

Ethics, Public Policy, and Criminal Justice

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Edited by

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ETHICS, PUBLIC POLICY, AND CRIMINAL JUSTICE

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Introduction

Frederick A. Elliston

The title of this book is derived from a conference that was held in the fall of 1980 at the University of Delaware. It deliberately places in a balance moral philosophy on the one hand and criminal justice administration on the other. As such, it marks the intersection of two traditions: the movement toward applied philosophy or professional ethics, and the growing emphasis on value questions and policy decisions among criminal justice scholars, researchers, and practitioners.

APPLIED PHILOSOPHY

During the 1970s and now into the 1980s, philosophy has undergone a shift in orientation that has become quite pronounced. The concerns for epistemology and metaphysics that dominated during the earlier half of this century have given way to ethics, social, and political philosophy. John Rawls's book *A Theory of Justice*¹ marks a milestone in this tradition, providing a major contribution to political theory.

No doubt the roots of this change run deep and in different directions. The Vietnam War roused the moral consciousness of the nation, and academics found it increasingly difficult to maintain their neutrality in the face of student demands for “relevant” courses and the challenge to justify the resources they drew from society. At the same time, the women’s movement sought to advance the claims of a majority treated as a minority, both in concert with yet in occasional tension with civil rights activists.

In addition to these military and political events, a third factor deserves mention: the shrinking academic market. Teachers were placed in stiff and sometimes acerbic competition with each other for students, and Ph.D. recipients found themselves faced with bleak employment prospects. The adage that “necessity is the mother of invention” proved true as innovative courses and careers were developed to cope with financial pressures. As a result of these three factors—military, political, and economic—philosophers were forced to expand their horizons both inside and outside academia.

Under the rubric “applied philosophy,” this expansion has led to new topics for philosophical analysis and to refashioning old tools to address them. Sex,² violence,³ women,⁴ and war⁵—themes both old and new—became part of the curriculum. What this book adds to the list is crime.

The expression “applied philosophy” suggests that the task at hand is straightforward: take a standard philosophical theory or technique and “apply” it to one of these new topics. Yet few of those who have attempted this task have found this simple metaphor instructive.

Some hurdles are theoretical. As the work of Allan Goldman argues,⁶ standard moral principles may not hold uniformly across all the professions. For doctors or lawyers, the conventional prohibition on lying, deception, or harm (see Deborah Johnson’s essay in this volume) may not hold at all. In terms of the metaphor, then, some of the principles to be “applied” just will not stick.

The result is a “sticky” situation for the philosopher who, in Sartre’s memorable words, must “dirty his hands,” a phrase refashioned by Carl Klockars to characterize police work.⁷ The “dirt” is the muddy world of facts that cannot be ignored. Applied philosophy requires a command of the details of a discipline or profession that precludes quick and easy solutions. In phenomenological terms, the philosopher must immerse himself in a domain of experience, suspending critical judgments in order first to become familiar with an integrated life-world.⁸ Yet this task, contrary to Husserl, is not one for which a lively imagination is an ample guide. The fact-world must speak for itself.

As the philosopher moves toward a critical standpoint, familiar forms of rationality—the current ethical theories—turn out to be problematic. Although they may serve as perspectives from which an evaluation or critique of sorts can be offered, they lack finality and need to be reworked, redesigned, and occasionally overhauled to yield their insights.

Shortsightedness poses a constant threat. For example, as one examines indeterminate sentencing, several moral objections quickly arise: the disparity of punishments for the same crime meted out to similar offenders by different judges; the cruelty of living in constant doubt about the amount of confinement one must endure; and the capriciousness of changing judgments as responsibility shifts from judges to parole boards. From this standpoint, the moral solution seems simple: determinate sentencing. Yet if one expands one's horizons to include district attorneys, one finds that determinate sentencing provides them with a more powerful tool when their actions are not subject to judicial or other kinds of review. Expanding horizons demonstrate that moral recommendations have to be offered from a comprehensive perspective that is difficult to achieve. Piecemeal proposals run the constant danger of having good intentions thwarted by the subsequent actions of others. Consequently, one finds in the critiques of criminal justice administration a constant tension between partial (re)engineering and total revolution.

THE HISTORY OF PHILOSOPHY AND CRIME

Although the philosophy of law is a rich and well-established tradition,⁹ comparatively little has been written about the "law in action"—about lawyers, the police, judges, and prisons. Of course, Plato's guardians in the *Republic* are well known. With some searching one is pleasantly surprised to discover a chapter of Fichte's *Science of Rights*¹⁰ devoted to the police, an extended discussion of lawyers by Bentham,¹¹ and more recently a monumental work on prisons by Foucault.¹² But these are the exceptions, tantalizing flowers in an otherwise barren landscape. Unlike the topic of sex, about which a rich philosophical tradition has recently been renewed,¹³ isolated studies by Flew,¹⁴ Foucault, and others mark significant advances into the largely unexplored domains of philosophy and crime. Why should this be so—why should crime and society's response to it be a topic so much neglected by philosophers?

Several hypotheses instructive about the nature and limits of

philosophic inquiry could be invoked to explain this discrepancy—institutional, sociological, methodological and procedural.

The context within which philosophy is “done” may affect the selection of topics. By and large, philosophy is practiced within universities and colleges, which stereotypically function as the guardians and purveyors of knowledge. This restriction to academia of what counts as philosophy leads to an overemphasis on epistemology, logic, and the philosophy of science. When advancing the frontiers of philosophical knowledge is a primary goal, the study of epistemology easily becomes an exclusive preoccupation. Then, developing and implementing policy recommendations, saving lives, and developing more equitable delivery systems for scarce medical resources are pragmatic concerns too easily dismissed as falling outside the purview of philosophical inquiry.

Quite different philosophical concerns arise if one practices philosophy while making the grand rounds at a hospital, during an on-site safety inspection, riding in a police car, or participating in boardroom deliberations. The decisions to be taken on these occasions pose serious philosophical questions: Who should get the one and only kidney dialysis machine? What is a level of acceptable risk to workers? When should an offender not be charged? How much money should be spent on corporate responsibility when it cuts into company profits? If philosophers worked in a different social context, these questions could take priority over the more traditional and familiar query: Is knowledge justified true belief?

The fact that few philosophers are (convicted) criminals may explain why few philosophers worry about crime and criminals. We are all citizens under the law, and many therefore treat that law as part of our common heritage worthy of careful analysis. University faculty and students, drawn generally from the middle class, tend to reflect the social concerns of the middle class. And poverty, crime, and unemployment are generally lower-class concerns. With the exception of getting a few parking tickets, philosophers are seldom caught in the arms of the law, and do not think about getting shot by the police or raped in prison.

The medium of philosophical inquiry is the printed word—as opposed to television, songs, films, or pictures. What philosophers do is write, and their books and articles are intended to be read by other philosophers or students of philosophy. This reliance on the written word and the audience thereby addressed makes the “law on the books” a more appropriate target of inquiry than “the law in action.”

The tools of research in philosophy are likewise books and articles—written by philosophers for philosophers. A philosopher

undertakes research typically by going to the library, not to the hospital, police station, or company head office. The problems addressed inevitably are those that would arise in this context—safe and sanitary.

Finally, the predominant methodology among British-American philosophers has been linguistic analysis. It creates a bias in favor of the philosophy of law and away from the philosophy of crime. Philosophical problems have been reinterpreted as problems of language, and linguistic analysis applies much more readily to the written law than to law as it is practiced and enforced. The phenomenological critique of crime is difficult to execute. Phenomenologists can rely on the experiences of others, and such experiential analysis has proved to be a powerful tool for social scientists, particularly in the hands of ethnomethodologists. Professor Robert Johnson's contribution to this book lies close to this tradition, as does the work of Hans Toch and Gresham Sykes (listed in the bibliography).

With the notable exception of Jean-Paul Sartre's monumental study *Saint Genet*,¹⁵ the existential approach to crime has scarcely been tried. Sartre's work stands alone as a sustained application of existential psychoanalytic techniques to one man's life—in this case his career of crime. In it, Sartre tries to reunite the existential emphasis on personal autonomy with the desperate and limited circumstances into which Genet was born, which made stealing almost inevitable. According to Sartre, Genet made a free choice to become what others made of him—a thief.

CRIMINOLOGY AND PUBLIC POLICY

Criminology was born—or, more accurately, reborn—in recent years, after the creation of the President's Commission on Law Enforcement and Administration of Justice—the Crime Commission of 1967. The studies it produced, the organizations it created, and the programs it developed brought unprecedented attention, expertise, and money to bear on one of America's highest priorities.

In addition to the commission's primary report, *The Challenge of Crime in a Free Society*,¹⁶ eleven careful and detailed task force reports were published dealing with the police, the courts, corrections, juvenile delinquency, organized crime, narcotics, and drunkenness. Following recommendations in these reports, the Law Enforcement Assistance Administration (LEAA) was created, which sponsored a wide variety of theoretical and practical research on the causes, correlates, costs, and consequences of crime.

The recent demise of the LEAA marks the end of an era of prosperity for social scientists intent on gathering data on the extent of criminal activity in America today. Nevertheless, the coming years of retrenchment provide an opportunity to digest their work, and to integrate it into more traditional academic disciplines.

It is within this integrationist movement that this book can most easily be placed and appreciated. Public policy regarding crime must be informed by the results of social science research. Yet facts alone are an insufficient basis for policy, which also has a normative dimension. The special skills of the philosopher can prove effective in identifying and appraising the value assumptions behind penal policy. They can be used to clarify the language, test the arguments, and locate the basic principles on which agreement must be secured.

But more important than this critical role, which can all too easily become pejorative, the philosopher has a positive role to play in the creation and implementation of more consistent and defensible policies. The visions of justice, which philosophers have been so eloquent and incisive at articulating, can serve to direct and shape the actions of criminological theorists, administrators, and practitioners.

PROGNOSIS AND PROSPECTS

This book begins to take up this task, but it can take only modest steps toward its completion. It is divided into five sections, beginning with the concept of crime and then examining the major phases of the criminal justice system through which a criminal passes—the police, the courts, and the prisons.

The first, and most fundamental question concerns the nature of crime. The papers in Part I, “The Concept of Crime,” examine perspectives on crime, kinds of crime, and attempts to measure crime. The papers in Part II turn to the police—our first defense against crime. Those in Part III discuss the courts, the traditional dispenser of justice, and those in Part IV deal with prisons. The volume concludes, in Part V, with a discussion of penal policy and research. Taken together, all the essays cover the gamut of the criminal justice system. They do not, and cannot, treat it comprehensively, however. No papers are included on important topics such as police corruption, plea bargaining, pretrial detention, gun control, and other topics—topics that certainly are as important as those covered here. It remains for others to continue this work.

This volume focuses primarily on one area of philosophy—ethics. But philosophy has other contributions to make to criminology and criminal justice. The contributions of social and political philosophy lie on the borders of ethics. And the contribution that philosophers of science could make to criminological theory has not even been broached either in this volume or indeed in the literature to date.

It is our hope that this volume will give impetus to the trend toward the concrete evidence in applied philosophy and professional ethics, and that others will continue the work it undertakes in crime-related studies.

NOTES

1. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).
2. Thomas Nagel's pioneering article, "Sexual Perversion," was published in 1969. It was included in the first volume of contemporary essays *Philosophy and Sex*, edited by Robert Baker and Frederick Elliston (Buffalo, N.Y.: Prometheus Books, 1975).
3. The American Philosophical Association sponsored a writing contest on violence. The best essays were published in a volume edited by Jerome A. Shaffer, *Violence* (New York: David McKay, 1971).
4. The first of a series of volumes on topics of special concern to women was first published in 1977. See *Feminism and Philosophy*, edited by Mary Bragg, Frederick Elliston, and Jane English (Totowa, N.J.: Littlefield Adams, 1977).
5. See Richard Wasserstrom's anthology *War and Morality* (Belmont, Calif.: Wadsworth, 1970) and the reader published by *Philosophy and Public Affairs* called *War and Moral Responsibility* (Princeton, N.J.: Princeton University Press, 1973).
6. See his study *The Moral Foundations of Professional Ethics* (Totowa, N.J.: Littlefield Adams, 1980).
7. See Carl Klockars's "The Dirty Harry Problem," reprinted in *Annals of the American Academy of Political and Social Science* 452 (Nov. 1980), 33-47.
8. See Edmund Husserl's "The World of the Living Present . . .," translated by Frederick Elliston in *Husserl: Shorter Works*, edited by Peter McCormick and Frederick Elliston (Notre Dame: University of Notre Dame Press, 1981), pp. 238-250.
9. See Section D in the bibliography for further references.
10. See Chapter 3, "Police Law," in *The Science of Rights*, translated by A. E. Kroeger (New York: Harper & Row, 1970).
11. See *Works of Jeremy Bentham*, edited by J. Bowring (New York: Russell and Russell, 1962), vol. vii, pp. 266-279, 312-315, and 455-472.
12. Michel Foucault's *Discipline and Punish* (New York: Random House, 1979) is one notable exception.
13. Some noteworthy contributions to this renewal include *Philosophy and Women*, edited by Sharon Bishop and Marjorie Weinzwieg (Belmont, Calif.: Wadsworth,

- 1979), *The Philosophy of Sex*, edited by Allan Soble (Totowa, N.J.: Littlefield Adams, 1980), and *Feminist Frameworks*, edited by A. Jaggar and P. Struhl (New York: McGraw-Hill, 1978).
14. See his *Crime or Disease* (New York: Macmillan, 1973).
 15. Jean-Paul Sartre, *Saint Genet: Actor and Martyr*, translated by Bernard Frechtman (New York: Braziller, 1968).
 16. The report was published by the Government Printing Office in 1967, and in 1968 as a separate paperback volume, *The Challenge of Crime in a Free Society* with an introduction by Isidore Silver (New York: Avon, 1968).

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PART I

The Concept of Crime

INTRODUCTION

If crimes are to be counted, we should be quite clear as to what crime is.

— *Leslie Wilkins*

Philosophers trained in the Anglo-American tradition tend to ask two sorts of questions: (1) What do you mean? (2) How do you justify your point of view? In any analysis of ethical issues in criminal justice, an obvious starting point would be disputes about the definition of crime and the value issues surrounding the acceptance or rejection of any proposed definition.

In our first essay, Chapter 1, Austin Turk rejects any paradigmatic definition of criminality. Instead, he examines three major alternatives for defining criminality—the legal, the polemical, and the empirical. Legal definitions are determined by the power of the state. Criminality is what the state, through its legal institutions, says it is. Persons using a polemical definition of criminality do not take the law books as sufficient in defining criminality. What counts as