

# THE ETHICS OF LAW ENFORCEMENT AND CRIMINAL PUNISHMENT

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## DEDICATION

To my father who ardently worked for social justice and to my mother who tempered justice with compassion.

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## INTRODUCTION

At face value, violence is a horror and an affront to human dignity. In a Century which has known the Stalinist purges, the Nazi holocaust, Hiroshima and Vietnam, we are in danger of becoming inured to the programmatic resort to coercive force as a seeming solution to a variety of social and political dilemmas.

Yet, in some circumstances, the restrained use of violence seems necessary in order to prevent some greater harm. Much of the ethical writing of the past forty years has concentrated on the development of analytical categories to render judgment on the various forms of international conflict and warfare. This necessary effort, however, has tended to divert attention from the equally essential reflection on domestic crime and violence and the structures and legal processes by which a legitimately constituted government can deter or punish such offenses.

The four chapters of this book focus on two dimensions of this complex phenomenon - law enforcement and criminal punishment. Chapter One provides a framework for evaluating the various demands placed upon police officers in the course of their work. This includes concern for those policies which govern the exercise of force to effect an arrest or to assure the personal safety of the officers and/or of others entrusted to their care. Extensive use is made of the historical tradition called Just War theory, which has Christian roots but has also been incorporated into codes of International Law. This perspective allows for a nuanced treatment of issues such as: gun policy, electronic surveillance, hot pursuit and interrogation methods.

Chapter Two builds upon the broad discussion of law enforcement in the opening chapter in order to offer an assessment of the extent of, and solutions for, police corruption. As discretionary

agents in the criminal justice system, the potential always exists for abuse of public confidence by police officers through the accumulation of special privileges and, in some cases, the deliberate acceptance of solicited bribes and regular payoffs. Unless the citizenry, through its elected representatives or other significant figures, responds decisively to this challenge to the integrity of local law enforcement there will develop a pervasive distrust of government and lack of respect for rule by law.

In the third chapter the focus shifts from the first-line administrator of the civil sanctions against misconduct to the perpetrator of the criminal action. In response to harm done against it, society must determine what is the proper and proportionate penalty. One alternative is imprisonment, for various periods of time. However, in order to defend the claim that physical confinement is a more equitable and satisfactory punishment for many offenses than other options, it is necessary to provide some persuasive rationale. The three main options in the theoretical literature are: retribution, general deterrence and rehabilitation. The central argument of the chapter is that none of these explanations is adequate. Rather it is isolation of the criminal agent (special deterrence) which is the primary justification for imprisonment.

Finally, in the fourth chapter, the most extreme punishment (the death penalty) is situated in its historical context. While the defenders of capital punishment continue in our day to participate vigorously in the philosophical, religious and legal debate, it is the abolitionists who a decade ago appeared to be close to a victory for their position (at least in Western society). Nevertheless, there has been a resurgence of support for capital punishment, particularly in reaction to certain heinous felonies where life is taken or the stability of the political order threatened. The goal of this chapter is to

examine a series of hard cases (assassination, terrorism, murder of a police officer) in order to show how, even here, the death penalty is not required for the protection of the common good.

More work needs to be done in this important area of ethical reflection on law enforcement and criminal punishment. In the preparation of these essays, I have freely drawn upon a variety of writing in philosophy and theology, as well as in the social sciences and law. I hope that this modest venture in a field which is ripe for interdisciplinary cooperation might encourage other Christian ethicists to grapple with this problem of the control of, and response to, domestic violence.



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CHAPTER 1

ETHICS AND THE USE OF FORCE:

AN ANALYSIS OF THE ROLE

OF THE POLICE PROFESSION

After the spate of books and articles generated by the Viet Nam conflict, Christian ethicists might presuppose that enough had been said about the major issues in the theological/ethical analysis of violence.<sup>1</sup> Yet, despite the high quality of the material available, there is a noticeable deficiency in applying such analysis to the domestic context of crime and punishment. In this paper I will concentrate on the police profession as an appropriate focus for Christian ethical reflection on domestic violence. In the American political setting, the individual police patrol officer is entrusted with far more flexibility in decision-making than the military has ever allowed to the lowest echelons of its fighting forces. As a result, when issues of force and counter-force arise, every citizen can be affected by the decision made.

This chapter will proceed in three parts. First, I will examine the literature on the professionalization of the police. Second, I will point out the nature of police discretion within the criminal justice process. Third, I will analyze the problems related to the police use of force and show how a 'justified violence' perspective can provide a useful framework of discussion.

## I. The Professionalization of the Police

A. History - A police force, as we know it, is a relatively recent innovation.<sup>2</sup> In the Anglo-American tradition the system of constables in the towns, sheriffs in the counties and a combination of watchmen and constables in the cities, prevailed until the 1830s. In 1829 Sir Robert Peel organized the London metropolitan police. Soon other cities followed this lead. By 1833 Philadelphia had a full-time police force and Boston followed quickly in 1838.

This new social institution won detractors right from the start. Pay was low; training consisted in walking the streets with an experienced officer; personnel standards were poor; and there was much political interference. As America expanded, each locality established its own police force. As a result, there was no uniformity of standards nor much of an exchange of ideas and techniques. From this lowly beginning, American police have proliferated into 40,000 separate organizations with a wide variety of responsibilities, resources and historical traditions.

B. The Goal of Professionalization - In Western society the three so-called learned professions-theology, law and medicine-share a certain prestige, statue and influence. Through a sometimes chaotic, and not always inspiring history, they have evolved in such a way that a context of basic trust has been created. Public expectations are high that the moral character, specialized training and skillful practice of the members of the profession will prevail despite individual differences of talent and experience.

In recognition of the value of being accounted a 'profession' by the general populace other categories of work groups have sought to tighten standards of admission, beef up their training programs, and generally try to convince the consumer citizen that they serve an important function.<sup>3</sup> In recent years, some experts in criminal justice have begun to push for a professionalization of the police. I will begin by briefly reviewing the arguments for and against such a professionalization model.

(1) The Advocates of Police Professionalization - Those who favor efforts to professionalize the police are talking more about a process or a direction of development than they are about satisfying technical definitions and requirements. They believe that the only way to move beyond a situation full of strife, corruption and public criticism is to create a goal and a

series of steps to achieve it. The goal is a professional police force and the steps include the following dimensions.

(a) Recruitment, Selection and Training - Police recruits should be chosen from a broad cross-section of the population, with a special concern for minority representation.<sup>4</sup> They should possess psychological balance, physical dexterity, basic honesty and capable intelligence.<sup>5</sup> They must be able to tolerate ambiguity and operate within broadly defined organizational goals. And their formal training must be realistic and extensive.<sup>6</sup>

(b) College Education - A college education or its equivalent should be a basic prerequisite for police work.<sup>7</sup>

(c) Pay Scale - With higher expectation for performance should go a satisfactory reward structure.

(d) Non-Military Orientation - At its very origin in the Anglo-American system, military-like dress, discipline and structure was introduced into police work. This is considered to have been a mistake and a precedent alien to democratic society.<sup>8</sup>

(e) Lateral Entry - Unlike the established professions, police officers have no geographical job mobility. Since the prime reason is the inability to transfer accumulated pension credits from one department to another, it is deemed desirable to work out a federal plan to make this possible. Lateral entry would bring creativity, a variety of experience and new leadership to police departments.<sup>9</sup>

(f) Professional Organization - There is an urgent need for the formation of a national organization, other than labor unions, to promote professional standards, to stimulate research, and

to communicate about innovative programs and techniques.<sup>10</sup>

Jerome Skolnick sums up what he thinks is at stake in the move to professionalization in the following terms, "What must occur is a significant alteration in the ideology of police, so that police 'professionalization' rests on the values of a democratic legal order, rather than on technological proficiency."<sup>11</sup>

(2) The Dissenters - The critics of the trend toward professionalization remain unconvinced that the tasks assigned to police by society require a professional model or that such a restructuring is worth the risks that come with it. These criticisms take three basic forms.)

(a) College education is not necessary. - These commentators tend to be skeptical about the inherent presumption of liberal social scientists that more education or technical skill makes for a better, i.e., more reliable, public servant.<sup>12</sup>

(b) Professionalism leads to demands for greater autonomy. - In a democratic context it is important to preserve workable procedures of police accountability to the citizenry. If police autonomy becomes too great, we have to fear that oppression or indifference will become characteristics of police performance.<sup>13</sup>

(c) Professionalism orients the police more to technical expertise than to humanistic values. - Abraham Blumberg musters a strong attack on the professionalization model. His main fear is that power and skill, in the absence of priority of responsible public service, makes the police into one more power bloc in an already fragmented society.<sup>14</sup>

(3) Conclusion - It seems to me that the move to professionalization of the police is a desirable one. Police work has become progressively more complicated, especially in urban settings.

The use of computers, electrical gadgetry and international bases of operation as well as the potential for terrorism and civil disorder has created a condition which demands a high caliber of response from law enforcement agencies.

How much restructuring will be required is still not clear. At a minimum the police should be more rigorously selected, better trained, paid a decent wage and held more fully accountable for their performance. In a sense, up to now, police in this country have been prisoners of their past--a past full of corruption, suspicion and political control. It is time to forge a new understanding of their proper role and necessary resources in the American context.

Having acknowledged the importance of the 'nuts and bolts' decisions about police structuring, I remain convinced that the most serious deficiency at the present time is the absence of a sustained and coherent 'professional ethic'--a body of knowledge with a clear assertion of the priority of certain values and the presentation of workable principles and rules which protect these values in practice. One of the reasons why the task of developing such an ethic is imperative is that American police are given the kind of judgmental discretion in the lives of others that is normally reserved for the learned professions. I will now turn to this matter of police discretion to examine its forms and consequences.

## II. Police Discretion -

The police are entrusted by the state with the enforcement of law and the preservation of the peace. They have little control over the formal code of law which regulates the society they serve. Yet they have a strong say in the form and regularity of enforcement of the laws that have been officially promulgated.

Through collective experience American police forces have established certain traditions in their exercise of legal discretion. Much of this is learned by the rookie, not at the training academy, but in everyday experience with veteran members of the force. Some of this tradition promotes a compassionate view of the role of law. Some of it springs from prejudice and misuse of power. But that police discretion is inevitable is one of the peculiarities of the American criminal justice system.

A. The Structure of Discretion - There seem to be at least four key characteristics of police discretion. First, the people at the bottom of the organizational hierarchy-the patrol officers on the beat-have the most discretion and the command officers the least.<sup>15</sup> As long as continuous patrol of territory remains the paradigm for police work, the relative independence of each police officer or unit will make difficult any greater supervision. Second, it is a physical, emotional and economic impossibility for the police to enforce all of the law all of the time.<sup>16</sup> Therefore, they must make choices about priorities of enforcement. Those who have systematically observed the police in action have come to the conclusion that their natural tendency is to 'underenforce' the law.<sup>17</sup> Third, the police are continually responding to clues from the community at large, and especially from the political establishment, to ascertain the working range of their discretion. Fourth, it is possible for a variety of styles of enforcement to exist even within the same department.<sup>18</sup>

B. The Problems of Discretion - The basic fear that police discretion generates is that it will be abused either by the individual police officer or in a systematic way by the department as a whole. The most prevalent forms of abuse are the following:



(1) Prejudicial Enforcement - When police treat citizens entirely according to pre-given categories of race, sex, age or cultural background or when they prosecute crime more vigorously in one section of a city than in another, then discretion is misused.

(2) Categories of Immunity - Because many crimes are solved through the help of informants, there is a tendency to create an Alice-in-Wonderland world where different segments of a department work at cross-purposes by granting relative immunity to certain types of criminals who provide information.<sup>19</sup>

(3) Revival of Antiquated Laws - When police are under pressure to crack down on certain kinds of crime, there is often a temptation to look for convenient methods of enforcement. One ploy is to make outdated laws serve purposes they were not intended for.

(4) Corruption - The most serious abuse of police discretion comes under the general category of corruption. Corruption refers to those types of conduct which debase the participant by calling him or her away from proper discharges of sworn responsibility, often for purposes of financial gain.<sup>20</sup>

B. Control Over Discretion - Two methods of control have been proposed. The first relies on written procedures within a well-coordinated bureaucratic framework.<sup>21</sup> This method tries to counteract individual discretion as much as possible. It has a limited value because it is not entirely adequate to the task at hand and it relies upon rigid disciplinary standards without adequately distinguishing between serious and trivial offenses. A professional police will never be controlled by written documentation because their professional status and training demand that they preserve their flexibility in decision-making.