*. Rioters should be disarmed forcibly — and it can be done. But that is only a beginning. All possible pressure must be brought to bear for effective weapons-control legislation — national, state and local.

The fine record of young Negroes in Viet Nam indicates that they have as much to contribute to this nation's welfare as their white counterparts. How to bring this promise to fruition is a question of utmost complexity, whose answer I think no man fully understands. Whatever the remedy or remedies may be, however, one thing is sure: no remedy can be applied until the rule of law has been recognized and order has been restored. That can be accomplished only by the prompt and courageous use of effective measures. But it *can* be

5 Referring to the riots of 1967, the National Advisory Commission found that "The typical rioter in the summer of 1967 was a Negro, unmarried male *between the ages of 15 and 24 . . .*" *supra* note 2, at 128 (emphasis added).

John P. Spiegel, Director of the Lemberg Center for the Study of Violence at Brandeis University, commenting on recent disorders, said:

Kids, often very young kids — I call it "youth phenomena" — started the trouble and then if the adults joined, it was because they gave in to the temptation of looting.

After all, they liked a colored television set as much as anyone. South Bend Tribune, April 10, 1968, at 12, cols. 5-6.

6 See Moore, *Anarchy on the Campus: The Rebels . . . and the Law*, THE POLICE CHIEF, April, 1965, at 10.

accomplished; and those city and state officials who fail to accomplish it should be held responsible by their constituents.

How can it be accomplished? How can a riot be stopped within 24 hours — less than a quarter of the time span of virtually all the riots of the last few years? Assuming that the mayor and the governor cooperate and that they are willing to use strong medicine, it can be done as follows. In the first place, the National Guard should be mobilized immediately, that is to say, as soon as it is plain that a serious riot is in progress.⁷ And the rule should be better too soon than too late.⁸ Moreover, someone other than the police should decide the question, for the police will hesitate to admit they can't handle the situation. What I have said doesn't mean that *some* Guardsmen should be sent to the scene, or that *all* Guardsmen should be alerted. It means that an adequate number of Guardsmen should be mobilized and dispatched to the riot area *at once*. And, again, the rule should be better too many than too few.⁹

As soon as the Guardsmen arrive, the riot area (that is, the area where the rioting is taking place and/or from which bands of marauders erupt to carry the rioting to other areas until resistance drives them back to the riot core) — the riot area, to repeat, should be sealed off absolutely and no one permitted in or out except the Guardsmen themselves and emergency vehicles, such as ambulances, convoyed by Guardsmen.

An around-the-clock curfew should be put into effect immediately and announced every few minutes by loud speakers at strategic points. This would allow no one on the streets. To enforce the curfew the streets should be patrolled by Guardsmen in tanks. They should be used to protect the Guardsmen from snipers. Anybody violating the curfew should be arrested or, if he resists arrest, shot.¹⁰ And if a little imagination were used, perhaps some of the Guardsmen could be armed with sawed-off shotguns using shells having a reduced charge of powder. It should be possible to reduce fatalities in this way, especially if the Guardsmen are ordered to shoot low, that is, at the ankles of the rioters.

Strategic buildings in the area should be rushed in order to get at snipers on the roofs, along with those using the primitive but deadly Molotov cocktail. With these preparations made, Guardsmen *in force* should systematically search every building in the area and confiscate all weapons found, including bottles and gasoline. There would be some resistance, of course; and those with arms (including bottles, etc.) who refuse to give them up and resist being deprived of them, should be arrested or, if necessary, shot. The new and apparently effective chemical weapon called "Mace" should be used at close quarters, since it

7 Orlando Wilson, one of the nation's leading criminologists, has said:

"There is no substitute for force in quelling civil disturbances, and if the police are unable to provide the manpower to restore normalcy, then there is no alternative but to put in a call for the National Guard — and as quickly as possible." This is my view in a nutshell.

Wilson, *Civil Disturbances and the Rule of Law*, 58 J. CRIM. L.C. & P.S. 157 (1967).

8 See HOUSE COMM. ON ARMED SERVICES OF THE SPECIAL SUBCOMM. TO INQUIRE INTO THE CAPABILITY OF THE NATIONAL GUARD TO COPE WITH CIVIL DISTURBANCES, 90th Cong., 1st Sess., 5652 (Dec. 18, 1967) (recommending the judicious early commitment of adequate National Guard forces).

9 See text accompanying notes 7-8 *supra*.

10 See text accompanying note 11 *infra*.

subdues without injuring.¹¹ There should be no hesitation, however, about using deadly weapons if the Guardsmen are fired on from a distance beyond the range of "Macc."

Strong medicine? Assuredly, but that is exactly what is needed. Consider what has happened in city after city across the country. Fires are set and the firemen who respond are attacked with rocks and bottles — even fired upon. More and more the rioters are armed with shotguns, rifles, and other deadly weapons. Motorists in peaceful neighborhoods are fired upon from passing cars. The police are shot at. Looting is growing in areas outside the riot core. Who is safe, either in his person or in his property? Are not citizens, black as well as white, entitled to protection from these increasing outbursts of mass violence?¹²

Milder measures have been tried for four years, but the riots spread and the violence increases. It is time and past time for tough tactics.¹³ To repeat, strong medicine is exactly what is needed. Needed or not, many will be horrified by my suggestion that armed persons in a riot area, who disregard the curfew, refuse to surrender their weapons or turn them on the police or Guardsmen, should be shot. To those who find this a shocking suggestion I put this question: Is it not better to kill some malefactors than to allow them to kill innocent persons?

That question will not stop those who are horrified by my suggestions. Regardless of the evidence to the contrary, they will insist that Harlem, Watts, and subsequent violent episodes were the product of a sense of injustice. Even if that were true, even if a riot (whether by whites or blacks) were churned up by a deep feeling of outraged justice, there would still be a moral as well as a legal obligation to use *effective* measures to protect the community. The "community" is not just an abstraction but *an aggregation of people, people whose rights as individuals are just as sacred as the rights of those few individuals who resort to violence.* Why is it so hard for some persons to understand this?

11 South Bend Tribune, Jan. 7, 1968, at 25, col. 3.

12 Consider the words of a young Negro Marine, wounded in Viet Nam, flying back to Detroit only to learn of the riot in progress there.

This is my first time home in almost two years and look what the hell I come home to. I just hope nobody hurt my family. They live on the West Side. I heard it was pretty bad there.

It's not like that in Vietnam. I'm a Marine. You know, Marines have a thing: I take care of the next guy, he takes care of me. It's beautiful.

I was in pre-med school before I went into the Marines. My mother's a pediatrician. I wanted to be a pediatrician. But when I get out, I'm going to be a cop. I left my application in Los Angeles.

... Boy I sure hope they didn't hurt my family. I don't care who it is, I'll fight to save my family.

South Bend Tribune, July 25, 1967, at 8.

13 The *Restatement (Second) of Torts* says of the tactics that may be used in riot control:

The use of force or the imposition of a confinement which is intended or likely to cause death or serious bodily harm for the purpose of suppressing a riot or preventing the other from participating in it is privileged if the riot is one which threatens death or serious bodily harm.

RESTATEMENT (SECOND) OF TORTS § 142(2) (1965). The commentary on this section clarifies this permissible use of force.

If the riot itself threatens death or serious bodily harm, it is sufficiently serious to justify the use of deadly means to suppress it. It is not necessary that the avowed purpose of the riot be to inflict such harm. It is enough that the conduct of the rioters is such as to create the probability or even the possibility of such consequences.

RESTATEMENT (SECOND) OF TORTS, Comments § 142, comment g, at 257 (1965).

When a lone sniper is surrounded and shot down, nobody is outraged. In a riot there are many snipers. And every person bearing arms in the riot zone is a potential sniper. So, I submit, the real question is: Whom should we protect? The snipers and those who beat and kill and burn and loot — or their victims?

Cities and neighborhoods differ from one another to a greater or lesser extent. Thus I recognize that modifications of the plan of operations I have outlined briefly might, almost certainly would be called for in some instances.

One final thought. A woman whose husband or son has been killed, the owner of property whose premises have been burned down, a merchant whose store has been looted — why are they not entitled to compensation from the municipality and/or state which could have protected them, but was too timid to do so? The city solicitors, corporation counsel (or whatever else they may be called) would do well, I suggest, to start preparing whatever defense they may think they have against the damage suits that are bound to be filed and are being filed.¹⁴

¹⁴ The Supreme Court has spoken to this point of public liability for riot damage, as follows:

The State is the creator of subordinate municipal governments. It vests in them the police powers essential to the preservation of law and order. It imposes upon them the duty of protecting property situated within their limits from the violence of such public breaches of the peace as are mobs and riots. *This duty and obligation thus entrusted to the local subordinate government is by this enactment emphasized and enforced by imposing upon the local community absolute liability for property losses resulting from the violence of such public tumults.*

The policy of imposing liability upon a civil subdivision of government exercising delegated police power is familiar to every student of the common law. We find it recognized in the beginning of the police system of Anglo-Saxon people. Thus, "The Hundred," a very early form of civil subdivision, was held answerable for robberies committed within the division. By a series of statutes, beginning possibly in 1285, in the statutes of Winchester, 13 Edw. I, c.1, coming on down to the 27th Elizabeth, c.13, the Riot Act of George I (1 Geo. I, St. 2) and Act of 8 George II, c.16, we may find a continuous recognition of the principle that a civil subdivision entrusted with the duty of protecting property in its midst and with police power to discharge the function, may be made answerable not only for negligence affirmatively shown, but absolutely as not having afforded a protection adequate to the obligation. *Chicago v. Sturges*, 222 U.S. 313,323 (1911) (emphasis added).

A majority of the relatively small number of cases appear to be contra. But *Chicago v. Sturges* never has been overruled or qualified. *See also County of Allegheny v. Gibson*, 90 Penn. St. 397, 35 American 670 (1879). These two cases, especially the latter, sketch the historical background of the legislative enactments about to be mentioned.

Nearly half of the states have statutes imposing liability or government subsidies for riot damage. Most of these are collected in Note, *Riot Insurance*, 77 YALE L.J. 541, 552 n.75 (1968). Another relevant statute is: W. VA. CODE § 61-6-12 (1966). It goes without saying, of course, that these enactments are not uniform in their provisions. The extent and conditions of liability vary considerably.