

2023

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Recommended Citation

Crim. L. & Phil. (2023).

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Introduction

Symposium on Policing and Political Philosophy for *Criminal Law and Philosophy*

Stephen Galoob and Jake Monaghan

Police are crucial to the criminal legal system. Police are front-line enforcers of the criminal law, and the actions that police officers and departments take reverberate throughout the criminal legal process. Police are one of the key bridges between the criminal law on the books and the criminal law in action.

Theoretical debates about policing parallel debates regarding criminal law theory. Some criminal law theorists conceive of their projects as contributions to moral philosophy—for example, construing the fundamental task of criminal law theory as establishing the moral justification(s), if any, for criminal punishment¹ or criminalization.² Another approach to criminal law theory, grounded more straightforwardly in political philosophy, begins from a question of political legitimacy, asking, as George Fletcher put it, “[w]hat makes it legitimate for the state to make

¹ See, e.g., MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 30 (1997) (“The first question of a theory of the criminal law is the question of why we punish.”)

² See, e.g., James Edwards, *Punishment Without Criminalization*, 23 *LEGAL THEORY* 69, 71 (2017) (summarizing the consensus position among criminal law theorists that “Φ’ing is permissibly criminalized only if Φ’ing is deserving of punishment”); cf. Tatjana Hörnle, *Theories of Criminalization*, 10 *CRIM L. & PHIL.* 301, 305 (2014) (noting that moral wrongfulness is subsidiarily relevant to the question of criminalization, but “the very first stage in a theory of criminalization should not yet deal with the moral wrongfulness of conduct but with issues of political philosophy”).

people suffer.”³ These different approaches to criminal law theory classify different questions as fundamental: for example, the defendant’s culpability is fundamentally important for many who see criminal law as a topic in ethics,⁴ but perhaps only derivatively important for those that see criminal law as a topic in political philosophy.⁵

There is a similar methodological divide among theorists of policing. By far the dominant approach among philosophers of policing, reflected in the work of John Kleinig and others, sees the fundamental questions as matters of applied ethics. Scholarship in this vein focuses questions such as (to take one prominent example) whether the policing role “give[s] police certain moral prerogatives that ‘common morality’ would eschew,”⁶ as well as whether and how a police officer should deploy the discretion afforded to them *in situ*.⁷ On this ethical approach, whether and how

³ George Fletcher, *The Nature and Function of Criminal Theory*, 88 CALIF. L. REV. 687, 697-98 (2000). Perhaps the preeminent recent work elaborating criminal law as a topic in political philosophy is VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* (2019).

⁴ See, e.g., Paul H. Robinson, *The ALI’s Proposed Distributive Principle of “Limiting Retributivism”*: Does It Mean in Practice Anything Other than Pure Desert?, 7 BUFFALO CRIM. L. REV. 3, 4 (2003) (noting that, under the American Law Institute’s proposed Sentencing Project Report, “not many” instances of sentencing would be “guided by a principle other than desert”).

⁵ See ERIN KELLY, *THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY* (2018); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293 (2006).

⁶ JOHN KLEINIG, *THE ETHICS OF POLICING* 1 (1996).

⁷ See, e.g., Michael Davis, “Police, Discretion, and Professions,” in *HANDLED WITH DISCRETION: ETHICAL ISSUES IN POLICE DECISION MAKING* 13-36 (John Kleinig, ed., 1996).

to police depends largely on considerations of ordinary morality.⁸ Whether police use of force is justified depends largely on whether it is permitted by principles of moral theory.⁹ Whether police deception is justified depends on the correct moral theory of deception.¹⁰ The link between the role actions of police and the phenomenon of mass incarceration is attenuated.

⁸ See, e.g., Julinna Oxley, “The Ethics of Policing: A Feminist Proposal,” in *THE ETHICS OF POLICING AND IMPRISONMENT* 63–86 (Molly Gardner and Michael Weber, eds., 2018) (developing a feminist care ethics model of the police officer), and MICHAEL HUEMER, *THE PROBLEM OF POLITICAL AUTHORITY: AN EXAMINATION OF THE RIGHT TO COERCE AND THE DUTY TO OBEY* 61 (2013) (arguing that police must obey principles of common-sense morality because all theories of police legitimacy are false).

⁹ See SEUMAS MILLER, *SHOOTING TO KILL: THE ETHICS OF POLICE AND MILITARY USE OF LETHAL FORCE* (2016) and SEUMAS MILLER AND IAN GORDON, *INVESTIGATIVE ETHICS: ETHICS FOR POLICE DETECTIVES AND CRIMINAL INVESTIGATORS* (2015) (developing a theory of the ethics of policing as an “institutional” expression of basic moral obligations). See also JASON BRENNAN, *WHEN ALL ELSE FAILS*, 12 (2019) (defending a theory of resistance to state injustice on the basis of “moral parity” between state and non-state agents, which implies not only that police officers may not enforce unjust laws, but also that those subject to police power are permitted to use defensive violence to resist such enforcement).

¹⁰ See Jerome H. Skolnick and Richard Leo, *The Ethics of Deceptive Interrogation*, 11 *CRIM. JUSTICE ETHICS* 3 (1992) (defending a utilitarian theory of deceptive interrogation on the grounds that the true theory of deception in other contexts is utilitarian). See also Samuel Duncan, *Why Police Shouldn't Be Allowed to Lie to Suspects*, *J. AM. PHIL. ASSOC* (forthcoming) (analyzing the topic of police deception from the perspective of Kantian ethics).

An alternative approach to policing theory focuses on questions from political philosophy, understood as a normative enterprise distinct from ethical theory. These approaches tend to focus on fundamental questions regarding the legitimacy of policing and its connection to the rule of law.¹¹ Questions about how officers or departments should carry out their duties cannot be considered in isolation from these broader questions of political theory. Approaches to policing grounded in political philosophy deemphasize, without eliminating, questions about the interpersonal morality of defensive force. The police sometimes defend themselves or others against wrongful threats. Yet police power is not merely defensive. It shapes society and the lives of those within it, and it is called upon to settle legitimate conflicts of interest. The centralization and state control of force generates important questions about the distribution of police power throughout society (as well as the inevitable mistakes of enforcement and administration that come with it). So, on this approach, the legitimacy of police actions depends on broader questions of the justice and legitimacy of a society.

Pressing questions about the police also show that there is some space between the questions of criminal law and questions of enforcement. For example, from the premises that justice requires a state to settle personal disputes and to provide security and criminal law must be created using liberal democratic procedures, there is no unique conclusion about what legal rules should apply to the police. The political approach to policing theory has distinct implications for a range of pressing theoretical questions, for example how police should respond to suspect flight and to disobedient protests, the scope of legitimate police deception, the relationship between ideal theory in political philosophy and the existence of coercive state agents, and the nature of the police role.

The political approach to policing also increases the salience of a variety of questions that are not seen as paramount on an ethical approach to policing theory. Should we have professional police departments, and what are police essentially? How should they be trained, staffed, and

¹¹ LUKE WILLIAM HUNT, *THE RETRIEVAL OF LIBERALISM IN POLICING* (2019); BRANDON DEL POZO, *THE POLICE AND THE STATE: SECURITY, SOCIAL COOPERATION, AND THE PUBLIC GOOD* (2022); JAKE MONAGHAN, *JUST POLICING* (forthcoming).

managed? What are the distinctive professional obligations and permissions attached to policing? When are police justified in using violence to enforce the law? How should police navigate conflicts of political and non-political interests?

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The papers in this volume were presented as part of a symposium on Policing and Political Philosophy held under the auspices of the Institute for Humane Studies in November 2021. The overarching goal of the symposium was to convene criminal law theorists and philosophers interested in policing to examine normative questions about the police. Not all of the participants in this symposium or contributors to this volume would agree that criminal law is primarily a topic in political philosophy or that policing theorists should concern themselves fundamentally with questions of political legitimacy and the rule of law. However, many of the participants accept both of these positions.

One goal of the political philosophy of policing is to fill in the theoretical space between general justifications of political power and justifications of specific modes of enforcement or administration. The state's justification, if any, in exercising political power to provide security to its citizens leaves unanswered a range of questions about the details. An initial question is whether professional police departments are a legitimate mode of social control in the first place. In "Abolitionism and Ideal Theory," Daniel Fryer interprets that police abolitionists, who answer this question "no," as offering an ideal theoretic argument. Fryer contends that existing versions of police abolitionism rest on idealizations that leave no space for the professional police. The abolitionists and their critics are engaged in a theoretical dispute that is conducted entirely at an abstract level of political philosophy. According to Fryer, a full normative understanding of the police, and their role in governance and the criminal law, requires considering fundamental questions in political philosophy.

Yet, Fryer argues, difficulties in ideal theoretic reasoning beset efforts to understand the police. The utility of ideal theory depends on getting the idealizations right, but the kinds of idealizations popular in police abolitionist theory are problematic. They do not illuminate the problems of *realized* policing in the United States, and so do not recommend solutions. Merely approximating the "no police" idealization by achieving the purportedly "second best" option of defunding (as opposed to abolishing) police is counterproductive. Fryer offers a superior account of the relationship between ideal theory and normative questions about the police.

Related to questions about whether there would be police in an ideal world, and what that means for our real political and social institutions, are questions about what the police essentially are. In “The Concept of The Police,” Eric Miller contends that a proper understanding of the police entails substantive limits on permissible police power and justifies a variety of responses to ineffective or otherwise inappropriate policing. Police are distinct, Miller argues, in having the *duty to protect* the public (even at their own risk) and as agents authorized to conduct some aspects of governance, the *power to arrest and detain* citizens. This conception emphasizes the police role in *governance* rather than mere protection. The governance conception of policing is importantly different from popular conceptions of police that emphasize their ability to exercise power.¹² Emphasizing the governance aspect when theorizing about the police generates important insights. Whereas the cases that occupy us when thinking about interpersonal theories of defensive force do not require us to think about institutions, understanding police force as governance does. This conception of the police places them firmly as a last resort, and it attributes to policing certain positive or special duties. Anytime a non-police alternative can provide community security and rapid emergency response, police legitimacy is undermined. But, in principle, there may be a circumscribed realm of legitimate police power. Further, any time the police respond in ways that violate those positive duties (e.g., by breaking the law or policing ineffectively), their legitimacy is undermined and citizens gain some rights of resistance.

Assuming a legitimate role for policing raises more specific questions about the administration of law. In “Flight and Force,” Ferzan and Harmon ask, assuming we have a view of political legitimacy on which the state is sometimes justified in using force to (e.g.) make lawful searches and seizures, when is police violence necessary to these activities justified? More

¹² This conception is associated with the Weberian view of the state as claiming a monopoly on legitimate force, or the Bittnerian conception of police as a (not *the*, as Weber might have it) mode of exercising legitimate force. See Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AMER. SOC. REV. 699 (1967). One might also include here popular conceptions of police as “sheepdogs.” Sheepdogs might exercise defensive force, but they don’t govern.

important, perhaps, when are police prohibited from using violence in the course of conducting generally legitimate state business like making an arrest? Ferzan and Harmon begin with *flight*, or a suspect trying to escape rather than submit to an arrest. The law allows lethal violence in some cases. Should it? This is a difficult question because it requires balancing the interests of the state (and the interests protected by law enforcement) with the interests of those subject to police force. However we settle the distributional question, that balance will have to allow *some* felony suspects to escape; using police violence to prevent all flight is clearly unacceptable.

Ferzan and Harmon distinguish two kinds of justification for lethal violence against a fleeing suspect: forfeiture and balancing justifications. The suspect's flight might make him forfeit his right against and be *liable* to the force, or the state's interest in preventing flight might be weighty enough that it *outweighs* the suspect's interests in avoiding force (such that it would be justified to subject even an innocent bystander to similar force). The state's interests in preventing flight (e.g., to facilitate adjudication) cannot be satisfied by killing suspects. Perhaps surprisingly, even non-lethal force may be hard to justify given that in many cases the interests of adjudication do not always require the suspect to be present. There are also rule of law interests to consider: obedience to law might be required for the integrity of the state or to prevent the deterioration of law-abiding social norms. But, Ferzan and Harmon note, successful flight rarely poses a sufficient threat to either aspect of the rule of law for the suspect to have plausibly forfeited their right against (police) violence. Appeals to the state's interest in preventing danger or punishing criminals also fail. If the fleeing suspect poses sufficient threat to others to justify lethal force, it is not the interest in preventing flight that does the work. Additionally, capital punishment is rarely taken to be a proportionate response to most of the offenses that might be involved in flight. Ultimately, lethal force is justified only to defend others, not directly to prevent flight. What about non-lethal force? Here, too, it will be justified only when arrest is necessary to satisfy the state's interests. The proportionality calculus is very difficult in these cases, and officers receive insufficient guidance on the use of non-lethal force to prevent flight.

An important question, one raised by controversial uses of police force, is whether police intentions are relevant to evaluating police actions? The Supreme Court's ruling in *United States v. Whren* and subsequent cases holds that they are not. The issue is connected not just to evaluating police use of force, but to the positive or special obligations of policing. Stephen Galoob makes the case that intentions are relevant in "A Fiduciary Principle of Policing." The fiduciary principle,

argues Galoob, entails that police have duties of *loyalty* and *care* in carrying out their work. But we cannot determine whether a police action satisfied those duties just by looking at behavior, so there are normative demands on police cognition (and so intention) as well. Accepting a fiduciary principle of policing allows for a novel critique of the type of pretextual policing that was upheld in *United States v. Whren*, one that also offers guidance on how officer cognition should influence assessments of constitutionality. By specifying some of the special duties that constrain policing, it also has broad implications for the political philosophy of policing.

The kinds of duties of loyalty and care that Galoob discusses are plausibly in some tension with the ordinary activity of police officers. Police occasionally need to deceive suspects in order to carry out their role obligations. Deception, though seemingly essential to policing, highlights the need to think about the systemic, institutional (rather than the interpersonal) nature of police power. It is intuitively plausible that facts about the political nature of policing render it unique; it is unlike other areas of human cooperation subject to good faith requirements. In “Good Faith as a Normative Foundation of Policing,” Luke Hunt defends the counterintuitive claim that policing, too, has good faith as a background requirement. Hunt argues that the normative principle of good faith that underlies personal contracts also underlies policing. This is for two basic reasons. First, it is a result of the social contractual relationship between the police and the policed. Second, and more importantly for understanding the investigative aspects of policing, the police–citizen relationship is often rather directly contractual. People often give information to or act on behalf of investigators to improve their own position. But as in personal relationships, sometimes aspects of the police–citizen relationship render the transactions unjust and the contracts invalid. We need, then, a way to distinguish between acceptable and unacceptable police deception. Good faith, as a commitment to the rule of law, suggests Hunt, enables us to distinguish fraud-like (and so unjustified) cases of police dishonesty from legitimate police dishonesty.

Providing security nearly always generates legitimate conflicts of interests, and not just in the interrogation room or when making arrests and combating flight. We also see it in the inevitable conflict of explicitly political activity. Citizens sometimes, to engage the political process, break the law. This puts the police in a complicated normative situation. In “Disobedient demonstrations and the police,” Jake Monaghan explores the nature of legitimate protest policing. Using a case study where the New Orleans Police Department fired less-lethal projectiles to defend a “skirmish line” in the wake of George Floyd’s death, he suggests that interpersonal moral principles, and

overly simple legalist principles, can mislead our evaluations of protest policing. In particular, proponents of this approach are likely to mistakenly evaluate police force as proportional, defensive force, conducted in the service of lawful activity, and therefore legitimate. But focusing on the political, professional nature of policing makes clear that the police have not only to balance the competing interests involved in political demonstrations, they also play an important role in the nature and extent of the demonstration's disobedience. The defensive violence framework needs to be augmented by distinctively political considerations.

To start, Monaghan briefly argues that citizens are permitted to engage in some civil disobedience. When we see that normative principles in political philosophy justify a range of disobedient activity, the case for police intervention is weakened. Disobedient demonstrations aren't mere lawbreaking. Further, balancing them against the ordinary, everyday interests in (e.g.,) using public space in a particular way is made more complicated. Demonstrators aren't acting disorderly to advance narrow, parochial interests the way some view (e.g.,) unlicensed vendors. But people *do* have legitimate interests in the orderly use of public space, so justifications of civil disobedience run out when we ask whether a particular skirmish line or rubber bullet was justified. Monaghan argues that a principle of proportionality, borrowed from self-defense theory, is a useful guide to these issues. But because proportionality calculations are sensitive to *who* has generated the threat, and because common police tactics often generate new threats, they are often disproportional and so unjustified. This shows that applying principles from interpersonal morality to the police comes with political complications.

Many of the papers included in this volume are part of a movement to assess significant questions about policing in distinctively political terms. Some of these broader normative questions must be answered before the questions of interpersonal morality arise, and even then, the political nature of policing requires our tools of interpersonal moral theory to be tempered by theoretical commitments in political philosophy.