

# Ethics

## *in Criminal Justice*

In Search of the Truth

5<sup>th</sup> Edition

Sam S. **SOURYAL**

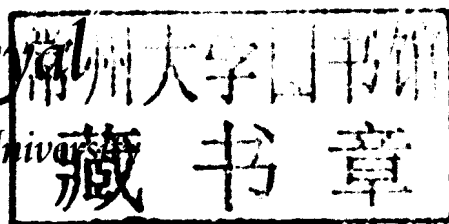
# ETHICS

in **CRIMINAL JUSTICE**

*In Search of the Truth*

*Sam S. Souryal*

*Sam Houston State University*



**5** FIFTH EDITION



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*In memory of Dr. T. Henry Souryal, my mentor, my friend, and my brother. He was not ours and he was not mine. He was a gift from God who succeeded a little bit in making the world a little better and when he was finished, he silently yet gallantly went Home.*

# FOREWORD

At the heart of every social institution is at least one paradox. The paradox of the criminal justice system is the working assumption that good will result from punishment. This idea, a perversion of the philosophic utilitarianism of Mill and Bentham that shaped Anglo American criminal law, substitutes *ex post facto* retribution for prevention, policy for reasoning, and organizational culture for human concern. To conceal such paradoxes, mystifying ideologies are produced and reproduced. Thus, in the American criminal justice system a deep and pervasive common belief obtains that pragmatism and diverse forms of expediency are the only principles available. This argument appears in many guises: from the cynical view that “nothing works,” to the intellectually flawed presumption that IQ and/or some pattern of genes create “criminals” or “career criminals.” Perhaps the most irresponsible guise is the argument urging still more of the same; that is, more prisons, more police, more courts, and more lawyers. Such arguments strongly suggest that our goals are obscured and our purposes lost.

Not only is there a paradox at the heart of the system, but the system also manifests patterned anarchy. Martha Feldman (1989) aptly calls this “order without design.” This means simply that a system with no overall design can work. The idea that a criminal justice system exists by design, and that it is held together by laws, flowcharts, algorithms, dispositions, and outcomes, is a relatively recent conceit. It is yet to be proven what common values and purposes, other than communicating itself (Luhmann, 1985), bind together this notional system. Perhaps the subsystems are articulated around negotiations over particular cases, shaped by dramaturgical principles of “looking good” and “maintaining respect,” and governed by a self-sustaining wish to produce and reproduce uncertainty in “outposts.” These “rules of thumb” reflect expediency, pragmatism, and sensitivity to a local political order. This state of affairs, according to Souryal, can and should be altered if one takes ethical principles seriously.

The arguments found in this book, presented in an admirably clear prose style, are courageous and refreshing principles. Souryal urges readers to consider basic ideas and their applications. A humanist, he sees most laws as good, yet people as flawed. They are not “flawed” in the

intrinsic sense of lacking redemption, but rather are ignorant of their own potential and of the essential entailments of humanity. He argues that the humanistic and philosophic bases for decisions be taught explicitly. Although I am sympathetic with this notion, I despair at times. I once asked a criminology class of nearly 200 how many had read Albert Camus, *The Stranger* (3); *Crime and Punishment* (5); and how many knew (anything) about the theater of the absurd or surrealism (2). In this vacuous context, how does one critically discuss issues of punishment, of rationality, of the kinds of evil best punished by criminal laws? Unfortunately, I do not consider this ignorance anomalous on modern campuses. If one assumes, as Souryal does, that the humanistic mandate of the social sciences, reflected in the field of criminal justice, is an essential grounding of all serious moral argumentation and enterprise, then the systematic teaching of ethics and ethical questions should have a primary role in any criminal justice curriculum.

Souryal pleads for a humanity entailing a measure of goodness, tolerance, and compassion. He is sensitive to the paradox previously noted, and argues that the way in which the state treats the evil and ignoble is essentially revealing. He urges noble treatment of the ignoble. This may be stated in yet another fashion that builds on the relationship between the self and the other. The criminal, the sick, the ignorant, the mad and sad, and the omnipresent other are essential, for they provide the mirror of ourselves. The others are, metaphorically speaking, the screen upon which dances our selves, dances our often denied and suppressed passions, pain, and failures. The other, at best, represents our choices and our negations. When the United States government wages war to “liberate Afghanistan” and causes thousands of Afghan deaths as a result of “collateral damage,” while denying the crying needs of the inner cities of this country, it is making a choice, displaying a value, and casting a vote. Who is the relevant other? What other is denied?

This book advances a thematic perspective with area-specific guidance for ethical decisions in criminal justice. The quest is surely an ambitious one: shaping a “collective conscience” or “soul” for the discipline of criminal justice. This concept of a soul—a powerful metaphor that combines action, thought, and feelings—if developed, will facilitate balancing: sustaining basic values, while enabling change; encouraging technological innovations, while resisting dehumanization; seeking policy changes and rewarding critical self-renewal and reflection. One inference from Souryal’s work is that the core idea essential to “soul-building” is self-reflexivity and critical self-evaluation. Drawn from Souryal’s review of ethics from the early Greeks to John Rawls, this idea is consistent with the notion that the criminal justice system sustains an “ambivalent reality.” Souryal believes that fundamental ethical clarity will reduce the salience of the “root sins” of lying, prejudice, and abuse of authority.

In this and in other ways, this is a courageous book. In arguing for the utility of ethics, Souryal also implies the failure of the policy sciences and public administration approaches that have long shaped criminal justice. These approaches have failed for a variety of reasons, not the least of which is the inability of combining a public administration approach appropriate for some reformist (largely western American) cities with the political organizing approach needed in other developing cities (in the South and Southwest) and the aging and politicized cities along the eastern seaboard. The politics of policing differ in these environments, and therefore policing differs. Nor can vague democratic values alone guide the criminal justice system (nor criminal justice practice). History shows that these values have been used to rationalize fighting wars in several continents since World War II, sending troops to South America to enforce U.S. drug laws, sustaining slavery and segregated education, justifying capital punishment as not cruel and inhumane, and rationalizing governmental terrorism in inner cities in the name of a "war on drugs." Although the "sciences of justice" possess scientific methods and techniques, science—and even criminology, the study of the logic of crime—remains a small but important aspect of criminal justice. Finally, very little effort has been given to clarifying the meaning of justice itself. There is more interest in the criminal than in justice in American criminal justice research.

In the last 25 years, criminal justice education has been increasingly scientific, methods driven, technologically preoccupied, and pragmatic in focus. Think of some of the recent research questions that have surfaced: "Can we control police shootings?" "Can we create a minimum sentencing grid?" "How can we increase the amount of available medical care in prisons?" "How can we better educate the police?" "How can one reduce calls to the police?" "How can we increase the arrests of drug users?" "Can electronic surveillance reduce the costs of parole supervision?" These are short-term questions, shaped by federal research agendas and the local political order. They obscure the questions of the purpose of such research, the intent in "solving" them, and the intended direction of social change. Tactical thinking is characteristic of emerging organizations just developing their sense of purpose and philosophic rationale.

What options remain? Clearly, most practitioners in the system believe that they can do little else than "fight fires" and "keep the ship afloat." Externally sponsored reform without a clear ethical position and a principled purpose is often self-serving and self-deceptive. It rarely takes into account the unanticipated consequences of short-term and expedient actions. It begs questions of justice, the sought-for quality of life, and the political and moral foci of such efforts. Perhaps long-term goals are inconsistent with such short-term tactical efforts, for they

require a paradigm within which to consider the consequences of one's actions. This does not presently exist. For example, good evidence suggests that contact with the criminal justice system in any form tends to amplify "deviance." How can the arrest of teenagers for school absences, spouses for violence against a spouse, DARE programs in schools, criminalizing drinking and driving, and longer and more severe sentences reduce crime? Are crime-control blitzes in inner cities mere expediency, or do they predict a rising use of the criminal sanction against lifestyles and minority preferences?

Such observations, my own reflections on the ambivalent reality of the American criminal justice system, lead me to advancing an idea consistent with Souryal's suggestions. If the purpose of crime control is increased justice and an enhanced sense of justice, then justice-seeking ought be governed by ethical principles. Something like "Do unto others . . ." seems a reasonable idea. It is at least possible that the "others" typically conceived of in public policy statements are not the others found in us, deeply embedded parts of us, but are a denied and projected, strange and inhuman other who can be brutalized with impunity in the name of law, the state, or authority of some kind. This raises again the paradox: how to combine the application of force and striving toward doing good.

The book is based upon philosophic humanism, ethical analysis, and the study of history. Souryal raises many questions, perhaps more than he can answer. Unfortunately, I would like to conclude by raising a further query. Perhaps the idea of deterrence should be reconsidered. Our current notions of deterrence and incapacitation are based on eighteenth- and nineteenth-century philosophies about motivation and choice, such as (a) people are guided in the present by anticipation of the future consequences of their actions; (b) people have a stake in conformity to the current social order; (c) people are willing to carefully reflect upon and weigh their choices; (d) a governing philosophic calculus guides these choices; (e) a limited pool of lawbreakers exists. Those caught are deterred, and those who are not caught will be deterred by awareness of the punishment of lawbreakers.

There are serious difficulties in this position. In the first instance, Jack Gibbs's (1975) review of the problems associated with the concept of deterrence and its conceptual vagaries is devastating. Unfortunately, the concept is still used in research in an ad hoc fashion. Furthermore, ethnographies, biographies, and autobiographies suggest that it is unlikely that these tenets apply to our financial leaders on Wall Street or people on the streets of Detroit, Boston, or Miami. Do they explain the actions of lawyers and judges weighing decisions? Do these ideas explain the actions of the executives of Exxon, General Motors, environmental activist groups, McDonald's, and those running the savings and loans? Perhaps



John Braithwaite (1989) is correct when he argues that fear of being shamed and making public restitution are more powerful forces shaping behavior than imagined punishment.

The paradox remains: Can violence be applied ethically? Can one be educated in such principles? Today we are educating tomorrow's leaders. Will these students reflect, develop principles and ethical standards, and evaluate themselves against ideas presented here? Can they analyze an ethical argument to spot the flaws and self-deceptions built into it? Will ethics shape the criminal justice professions? A tentative first step toward considering these questions in the depth Souryal urges is to read this rather challenging and, at times, passionate book.

P.K. Manning  
Boston  
2010

# PREFACE

Despite advances in the legal and technological aspects of criminal justice, practitioners continue to face difficult moral choices. These include whether to arrest, use deadly force, prosecute, offer plea bargaining, impose punishment, and from an organizational standpoint, whether to comply with policy, cooperate with supervisors, or treat the public equitably. As in other public service sectors where discretion is essential, individual and institutional ethics become major vectors. Surprisingly, while the consequences of such choices continue to cause great public anguish, the moral grounds for these choices have seldom been examined.

In a free society, issues of crime and punishment are perhaps the most deserving of the moral imperative of justice—a quality the state must extend freely to the guilty and the innocent alike. Moral behaviors need no validation by the state, because they constitute justice unto themselves. It is in responding to immoral behaviors that civilized governments cannot rightfully employ immoral means. Succinctly stated, the more civilized the state, the more willing it is to address the “worst in us” by the “noble means” available.

The purpose of this book is not to question the value of the law as the primary instrument of criminal justice, but to present ethics as an “umbrella of civility” under which the law can be more meaningful, rational, and obeyable. By way of analogy, if the law is compared to the Old Testament, ethics is comparable to the New Testament. They complement each other, making Christianity blissful and tolerable. This view of ethics may not impress hardened practitioners who believe that we only “live by the law” but forget that we also “die by the law.” By the same token, this view may not enthuse students who are so enamored with the trimmings of criminal justice so as to overlook its noble substance. To both of these groups, there is one rational reply: “No one is free until we can see the truth of what we are seeking.” Without capturing the truths of criminal justice, we are left with images that may be not only irrational, but also disgraceful.

This book rejects the cynical view that ethical knowledge and moral character are peripheral to the administration of justice. Indeed, every conduct in the administration of justice is directed either by the moral

of a rule or policy, or by the moral judgment of the practitioner who implements it. Furthermore, the obligation to “establishing justice and insuring domestic tranquility” continues to be the central force behind any act of criminal justice. Therefore, without a fresh look at our weaknesses, biases, and prejudices, the young discipline of criminal justice will grow into a degenerative field; more like a temple without a god, a body without a soul, and a theory without a meaning.

In this book students and practitioners will be introduced to the fundamentals of ethical theory, doctrines, and controversies, and the rules of moral judgment. They will be exposed to the ways and means of making moral judgment—but not in specific situations. That is beyond the capacity of any book, and must be left to the minds and hearts of the well-informed practitioner. Knowledge will be presented in two forms: (1) a thematic perspective, which will examine ethical principles common to all components of the discipline, such as wisdom, goodness, morality, and justice, as well as the common vices of deception, racial prejudice, and egoism; and (2) an area-specific perspective, which will address the state of ethics in policing, corrections, and probation and parole.

Every academic discipline or professional field is born an infant and slowly grows into maturity. In the process, practitioners test its limits, establish its boundaries, and legitimize its claims. During the maturation process serious excesses and failures appear that create contradiction between the goals of the field and the means by which objectives are to be met. In attempting to reason away contradiction, an introspection usually emerges urging caution, denouncing falsity, and searching for the truth. This introspection gradually hardens, constituting the collective conscience of the discipline—its soul. Eventually, the soul becomes instrumental in halting intellectual ostentation, in exposing fallacies, and in reaffirming basic values. This collective conscience keeps a vigilant eye whenever new technology is introduced or a major policy shift is inaugurated. In time, the membership of the discipline or field comes to recognize that collective conscience and call it by its true name: professional ethics.

The field of criminal justice is certainly young, but not too distant from maturity. It lacks a unifying philosophy that can give it autonomy and inner strength. Primary issues of crime and justice still beg for clarification. Secondary issues continue to frustrate rationality; for instance, the role of the police in maintaining order, the role of prosecutors in controlling entry into the system, the role of judges in dominating the sentencing process, the role of victims in reclaiming the central court of justice, and the role of lawbreakers in sabotaging the system by ingenious means. All such claims compete in an environment of ambiguity, egoism, and fear. The resulting picture is a mosaic of incoherence and lack of scruples. Consequently, the field has not proven successful

beyond mere survival. Its efficacy has been questioned both from within, by its officials, and from without, by its users. Few artificial reforms have been introduced in the area of criminal justice management, the field's most logical instrument of reform. Top management is often controlled by a syndicate of lobbying bureaucrats who lack integrative thinking and, at times, the tenacity to reason away simple problems. Middle managers are unwitting brokers who "dance on the stairway"; they are as hesitant to face those at the top as they are reluctant to confront those at the bottom. Frontline workers operate as an army of "apparatchiks," or functionaries. They suffer from bureaucratic fatigue, a disturbing subculture, and a confused view of reality.

The introspective voice of ethics in criminal justice is yet to be heard louder and louder as the comforting shriek of a first-born infant heralds the coming of age of his parents. Until it is, criminal justice will continue to be perceived with uneasiness and suspicion.

With these well-intended thoughts, this work is dedicated to the better understanding of ethics—the indestructible soul of criminal justice.

Sam S. Souryal  
Huntsville, Texas  
2010

# ACKNOWLEDGMENTS

Inspiration for this book came from my students. Precisely, it came from undergraduates who were dedicated to the ideals of criminal justice, yet were dismayed by its image. They could not comprehend the “schizophrenic ballad” of criminal justice: How could it be that criminal justice practitioners serve such a “noble cause,” yet many of them are accused—and, worse still, found guilty—of so much injustice, cruelty, and acts of corruption?

In my early years of teaching, I responded to my students’ skepticism by naively suggesting that the problem was inadequate control. So I wrote about discipline, supervision, and other administrative tools. In later years, I also naively thought that the problem was lack of guidance. So, I wrote about motivation, leadership, job enrichment, and similar managerial tools. In recent years it became apparent to me that while administration and management have a major role to play, the “schizophrenic ballad” of criminal justice is the product of the ethical indifference of practitioners, especially those who claim to be administrators and managers. While many of these may appear to be efficient, effective, eloquent, and polished, in reality many may still be dishonest and immoral.

Criminal justice is essentially a moral function, and professional criminal justice agencies must operate in an environment of moral values. When these values are internalized in the soul of practitioners, agencies flourish in professionalism and decency, and when they are not, they sink in the toxicity of corruption and decay. In the latter case, the situation can be reversed only through a Herculean effort by conscientious practitioners and administrators who possess the moral fortitude to stem the tide and restore institutional morality.

The intellectual guidance offered by the works of John Kleinig, Sissela Bok, Peter Manning, Samuel Walker, Herman Goldstein, Charles Friel, and Michael Braswell was instrumental in treating this difficult subject. I quoted them frequently and liberally. I wish I were able to read their minds, to penetrate their reasoning, and to engage them in the dialectics of crime, justice, and ethical values. If I erred, however, in responding to their challenges, only my passion for justice is to blame.

My thanks are due to all those who assisted in this project, especially Gerald Jones (the constant skeptic), George Eisenberg (the interpreter of

history), Adam Trahan (the silent enhancer), and Dennis Potts (the outspoken critic, the kind every doctoral program should have—and keep!). They painstakingly read several drafts of this manuscript and provided me with invaluable insights into the workings of many criminal justice agencies with which I was barely familiar. Dennis Potts, in particular, was concerned about making this book “more friendly.” I am glad I did not take his advice, because too many friendly books remain on the shelf. Perhaps that is also a reason why Mr. Potts—who had left academe when the first edition appeared—has recently returned! I owe a very special thanks to Elisabeth Roszmann Ebben, my editor at Elsevier/Anderson Publishing. She has been helpful, patient, and always a joy to work with.

## On the Virtues of Man

Three monkeys sat in a coconut tree  
Discussing things as they are said to be.  
Said one to the others, "Now listen you two,  
There's a certain rumor that can't be true.  
That man descended from our noble race,  
The very idea is a dire disgrace.  
No monkey ever deserted his wife.  
Starved his babies and ruined their life.  
And you never heard of a mother monk  
Leaving her babies with others to bunk;  
Or passing them on from one to another  
Til they hardly know who is their mother.  
And another thing, you will never see  
A monk build a fence around a coconut tree  
And let all the coconuts go to waste.  
Forbidding all other monks to taste.  
Why, if I built a fence around this tree,  
Starvation would force you to steal from me.  
And here's another thing a monk won't do,  
Go out at night and go on a stew  
And use a club or a gun or a knife  
To take some other monkey's life.  
Yes, man descended, the ornery cuss,  
But brother, he didn't descend from us."

Author Unknown

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