Arrest Procedure--Right to Use Force to Arrest During a Riot

John William Bland Jr.
University of Kentucky

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The full effect of the adoption of the positional risk and operating premises doctrines awaits further illumination by the Court of Appeals. It is clear that the new look which the Court is giving KRS 342.005(1) requirements of arising "out of and in the course of his employment" will result in allowing more comprehensive coverage.

Glen S. Bagby

ARREST PROCEDURE: RIGHT TO USE FORCE TO ARREST DURING A RIOT

A riot is the earlier sowing of bitterness and confusion by political opportunists and racial hate mongers, goody goody fakes, Negro and white, coupling themselves tragically with the public apathy that marks off this whole generation to anybody's needs.  

Kentucky's first racial violence occurred in Louisville, beginning on the evening of May 27, 1968. The rioting continued for several days and was accompanied by vandalism, looting and burning. Several of Louisville's ghetto residents were injured, many by policemen's bullets. This tragedy reached its climax when two teenage Negro boys were killed—one by a storeowner and the other by a blast from

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2 It started one evening when 350 young ghetto residents came to a rally to see and listen to Stokely Carmichael. Circulars had been distributed to the ghetto residents stating that Carmichael would be the featured speaker at a rally called to demand the dismissal of a Louisville patrolman. Actually, the circulars were a "come-on" to attract a crowd. Members of the Black Unity League of Kentucky who organized the rally knew that Carmichael would not appear. At the rally, a rumor was started by James Cortez, a self-proclaimed volunteer worker for the Student Nonviolent Coordinating Committee, who climbed upon the top of his car and said, "I am Stokely's right hand-man. Stokely wanted to be here, but another honky [white man] trick is keeping Stokely out of Louisville." By this time, twenty-five teenagers were perched atop buildings in the area to observe the rally. After several speeches, part of the crowd chanted, "Black power, black power, black is beautiful." After more speeches which were drowned out by shouts, it happened. A soft drink bottle was tossed from the top of a building. Store windows were broken. Police cars rushed to the scene. Several of the cars were struck with rocks and bottles as officers emerged from them with guns drawn. "Man, when I saw those guns, it was all over," a fifteen year old said. "That's when I started throwing." A few minutes later, a band of about twenty youths went after an empty police captain's car. They rocked it back and forth in almost joyous fashion until it finally turned over; later it was set afire. By now, the atmosphere was festive, almost carnival-like. Two taxicabs were overturned and set afire in the minutes that followed. "Oh baby, it's finally here. It's really happening." several youths were heard to say as the rioting spread from the intersection. The Courier-Journal & Times, June 16, 1968, § A, 8, cols. 1, 2, 3, 4, 5, 6. (emphasis added.)
a policeman's shotgun.\textsuperscript{3} A Jefferson County coroner's jury found that the Louisville patrolman killed the boy in the line of duty.\textsuperscript{4}

Why did the rioting occur? Why were so many of the rioter's tactics aimed at intimidating the police? The overt acts said to have been the cause of the riot were rumors—rumors that Stokely Carmichael had been barred from Louisville, and that a certain Louisville patrolman who had been accused of brutality was back on the job in the West End ghetto.\textsuperscript{5} Perhaps the true cause of the riot was the ingrained racial prejudice\textsuperscript{6} that pervades the United States and which is most apparent in the dealings that Negroes have with the police.\textsuperscript{7}

\textsuperscript{3} James Groves, 14, was drawn from his home by the only excitement on his block—a small gathering of young boys near a grocery store. Police said that a patrolman shot him as he and two other youths fled the grocery store, dropping loot as they ran. The jury said the patrolman fired a warning shot, reloaded, then leveled the single shot 12 gauge shotgun at the suspect disappearing into the dark and fired.

Whether the boy was a looter or a mere onlooker will never be known. Five persons claim the boy was merely watching the other boys; but two others claim he was carrying away two bags of potato chips and two six-packs of Coca-Cola. The Courier-Journal & Times, June 16, 1968, \$ A, at 10, cols. 2, 3, 4, 5, 6.


\textsuperscript{5} The Courier-Journal & Times, June 16, 1968, \$ A, at 11, col. 5.

\textsuperscript{6} The continued exclusion of Negroes from American economic and social life is the fundamental cause of riots. This exclusion is a result of arbitrary racial barriers rather than of lack of ability, motivation or aspiration on the part of Negroes, and it is most galling to young Negroes who perceive it as arbitrary and unjust. Caplan & Page, \textit{A Study of Ghetto Rioters}, 219 \textit{Scientific Am.} 15, 21 (1968).

\textsuperscript{7} The role of the police is questioned by every section of our nation. This may be attributed to the impact of four historic trends: the increasing urbanization of our country; the increasing insistence of the United States Supreme Court on strict compliance by the police with the principles of the Bill of Rights; the vast and continuing migration of millions of Negro citizens, principally from southern rural areas to the great metropolitan centers; and the civil rights revolution of the sixties which is seeking to establish within this decade full freedom and equality for all Negro citizens. C. Silberman, \textit{Crisis in Black and White} 357 (1964). See also 5 \textit{Comm'n on Civil Rights}, Rep. 24 (1961).

Police brutality is the most serious type of police abuse. This abuse occurs most frequently during the arrest stage, if and when it occurs at all. In the tense moment of initial contact between a policeman and a person he suspects of a crime, some officers respond to force with a force that is out of proportion to the need.

The prejudices existing between the police and the Negro have a long and a violent history. Racial violence against Negroes in the South is lawlessness with a history and a purpose. First with explicit and then with implicit legal sanction, violence has been used since the early days of slavery to maintain and reinforce the traditional subservient position of the Negro. U.S. \textit{Comm'n on Civil Rights, Law Enforcement: A Report on Equal Protection in the South}, (1965).

The police of the South generally come from the lower middle class in which racial attitudes are firmly fixed because of their low level of education and socio-economic insecurity. They see it as their job to keep the status quo and protect "white manhood" and "white supremacy." C. Johnson, \textit{Patterns of Negro Segregation} 26-29 (1943).

The Negro citizen sees the police officer in blue coat, with a white face, as

(Continued on next page)
But racial prejudice and hatred are not the only causes. The riot was like a circus or carnival. Both Negroes and the police would probably not have done many of the things they did under normal circumstances.

(Footnote continued from preceding page)

the representative of the white man's law, who for nearly 300 years has enforced the laws—first of slavery and more recently of legally sanctioned segregation. C. Silberman, Crisis in Black and White 357 (1964).

Similarly, the bitterness that has been demonstrated by Negro rioters may be the product of a long series of unforgettable personal experiences. Edwards, Order and Civil Liberties: A Complex Role for the Police, 64 Mich. L. Rev. 47 (1965-66). See also National Advisory Comm'n on Civil Disorders, Rep. 159 (1968). Some conduct—breaking up of street gangs, indiscriminate stops and searches—is frequently directed at youths, creating special tensions in the ghetto where the average age is generally under 21. There have been complaints of harassment by the police of interracial couples, dispersal of social street gatherings and the stopping of Negroes on foot or in cars without objective basis. These together with contemptuous and degrading verbal abuse, have great impact in the ghetto.

It is unfortunate that the Negro has this fear and distrust of the policeman because he usually carries it with him wherever he goes, especially when he comes North. He reacts with hostility at every action performed by the policeman even though the action may be perfectly legitimate and this in turn causes the policeman to react with hostility; thus we have a vicious circle evolved from which only more harm can come. Cross, The Negro, Prejudice, and the Police, 55 J. Crim. L. C. & P. S. 405 (1964).

Feelings of hostility also exist on the other side of the conflict. Police officers have grown up in a tradition in which part of their historic function assigned by the community has been keeping the Negro in his place. This history produces current attitudes which are illustrated by the number of police officers who invariably use the hated term "nigger" in talking about and sometimes to Negro citizens. Edwards, Order and Civil Liberties: A Complex Role for the Police, 64 Mich. L. Rev. 47 (1965-66).

These feelings of hostility are aggravated by the antics of ghetto youngsters. They are not only hostile to police, but are eager to demonstrate their own masculinity and courage. The police therefore, are often subject to taunts and provocations, testing their self-control and, probably for some, reinforcing their hostility to Negroes in general. Cross, The Negro, Prejudice, and the Police, 55 J. Crim. L. C. & P. S. 405 (1964). The parents of these youths are mainly responsible for their attitudes. Parental antagonisms toward police influence children, thus developing unfavorable attitudes in early youth. These prejudices are very hard to eradicate later, particularly if parents have used the police as a threat to enforce discipline at home. The result of such attitudes in children is the belief that the police are tough bullies who ignore civil rights and have punishment, rather than protection as their primary aim in life. Falk, The Public's Prejudice Against the Police, 50 A.B.A.J. 754 (1964).

Another point the looters made is that there was a frenzied, carnival atmosphere about the looting. "When I got out in the street a strong feeling overcame me," one said. "I can't describe it. It was like an urge to let yourself go. It was a fever. I was hooked by the demon. It was like you caught a sneezing virus and couldn't help sneezing. I couldn't help stealing. Everyone was stealing.' The Courier-Journal & Times, June 16, 1968, § A, at 9, col. 3.

After the riot was underway, black youths laughed and pranced at the tips of National Guard bayonets, mocking the men who were pointing them. But so much seemed to have been done in a spirit more attendant to a college panty raid. There was, at the least, the same kind of flouting of authority—the reckless disregard for the consequences. The Courier-Journal & Times, June 16, 1968, § A, at 1, col. 1.

Why did a fourteen-year old boy pay for the riot with his life? The law in Kentucky still recognizes the right of a police officer to shoot a felon attempting to flee, but not a misdemeanant. This felony-misdemeanor distinction is a carry-over from England. From the early cases to those of the present day, courts have relied on it in their decisions as to the use of force in making an arrest. Yet if a police officer may "legally" shoot a fourteen-year old child in the back for failing to halt, then perhaps this distinction has outlived its useful-

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10 In a case where a riotous group resisted arrest by force, it was lawful for the police to shoot them if necessary to make the arrest. Lindle v. Commonwealth, 111 Ky. 866, 64 S.W. 986 (1901). The distinction as to when an officer may use his gun was plainly pronounced in Reed v. Commonwealth, 125 Ky. 126, 100 S.W. 856 (1907). An officer in attempting to arrest one guilty of a misdemeanor is not justified in killing the alleged offender merely to effect the arrest, whether the offender be fleeing to avoid arrest or to escape from custody; but in making an arrest for a felony, the officer may use such force as is necessary to effect the arrest, even to the point of killing a felon when in flight. The right to use force in making an arrest of a misdemeanant was greatly expanded, with one important qualification in Commonwealth v. Marcum, 135 Ky. 1, 122 S.W. 215 (1909). There, the Court said that an officer may use such force as is necessary or reasonably appears to the officer to be necessary in the exercise of a sound judgment to overcome the resistance and to make the arrest, but he may not, while the resistance is not forcible, wantonly shoot or injure the person sought to be apprehended. (emphasis added.) Later, the Court said that an officer having authority to make an arrest for a misdemeanor has no right, except in exercise of self-defense, to kill the offender in effecting an arrest. Hickey v. Commonwealth, 185 Ky. 570, 215 S.W. 431 (1919). This position was reaffirmed where the defendant exercised no violence or force and made no threat in the officer's presence and did not hinder or obstruct the officer, but merely ran away from the officer. (emphasis added.) The officer had no right to take the life of the defendant even though the defendant had committed a misdemeanor. Anderson v. Commonwealth, 232 Ky. 159, 22 S.W.2d 599 (1929). A year later, the Court, fearing that all misdemeanants would escape punishment by forcibly fleeing, said that if one about to be arrested, forcibly resists, he is guilty of a felony and the officer may use such force as is necessary to subdue him. Bently v. Commonwealth, 234 Ky. 37, 26 S.W.2d 397 (1930). Later, the Court said that where misdemeanants resist arrest by force or violence, the officer may use such force as is necessary or appears necessary to overcome such forcible resistance, even to the taking of life and the officer's right is not limited to the single ground of self-defense. Hatfield v. Commonwealth, 245 Ky. 573, 59 S.W.2d 540 (1933). The Court put a limitation on the Hatfield ruling in Siler v. Commonwealth, 280 Ky. 830, 134 S.W.2d 945 (1939) in ruling that an officer is never justified in killing merely to arrest or prevent escape where the offense is a misdemeanor, or to inflict great bodily harm unless the latter is resisting to such an extent that the officer is placed in danger of loss of life or great bodily harm. This limitation was reiterated in Scott v. Commonwealth, 301 Ky. 137, 190 S.W.2d 345 (1945), when the Court held that an officer in making an arrest for a misdemeanor may not take the life of a misdemeanant who merely flees to avoid arrest, but where the misdemeanant forcibly resists arrest, the officer has the right of self-defense. The limitation was broadened in Rice v. Commonwealth, 288 S.W.2d. 685 (Ky. 1956), when the Court said an officer is never justified in killing merely to effect an arrest or to prevent an escape after arrest when the offense is a misdemeanor and in any event the officer must use no greater force than is necessary or apparently so, for his protection. (Emphasis added.)
ness. 11 A riot situation is a unique situation, somewhere between the extremities of misdemeanor and felony. The existing rules that apply to the use of force in making an arrest should not be used to justify the killing of rioters. There is even authority to the effect that felons should not be shot. 12 The clearest statement of the use of force as it should apply to rioters was made in Kinder v. Commonwealth 13 when the Court said that deadly force cannot be used to prevent a non-dangerous felony and it is criminal to shoot at a thief even if the larceny cannot be prevented by other means.

There are at least two additional reasons why deadly force is inappropriate in suppressing civil disorders—the risk of killing innocent persons and the catalytic effect of worsening the disorder. 14 Deadly force is not necessary to suppress a riot. 15 It should be used by the police on only two occasions—in self-defense 16 or to prevent the de-

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11 The felony-misdemeanor distinction is inherently incapable of separating out those persons of such dangerousness that the perils arising from the failure to accomplish immediate apprehension justify resort to extreme force to accomplish it. Model Penal Code § 3.07, Comment, (Tent. Draft No. 8, 1956).

12 If an officer uses more force than is reasonably necessary to effect the arrest and, as a result, kills the person whom he is attempting to arrest, he is guilty of culpable homicide. Even in the case where one has committed the most heinous felony there can be no excuse for a killing when capture can be reasonably effected without sacrificing life. 26 Am. Jur. Homicide § 230 (1940). An officer is not justified in shooting at and killing every offender who may fail to obey his command to halt. Brown v. Weaver, 76 Miss 7, 23 So. 388 (1898). An officer has no right to shoot a person who is merely running away from him without committing any violence, where the latter is under arrest, or is trying to avoid arrest. 26 Am. Jur. Homicide § 233 (1940).

13 263 Ky. 145, 92 S.W.2d 8 (1936). See also N.Y. Penal Law §§ 35.20, 35.25 (McKinney 1965). The preservation of life has such moral and ethical value in our culture and society that the deliberate sacrifice of life merely for the protection of property ought not to be sanctioned by the law. It is only when the protection of a property interest also involves protection of the person that deadly force may be used. No piece of property should be deemed to have a value greater than the value of a human being. Tsimbinos, The Justified Use of Deadly Force, 4 Crim. L. Bull. 3 (1968).

14 Innocent persons—bystanders or passersby—may be killed by a shot fired hundreds of feet away. The use of this excessive force or even the inappropriate display of weapons may be inflammatory and lead to even worse disorders. National Advisory Comm'n on Civil Disorders, Rep. 178 (1968).

15 "The fact of the riot itself is no generalized justification for extraordinary police measures..." Note, Riot Control and the Fourth Amendment, 81 Harv. L. Rev. 625, 628 (1968). Contra, The Courier-Journal, Sept. 25, 1968, § A, at 1, cols. 2, 3. Louisville's Chief of Police told the Kentucky Committee on Un-American Activities (KUAC) that police should be immune from prosecution if they are forced to kill anyone while attempting to put down a riot. This position was strongly criticized in an editorial. The Courier-Journal, Sept. 26, 1968, § A, at 6, cols. 1, 2.

16 McDonald, Use of Force by Police to Effect Lawful Arrest, 9 Crim. L. Q. 495 (1966-67). Force used in self-defense by a police officer must not be confused with the use of force to restrain attempted flight. The former is justified by the private necessity of preserving one's life and health, whereas justification for the latter is a necessity in the public interest to effect immediate arrest.
struction of property that imperils human life. In every other situation, measures to suppress the disorders without sacrificing human life should be employed.

There is no one "perfect" method to suppress a disorder. What has worked well in one situation may not work at all in another. This means that our police departments need to acquaint themselves with as many methods as possible and to especially take advantage of technology. New technological developments make it possible to suppress riots without needlessly killing rioters or injuring innocent persons.

While there is no perfect way, the best way to handle a riot is to prevent it from happening. This could result from better communication between the police and the rioters. To get both parties to communicate, there must be deeper understanding on the part of both, of the problems and personal attitudes of each. But, if a riot does develop, the police must act intelligently, swiftly and with a sufficient display of force to control it. The initial response of the policeman

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17 See generally Tsimbinos, The Justified Use of Deadly Force, 4 CRM. L. BULL. 3 (1968). Obviously, if a policeman sees a sniper or fire bomber in a window of a building, he may immediately enter the building to search for both the snipers or bombers and their weapons. Note, Riot Control and the Fourth Amendment, 81 Harv. L. Rev. 625, 626 (1968).

18 There are no all-purpose control tactics. The cardinal requirement is to have enough men and control equipment available to carry out effectively whatever tactics are necessary and appropriate according to the dictates of sound judgment. NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, Rep. 175-176 (1968).

19 Chemical agents such as mace, tear-gas, distinctive color and marking dyes, sticky tapes, adhesive blobs, liquid foam, and a slick substance known as "banana peel" could be used to stop rioters. Intensely bright lights and loud distressing sounds capable of creating temporary disability may prove to be useful. Cameras should replace guns; the filming of rioters has been recommended both to deter and to positively identify persons guilty of illegal activity. NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, Rep. 177 (1968). See also Police: The Thin Blue Line, TIME, July 19, 1968, at 21. The only weapon the policeman needs is a baton. As was demonstrated by the Chicago Police Department, during the riots at the 1968 Democratic National Convention, a riot can be suppressed by using only a baton. While some may feel that even the baton is too much force, at least no one was killed in the suppression of that riot.

20 Cross, The Negro, Prejudice, and the Police, 55 J. CRM. L.C. & P.S. 405 (1964). The best way to handle any riot is to prevent it from occurring. This can be accomplished by having open communications between the supporters of demonstrations and the police.

21 NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, Rep. 287 (1968). If an incident develops, and a crowd begins to threaten lawlessly and show acts of violence, the police must act promptly and with a sufficient display of force as to make clear their intent and capacity to suppress disorder and insure public safety. See also Leary, The Role of the Police in Riotous Demonstrations, 40 Notre Dame Law. 499, 502-503 (1965). When riotous activity breaks out, the police have four basic objectives: (1) Prompt evaluation to determine whether the initial incident is of riotous proportions or may escalate into a riot; (2) Rapid mobilization and assembly of sufficient manpower and equipment to suppress the riot; (3) Utilization of riot control techniques to contain the area of the riot,
has a crucial effect on the outcome of a riotous incident.\textsuperscript{22} The policeman must be well disciplined,\textsuperscript{23} have confidence in himself,\textsuperscript{24} and use good judgment\textsuperscript{25} at all times. This could be accomplished by stressing more detailed and comprehensive police training.\textsuperscript{26}

A riot occurred. A fourteen year old boy was shot in the back by a policeman for failing to obey a command to halt. This unnecessary killing has the blessing of the present law in Kentucky. This law is an age old carryover from England incorporating the idea that property is to be valued more highly than human life and the idea that all felonies are more serious than misdemeanors. But, are these true today, especially in a riot situation? A riot is different from the ordinary felony. In the ghetto, it is a carnival, a festival, a gala event where wildness, rampage, and "live for the moment" acts replace reasoning, judgment and common sense.

Today is a day of change, and the day has come to change the law in Kentucky. The felony-misdemeanor distinction should no longer

\footnotesize{(Footnote continued from preceding page)}

\footnotesize{disperse the mob, and clear and secure the area of the riot and; (4) Establishment of a security plan to provide sufficient patrol coverage of the riot area to suppress the riot and maintain law and order. See generally J. Towler, The Police Role in Racial Conflicts 70 (1964). The basic requirements of a police officer in case of a disorder are: (1) To prevent crimes and preserve order; (2) To enforce the law without favor; and (3) To protect life and property.

\textsuperscript{23} National Advisory Comm'n on Civil Disorders, Rep. 172 (1968). The responding officers initial judgment is crucial.

\textsuperscript{24} Chicago, Illinois, Police Dept., Training Bulletin-Tension Situations, April 24, 1967. The police officer, by disciplining his emotions, recognizing the rights of all citizens and conducting himself in the manner his office demands, can do much to prevent a tension situation from erupting into a serious disturbance.

\textsuperscript{25} National Advisory Comm'n on Civil Disorders, Rep. 174-175 (1968). Officers at the scene of a ghetto disorder are likely to suffer vilification, and to be the targets for rocks and bottles. Nevertheless, police discipline must be sufficiently strong so that an individual officer is not provoked in unilateral action. He must develop sufficient confidence in himself and his fellow officers to avoid panic or the indiscriminate and inflammatory use of force that has sometimes occurred in the heat of disorders.

\textsuperscript{26} National Advisory Comm'n on Civil Disorders, Rep. 267 (1968). The police should not over-respond, but should use good judgment and common sense. See also Leary, The Role of the Police in Riotous Demonstrations, 40 Notre Dame Law. 499, 504, 507 (1965). It must always be remembered that prior to and during the riotous period, a wrong decision by the chief of the department, or by any of his subordinates down to and including each patrolman, could worsen the conditions substantially not only for the immediate time, but also cause conditions to persist for many days. The policeman's sworn duty is to enforce the law. To perform this duty in accordance with the spirit of his oath, the police officer must operate from a position of complete neutrality. His actions must be impartial and objective.

\textsuperscript{27} Watchorn, Abuse of Police Powers: Reasons, Effect and Control, 24 Fac. L. Rev. 48 (1966). Training must embody ideas ranging from simple courtesy to social psychiatry, race relations, the status of minority groups, and civil rights. Impartiality and the need for subordination of personal prejudices to the overriding duties of law enforcement must be stressed. See also Time, July 19, 1968, at 21. "A policeman these days has to be part psychiatrist, part social worker, part karate expert. . . ."
apply in the unique riot situation. Deadly force should be permitted only in self-defense or to protect another human life. Not only is reform needed in the law, but also in the attitude of our police. They must understand the social and economic plight of the ghetto residents. They should learn the most modern technological methods of suppressing a riot—methods of suppression which do not resort to the unnecessary taking of human life. Both reforms are needed, but the statutory change is needed first—to be a proclamation declaring human life to be more valuable than property and to be an impetus for police reform.

John William Bland, Jr.

Physicians and Surgeons—Right to Practice in Hospital—Public-Private Hospital Distinction.—Dr. Stephen Burkhart brought suit against the Community Medical Center of Livingston County, Kentucky demanding injunctive relief because the managers refused to permit him to use the facilities of their hospital and refused to admit his patients. The trial court sustained defendant's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The trial court held that plaintiff had a right to practice in the Community Medical Center only if it was a public hospital and that a hospital is public only when it is supported by tax funds. Plaintiff appealed. Held: Reversed. Without announcing any rule of law applicable to the facts of the case (which the Court did not have before it), the Kentucky Court of Appeals ruled that appellant had pleaded sufficient facts to state a claim upon which relief could be granted. In the Court's own words, "appellant pleaded sufficient facts to get a foot inside the door of the court." Burkhart v. Community Medical Center, 432 S.W.2d 438 (Ky. 1968).

The Kentucky Court of Appeals has had only one other occasion to rule on the right of a physician to practice medicine in, and to have his patients admitted by a particular hospital. Then, it followed

1 Hughes v. Good Samaritan Hosp., 289 Ky. 123, 158 S.W.2d 159 (1942). A doctor was denied the right of operating in the hospital because as a general practitioner he was performing operations usually reserved for specialists; to permit him to so continue would have jeopardized the hospital's standing with the American College of Surgeons whose indorsement was needed if the hospital was to continue as an accredited hospital.

This case could have been decided without undue reliance on public/private distinctions. A hospital, no matter whether it is designated public or private, has the right to adopt reasonable regulations to insure an efficient, competent and well run organization. A doctor who refuses to abide by these regulations forfeits his right to practice in that hospital.