

## *Introduction*

### *Toward a Theory of the Police*

The policeman was beset by the same profound questions of moral philosophy as any other member of mankind.

— William K. Muir, *Police: Streetcorner Politicians*, 1977

*Moral Issues in Police Work*, published in 1985, opens with this observation:

The police are among the most powerful agents of the state. They can disrupt the daily routines of citizens more than any other public official by deciding who shall be stopped, who shall be detained, who shall be arrested, and who shall go free. Not even the President of the United States has their immediate and direct power over life and death. Yet despite their awesome capacities, until recently they have been studied little by social scientists or philosophers. (Elliston & Feldberg, 1985, p. 1)

There has since been much progress, at least where social science is concerned. There have been many systematic studies of police behavior and its effects. Criminal justice and criminology have grown into popular, although often vocational, fields of inquiry. Legal scholarship on the intersection between policing and the American justice system thrives. The ethics of policing has also seen considerable growth as a result of fruitful research by John Kleinig, Seamus Miller, and John Blackler, among others. John Kleinig's (1996) work consists of sustained and nuanced thought about issues such as discretion, deception, coercion, and the institutional culture of policing's ethical challenges. Seamus Miller (2016) takes up the police use of deadly force at length, and along with former police officer John Blackler (2017) has examined the role of the police and its practical implications as an exercise in applied philosophy. At present, the cutting edge of the philosophical tradition is represented by Luke Hunt's 2018 book, *The Retrieval of Liberalism in Policing*. It looks at policing through the lenses of dignity and a liberal conception of personhood, seeking to ground the issues that concern Kleinig and Miller

in the concepts of political philosophy. Hunt offered his work in response to what he perceives as a receding of liberalism in policing, and perhaps society at large, over the last several decades (2018, pp. 1–2).

And yet we still have no readily discernible, durable philosophy of policing. Legal scholars may move from the intersection of policing and judicial process to ask larger societal questions, and they may make the case for regulation or reform, yet these questions are rarely posed in terms of the philosophical tradition. When we turn to the modern classics of moral and political philosophy for guidance, except for the treatment offered by Hegel discussed in Chapter 4, it is nearly impossible to find the word “police” in any of them.

The goal of this book is to correct this omission: it will offer an account, in philosophical terms, of the relationship between a liberal democracy and its police. My hope is that such a book will help philosophers and practitioners better understand one another, whether they are debating the structure of the just state or asking how police should perform their duties in a nonideal world. I am aware that philosophers and practitioners rarely convene for such purposes; yet both lines of inquiry lead to the same fundamental question, namely, how the most visibly coercive institution in any liberal democracy can justify its powers, and how these powers should be used to further the goals and values of a democratic state.

You could say this book grew out of a frustration with the ideal theory of John Rawls. The ingenious way in which Rawls builds out his theory of justice using a progression of carefully articulated concepts and explicit assumptions about morality and reason is what served to revive the moribund practice of political philosophy after it had been hobbled by the discipline’s linguistic turn and the pall of postmodernism. That said, when Rawls stipulated his work was not meant to provide normative guidance beyond the basic structure of the state and its most fundamental questions, it left me feeling it was incomplete. At the times and places where the state’s power was being brought to bear in critical ways that were also small and local – that is, in the basic terrain of American policing – the dominant theory of justice had nothing to say. A liberal democracy needs a theory of justice that provides concrete insight and guidance to the people who are responsible for administering its agencies and institutions. As a student of political philosophy who had commanded urban police operations for many years, I could only see this as a glaring gap.

My experience as a police officer taught me that police need to philosophize, along Rawlsian lines, by giving public reasons for what they do. Reason-giving, in the political and moral senses, was an elemental part of

my work, both at the level of street policing, and in devising overall strategies. Policing has consequences, some of them fatal and others deep and long-lasting, no matter how routine many can seem in the moment. I felt the reasons behind our decisions were indispensable in justifying our work. I had also come to believe some of our reasons had been inadequate, did not pass democratic muster. In many cases, the only reason we proceeded as we did was because we had not been called upon to engage in a reason-giving transaction with the public we served. Often, the reasons for police work may have satisfied one segment of society, even perhaps a broad one (or in many cases a highly influential one) but did so in a way that would seem unjust to others. So despite its silence on policing, how could we abandon a political philosophy that called for reason-giving in justifying government coercion, that was designed to accommodate reasonable disagreement between citizens? That said, if the reader rejects Rawlsian thinking or doesn't feel it is possible to bring his ideal theory down to earth with enough fidelity to mate it with a topic like policing, he or she will have a hard time accepting the thrust of the argument here, especially where it concerns public reason.

This work attempts to situate the police in contemporary discussions of political philosophy in a way that is philosophically illuminating and practically instructive (without simply being an exercise in “practical philosophy” that Brian Leiter criticizes as yielding “bourgeois ‘étiquette manuals’” (Hunt, 2018, p. 61). It strives to do so for the benefit of philosophers, who would presumably like to see their work mesh with the world around them. Insofar as it may demonstrate what democratic equality or public reason mean for the police as a matter of theory, the work constitutes an advance in our understanding of political philosophy. If we can philosophize the work of legislators, we can – and must, as a requirement of justice – extend the same concepts to the work of police.

This book also strives to benefit practitioners, who have been left to follow either their moral intuitions when making complex but critical decisions about matters of justice, or to rely on legislation and post-hoc judicial decisions, with the accompanying case law, to offer clarity about how the state expects them to proceed. These are mechanisms of guidance and accountability that legal scholar Barry Friedman (2017), writing in *Unwarranted*, argues are inadequate owing to their slow pace, fundamentally backward-looking nature, and the disparate laws and rulings that prevail throughout the nation (pp. 51–91).

No work of descriptive philosophy can be free of connections to particular systems of governance and political economy (e.g., liberalism,

neoliberalism, capitalism, or the American jurisprudential tradition). I will argue, however, that while my conceptions of the role and powers of the police are specifically meant to mesh with democratic liberalism and the needs of a pluralist state, their bases in natural rights, and the ways in which humans typically organize themselves in social ecologies indicate they could easily be applicable to most political philosophies that promote the individual liberty of people living in cooperative communities.

The past few years have seen the United States convulsed over questions of how it is policed, who it is that police officers actually protect and serve, and what values they embody as they work. The protests and unrest after the murder of George Floyd have shifted the conversation by demanding starker alternatives to the status quo. Calls for reform are now the bare minimum, there has been serious talk of defunding police, and some have insisted on abolishing policing as an institution. To proceed with any clarity while delivering public safety to America's communities, it is not enough to become more efficient in pursuing predetermined goals. We must also understand what police are for, what democratic commitments should empower and guide them, and what principles should constrain them. These understandings must be based in the political philosophy that guides us, rather than the pendulous emotional and political pressures of an era, no matter how instrumentally motivating they may be. It is my hope, then, that what follows lays out a vision for the police that puts them in an enduringly useful and affirmative place in the conception of a democratic, pluralist state.

## CHAPTER I

*The Role of the Police*

The person who elects to become a police officer agrees, by virtue of an oath of office, to protect other people as a promise and a duty, including strangers they do not know and people who may be physically aggressive toward them. If required, they will shoulder real dangers on behalf of these strangers. In doing so, the ideal police officer affirms two things: the value of human life and dignity for all people, regardless of the prior relationships you may or may not have with them, and the compassion one person has for another by virtue of their common personhood. The promise made by the police officer also acknowledges the value of social cooperation, and the peace of mind and physical security that makes human flourishing possible.

The dangers a police officer faces in the discharge of their work are morally distinctive hazards, even if there are other more dangerous things to do for a living from an actuarial perspective (Bier, 2016). The lumberjack, coal miner, or deep-sea fisherman may have jobs that pose more frequent physical risks, but these workers bear them to produce sought-after commodities of economic value in response to the incentives of the market. The police officer, on the other hand, promises to confront physical dangers because the state has a duty to care for citizens in a basic, humanitarian sense. They do so to provide citizens with the security and stability necessary to thrive, which in a pluralist state means pursuing a diverse range of activities and life plans. Whereas the dangers of nearly all other vocations are products of well-ordered systems gone awry, it is the duty of the police to respond to instances where order has broken down, confront and reduce the resulting dangers, and face personal risk in doing so. It is therefore a profession with a duty to deliberately seek out physical danger, and where not confronting it while others remain at risk is considered a profound failure. This makes policing unique and morally distinctive regardless of how well police in fact manage the risks they face, or if the practitioners of other professions are more prone to injury.

The responsibility to face dangers that offer others a license to flee is its own type of burden.

### Shortcomings of “Law Enforcement” and “Investigatory” Conceptions

But beyond our basic intuitions about protection and service, what do police actually do? There are over 17,000 separate police and law enforcement agencies in the United States, and whatever they do in practice, insofar as these practices substantially overlap, creates the reality of the American police role. Whether the police *ought* to do any of these things in the first place, and why these duties would be required of a democratic government, are questions for later chapters. In the meantime, if we assume that policing has an inherently normative dimension, and if we can find tasks the police perform that transcend nearly all agencies, we may be able to reach some general conclusions about what police do.

The most obvious answer seems to be police fight crime by enforcing the law. Indeed, this view dominates both popular conceptions of policing and scholarship too. It is the view taken by Luke Hunt (2018, p. 18) in *The Retrieval of Liberalism in Policing*:

It is of course true that the police arrest criminals and enforce the law, but the concept of “police” gives rise to a much broader range of political and ethical issues in the liberal polity. To name just a few tasks, the police interview witnesses and interrogate suspects, handle informants, collect evidence, write reports and affidavits, testify in court, train in defensive tactics and the use of firearms, sit for hours in cars while conducting surveillance, listen to countless hours of wiretap recordings, analyze vast amounts of investigative information, and on and on – all while navigating a complex array of administrative regulations, legal constraints and general bureaucracy.

If these are the tasks a person names when he could name many others, then it says much about what he thinks the police primarily do: act as the initiators and executors of judicial process. If we consider the type of police work that has had a profound effect on the nation, however, it often concerns things that are not on this list but that are no less crucial to the role. Think, for example, of responding to people who are suffering during acute mental health crises, who are trapped in overturned cars, or who are overdosing on drugs, whose children are lost, or who are barricaded in a nightclub bathroom while a gunman outside is trying to kill them. Think of the police interrupting acts in progress that pose dangers to citizens or

*Gaps in “Moral Rights” and “Social Peacekeeping”* 7

their property, whether or not an arrest ensues, and whether or not the acts merit prosecution. Or, consider the policing of large and sometimes unruly protests and marches, or ensuring something like the lighting of the Rockefeller Center Christmas Tree or the dropping of the ball in Times Square on New Year’s Eve goes off safely and without a hitch, and not just because there are statutes that govern people’s behavior in public. None of these things could be deduced as duties of the police when one refers to Hunt’s description, but they are both central to the work of the police and their role in a democracy.

Hunt’s version of policing has everything to do with investigation (he was for many years an investigator with the FBI). He goes on to refer to his description of police work as “the job,” which is a phrase commonly evoked by police officers – in New York City they ask people they suspect of being fellow officers if they are “on the job” – and in doing so he cites Robert Jackall (2005, p. 128) on what New York City police officers call “the Job”:

The Job is, first, to investigate and establish responsibility for crimes and thus help contain the forces of disorder. Second, the Job is to negotiate the sprawling interconnected bureaucracies of the criminal justice system and the concomitant thicket of rules, regulations and laws that impede the investigation of crimes.

Even if police officers see the importance of holding people responsible for crimes through investigation, and balk at the rules and bureaucracies that impede this process, this is not how narrowly most police officers view their work.

**Gaps in the “Moral Rights” and “Social Peacekeeping”  
 Conceptions**

We encounter other gaps in another normative account offered by Miller and Blackler (2017). They argue that the primary and overriding goal of policing, its “*raison d’être*,” is to protect people’s moral rights as enshrined in the law (pp. 4–29). According to this line of thinking, it is protecting these rights that gives the police the distinctive ability to use force (including lethal force), since such protection can require defeating violent attacks and physical threats. I will turn to this argument in a moment; for now, it may be enough to make two observations: that many policing situations (such as ensuring fair cooperation in public spaces) are not about protecting rights from violation *per se*, but are instead a matter of adjudicating

between two or more parties whose rights are in competition, and that the creation and delivery of practical justice includes not only the protection of legally enshrined rights, but many other things the police do that could possibly be likened to protecting rights but that are better explained as matters of substantive justice.

A purely rights-based account has the burden of distinguishing between rights that convey to all citizens by virtue of their personhood, and rights that the state *creates* by virtue of enacting laws. The former are rights that are always in force, and a state uses statutes to enshrine them, while the latter exist *because* they are created by the force of law. To illustrate the difference, we can contrast the right to be secure in one's body, which exists for all people and has been enshrined in the law, and the right to drive down a street free of unnecessary obstruction by pedestrians, which is something a citizen can assert only because the state has decided to allocate the use of space in such a way. The right for an adult to drink a Hurricane on the sidewalk exists in New Orleans but certainly not New York City, where people have the right to sit in a restaurant or a park without smelling cigarette smoke, while a person has the right to a cigarette with a meal in establishments in Alabama and Arkansas. A test that highlights the distinction, which essentially distinguishes natural rights from others, is whether a sufficient justification of the right can be made by asserting "... because I am a person." Rights that pass this test, especially where physical dangers are involved, are ones that the police must protect as a core feature of their role, as a duty of the state. Requirements of social cooperation or good order, rules that govern behavior so as to keep communal living fair and stable, create rights when they are expressed as laws, but not because they accord to all people in all places. These rules are highly variable and, in some cases, arbitrary. The police are responsible for protecting these rights too – as a matter of practical justice.

It could be argued that the state is the overarching entity committed to protecting all forms of rights, that doing so is a type of justice, and the police are the agents tasked with creating and distributing that justice. But any attempt to characterize everything the police do as protecting rights, from addressing violent crime to facilitating parades, celebrations, commerce, and the smooth flow of traffic, makes the relationship between some laws and rights circular or tautological. If the police always protect rights because the laws they enforce have created rights by virtue of being passed as laws, then this construal fails to capture something important about policing: why these laws were written in the first place. Again, I will



say that many laws are passed to promote social cooperation by empowering the police to resolve equally valid but incompatible competing rights claims. Consider, for example, the case of spirited protestors competing for the same roadway as commuters with important and timely goals that matter to them. Doing so requires protecting some rights by discounting others, given valid reasons. That is rendering justice, which brings us back to the basic definition of the police role advanced here.

In another approach to defining the police role, Kleinig (1996) compares four different conceptions of the police role: the “crimefighter,” the “emergency operator,” the “social enforcer,” and the “social peacekeeper” (pp. 22–29). He concludes “there is nothing sacrosanct about the crimefighting model” (p. 23), and ultimately argues that the social peacekeeper is the articulation of the police role that may “offer the best potential for accommodating in a normative and satisfactory way the varied tasks that the police are called on to perform” (p. 27). While I concur that this is the best conception from among the four in terms of encapsulating the police role, I will describe the role in ways that better conform to the traditions of (Anglo-Saxon, broadly analytic) political philosophy, specifically in the context of the state’s obligation to create and distribute forms of justice, since I think they are critical to police reform.

Hunt notes “from at least 2014 to the present, it was difficult to open a newspaper without seeing a headline about the questionable killing of a person by a police officer” (2018, p. 6). This is true, and since he wrote it, the situation has only become more acute. It is ostensibly one of the motivations for undertaking his project as well as this one. But in talking about people killed by police such as George Floyd, Michael Brown, Tamir Rice, Philando Castile, Eric Garner, Freddie Gray, Jordan Edwards, Walter Scott, Stephon Clark, and Justine Diamond, then we are talking about people killed when the police were responding to a call to protect or rescue someone, or to make a summary arrest because a person had witnessed a crime and called upon the police to respond to it, or because an encounter such as a traffic stop or noisy party quickly escalated into something deadly. We will also need to talk about how police responded to the ensuing protests, how their approach can unjustly differ by race, class, and political orientation, and how some communities feel much better and more fairly protected than others. This means a rights or peacekeeper account of policing must be at least complemented by one that can help adjudicate legitimate competing rights claims among people and groups, account for the need to deliver public safety comprehensively and equitably, and guide the distribution of policing and its benefits as

important social goods. This requires a new kind of articulation of the relationship between the police and the state.

### **Backing into the Police Role by Examining Police Practices**

In trying to tackle these matters, a better approach might be to make a long, overlapping, and admittedly sloppy list of what the police in fact do in a liberal democracy, and see what generalizations may come of it. Miller (2014) acknowledges one of the challenges of defining the police role is the vast array of things police do, but concludes that “one way to respond to this challenge is to first distinguish between the activities or roles in themselves and the collective end that they serve, and then try to identify the collective good served by these activities” (p. 259). In keeping with such an approach, the list here is based on the activities of the New York City Police Department, which, due to its size and complexities, stand to be as broad in scope as can be expected from a police agency. The police:

- Rescue people in physical danger of almost any type
- Deter acts characterized as crimes by the law
- Interdict crimes in progress
- Make summary arrests of people committing acts which the law classifies as crimes
- Arrest people who have committed crimes for which a summary arrest wasn't made
- Execute search and arrest warrants issued by the courts
- Collect evidence for ongoing criminal proceedings
- Search for lost or vulnerable people incapable of self-care
- Respond to mentally ill people in crisis and present them for evaluation and treatment
- Respond to drug overdoses and attempt to reverse them or send users to treatment
- Investigate the circumstances under which people have died
- Mediate disputes between landlords and tenants, or customers and shop owners
- Respond to, investigate, and record the circumstances of automobile accidents
- Ensure safe and orderly parades, protests, and other large public events
- Control crowds and disperse disorderly groups
- Decide which needs and desires take priority when people's use of public spaces conflicts