THE LEGITIMACY OF FORCE

An Inquiry into the Normative Foundations of Police Work

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CONTENTS

1 Introduction

Under what conditions, if any, is the use of *force* by the police *legitimate* and why, if at all, does it have to be *monopolised* by the state?

That is the two questions I set out to answer in this project. Such a task requires an inherently interdisciplinary approach, utilizing perspectives and arguments from empirical social science, philosophy of law, ethics and political theory.

So far, there are very few studies that focus on policing from a normative point of view. Strangely, while moral choices and dilemmas of policing have provoked widespread interest in the mass media and among the public, these issues and the normative framework inside which they must be analysed, have rarely been examined in a systematic way. This fact explains, I hope, the relevance of my project.

My aim is to develop a *normative framework* that might help clarify the morality of force in policing. Such an undertaking must be interpreted in terms of what Charles Larmore in **Patterns of Moral Complexity** (1987) has called the heterogeneity of morality. This doctrine, which I shall accept, implies that "the ultimate sources of moral value are not one, but many" (p. 138).

However, to accept the doctrine of the heterogeneity of morality is not to accept a doctrine of independent "spheres of moralities" in the sense that professional ethics is detached from general moral principles. I shall maintain that a general normative framework is a necessary (but not sufficient) precondition for the development of a professional ethics of policing.

I shall try to explain what I intend to do by describing the research problems, working hypotheses and the preliminary structure of the thesis itself. The size of the seven chapters is roughly indicated in brackets.

2 Chapter I: Policing as a Subject of Research (20 pages)

In the first chapter, I intend to locate my project in the context of contemporary research on the police.

Policing is a process of vital importance to the legal and social order of any society. Despite this obvious fact, it is only in the last twenty years or so that systematic social research into policing has been conducted at the universities and research institutions around the world.

Today there is a veritable explosion of research on almost every aspect of policing. One of the most well-informed observers of current police research and also one of its most influential participants, professor Robert Reiner at the London School of Economics, has pointed out an interesting difference between the pioneer studies of the 1960s and the numerous research projects of the 1980s and the 1990s (Reiner 1992).

The pioneers of policing research, like Banton (1964) and Skolnick (1966), were primarily concerned with issues derived from the perspective of general social theories. Current research, Reiner maintains, is policy oriented and related to the concerns of practitioners and managers. No doubt, such research has provided a substantial increase in our knowledge of what the police do, how police officers are selected and trained, how they are shaped by training, how police officers understand themselves and their tasks, what the public think of the police, and what the effects are of the varieties of policing activities - to mention only a few of the topics adressed by contemporary research.

However, I fundamentally agree with Reiners plea for "a revival of the broader theoretical conceptions which have been replaced". In the absence of such a revival, empirical research tends to generate more and more data with less and less scope. There is an obvious need to construct conceptual frames inside which the increasing mass of empirical observations can be interpreted and understood. Moreover, I shall argue that a theoretical revival is incomplete and flawed unless it incorporates a normative perspective as well.

3 Chapter II: Force and Violence (25 pages)

In the second chapter, I intend to explore the relevance of normative theory by taking one of the controversies of police research as my point of departure. A debate has been going on about whether the very idea of policing should be understood in terms of law enforcement (Kinsey et al. 1986), social service functions (Punch and Naylor 1973) or order maintenance (Reiner 1985).

A presupposition of this controversy is the view that policing can be properly identified in terms of some essential body of tasks. I shall explore an alternative perspective, implying that the various activities of policing are conceptually tied to legal rules authorizing the police to exercise *force* in resolving whatever tasks they are supposed to resolve.

This position is insufficient unless the concept of *force* and the different types of force used by the police are examined more closely. Intuitively, there seems to be an essential and morally relevant difference between force and violence, but it may prove difficult to describe it accurately. Is it the case that the police use force, while criminals use violence?

In police research (Westley 1970) and public debates on "police violence", this term is usually defined as "the illegal use of force", but the *morally* relevant difference can hardly be explicated by a reference to a difference in *legal* status between force and violence. Is it true that violence violates moral principles or moral rights, while force does not? Obviously, the enforcement of unjust laws implies that moral principles or rights are violated. Now, does this mean that the concept of force and, by implication, the very idea of policing, is dependent on the *moral* validity of legal rules? Or does it make sense to say that unjust laws are enforced justly?

4 Chapter III: Liberalism as a Normative Theory of Policing (40 pages)

The last two questions in the previous section clearly indicate that these issues must be analysed in a more comprehensive context. This is what I intend to do in chapter III.

Although the *state* is a controversial concept in political science, there seems to be a concensus among political scientists as to at least some of its characteristics. Max Weber`s definition of the state as an institution with a monopoly of the legitimate use of physical force within a given territory is frequently accepted as an analytical startingpoint and illustrates the apparent conceptual connection between the state and the police: It is through its policing institutions that the state exercises one of its characteristics, the monopoly of coercive power. However, although legitimacy is incorporated as an ingredient in the definition of the state, we still need to establish, by theoretical arguments, what makes the use of force legitimate and why it ought to be monopolised.

I shall claim that the political and theoretical tradition most relevant to the task of answering these two questions is *liberalism*. However, there are many versions of liberal theories, and it would be a mistake, as Stephen Holmes (1991) has effectively pointed out, to identify liberalism with "a crusade to restrict state power". Actually, John Rawls, the most influential of contemporary liberal philosophers, only occasionally refers to the concept of the state in **A Theory of Justice** (1972).

Of course, there are many ways of classifying the plurality of liberal theories. For instance, Rune Slagstad (1981) distinguishes between the individualistic perspective of English liberalism from Locke to Mill; the sociological onlook of French liberalism (Constant, de Tocqueville); and the constitutional point of view of German liberalism from Kant to Kelsen. Given the plurality of liberal theories, it would be unwise, I suppose, to embark on a general analysis of legitimacy and the monopoly of coercive power.

Consequently, I shall restrict my focus to an analysis of the *libertarian* theory of rights found in Nozick`s **Anarchy, State, and Utopia** (1974). The legitimate state, Nozick maintains, is a police state in the sense that it can have no other task than the protection, ultimately by the use of force, of Lockean rights. However, I shall argue that Nozick`s *justification* of the protective state in part I of **Anarchy, State, and Utopia** provides a valid *minimalist* theory of policing and the monopoly of coercive power which is independent of the much more radical and controversial claim elaborated in part II that a more comprehensive state necessarily violates people`s rights.

5 Chapter IV: Policing and the Moral Resolution of Hard Cases (30 pages)

Even if it is tentatively presupposed that the justification of the normative framework elaborated in the preceding chapters succeeds, this is only part of the story, due to the fact that policing is characteristically confronted with hard cases that do not easily fit into normative frames or escape subsumption under rules. Rules, for example, might be sparse and fragmentary, as in order maintainance, or unclear, as sometimes is the case in criminal law and criminal procedure. In addition, resources are limited and choices about priorities are inescapable. *Discretion*, then, is unavoidable in much police work and, in the words of David Lyons, "constitutes a "window" through which moral standards might help determine what the law requires and allows" (Lyons 1984: 87).

In chapter IV I shall consider two theoretical approaches to discretion and hard cases, the view defended by Herbert Hart in **The Concept of Law** (1961) and the position developed by Ronald Dworkin in **Taking Rights Seriously** (1978) and **Law`s Empire** (1986). According to Hart, a legal system consists in the union of primary rules regulating conduct and secondary rules making possible the authoritative identification of primary rules and enabling institutions like the police to pursue particular courses of action. Because rules are general and "open textured", the discretionary resolution of hard cases must frequently invoke *extra-legal*, *moral* considerations. In an influential critique of Hart, Dworkin objects that there is more to a legal system than a hierarchy of rules: because *principles of political theory* are at the very heart of a legal system, legal reasoning cannot simply be understood as syllogistic conjugations of rules and factual premises. The moral resolution of hard cases, then, is not extra-legal; it is within the realms of "law`s empire".

Although the controversy of Hart and Dworkin primarily refers to adjudication by judges in court, I shall argue that their theories are highly relevant if one wants to achieve a proper understanding of discretion in policing. This is because much policing might be looked upon as informal adjudication, as indicated by the titles of two modern classics in police research, **Justice without Trial** by Skolnick (1966) and **Police: Streetcorner Politicians** by Muir (1977). Moreover, empirical studies within the tradition of critical criminology have raised the question whether discretion by the police really means *discrimination*, in particular against ethnic minorities and the economically and socially disadvantaged. This question is important, and the findings of the research that have attempted to answer it are clearly relevant. I shall claim that a theoretical analysis

of discretion might contribute constructively to the debate on police discrimination spurred by critical criminology.

6 Chapter V: The Use of Force: a Case Study Approach (50 pages)

In the fifth chapter I shall take the theoretical discussion in the preceding chapter one step further and analyse Norwegian court cases involving the use of force by the police. The legal framework regulating the use of firearms, for example, leaves much room for police discretion and is consequently open to interpretation in terms of the arguments and perspectives of the Hart/Dworkin-controversy. The selection of court cases, supplied with materials from the Police Complaints Authority, for closer scrutiny should not be taken to imply, however, that the moral dimensions of police discretion are absent in routine and everyday policing.

My reasons for doing case studies on the controversial rather than the more "trivial" aspect of police work are *methodological*: When cases are taken to court, judges are under an obligation to justify their decisions in public. In addition, public debates are frequently provoked and official inquiries are sometimes conducted to assess whether the police have operated within the limits of the law and to what extent their operational dispositions have been sound. This fact is fortunate and makes an analysis of the normative validity of legal and moral deliberation much more feasible.

7 Chapter VI: The Challenge of Private Policing (35 pages)

In the sixth and final chapter, I shall confront liberalism with the challenge of private policing. In an important book published in 1992, **The Rebirth of Private Policing**, Les Johnston convincingly demonstrates, by historical reconstructions as well as detailed analysis of current developments, that policing are undertaken by a mixture of public, private and quasi-public agents.

The fact of private policing, Johnston argues, has implications for how we should conceptualize power and authority and calls into question the crucial liberal distinction between "public" and "private":

> "In fact, the rebirth of private policing forces us to reassess the conventional distinction between "public" and "private" spheres, so often taken for granted in social and political theory" (Johnston 1992: vii).

Is this claim true? How should liberal theory deal with the fact of private policing? In Norway, the challenge of private policing has been adressed by two expert commissions issuing reports on "the role of the police in society" (1981) and the private security sector (1984), respectively. On the basis of these reports, the Ministry of Justice put forth a legal statute (1987) which was enacted by Parliament in 1988. Together, these documents attempt to define the legal scope and competence of the private provision of security. I shall reconstruct and assess the arguments in these public documents in terms of the liberal position defended in chapter III and the criticism of that position elaborated by Les Johnston in **The Rebirth of Private Policing**.

8 Methods and Research Strategy

I shall make use of *secondary data* generated by current research on policing where this is relevant and necessary. This is particulary the case in chapter I on policing as a subject of research, chapter II on force and violence and chapter VI on private policing.

Chapters III and IV will mainly be devoted to the hermeneutical interpretation and critical assessment of central works in philosophy of law, ethics and political theory.

Chapters IV and V require, moreover, careful analysis of public and semi-public *documents* of various sorts: Reports from the Ministry of Justice and expert commissions; law proposals from the Ministry, legal statutes enacted by the Parliament and statements made by the Parliament`s Justice Committee; articles in police journals and newspapers etc. Depending on the quality and relevance of these materials, it might also be necessary to conduct supplementary *informal interviews* with police officers involved in the cases to be analysed in chapter V.

The notion of "normative research" calls for a brief methodological commentary. I shall adopt a Rawlsian approach to ethics and normative theory. According to Rawls, the logic and methodology of normative research are basically the same as the logic and methodology of empirical research. From general normative theories and principles we deduce consequences by means of premises stating matters of fact and see how the consequences fit with our judgments in particular cases. General normative theories, like empirical theories of science, need support from "below", from our judgments, and our judgments from "below" are considered and adjusted from "above", in terms of the theories that might justify them.

This is *not* like moving in a vicious circle. Rather, a moving back and forth between theories and data, as described by the theory of the hypothetico-deductive method, aims at reaching a state which Rawls calls "reflective equilibrium" (Rawls 1972: 48), that is a state in which our theories match our considered judgements in particular cases. In the words of David Lyons,

> "...our moral knowledge, just like our knowledge of other matters, depends on how our judgments fit together and can be reinforced by further experience. That is the standard for knowledge in the rest of our lives. We can ask for no less here" (Lyons 1984: 35).

9 Supervision and Institutional Affiliation

Supervisors are professor Dagfinn Føllesdal, University of Oslo, and Senior Researcher Tore Lindholm at the Institute of Human Rights, Oslo. My aim is to submit a thesis (in English) on the legitimacy of force for the dr. art. degree in December 1997.

The project will be carried out at the Research and Development Unit, The National Police College (Oslo), where I have been working as a senior planning officer since November 1990. The project has been accepted by the College`s research board as part of the research program currently being worked out by the Research and Development Unit.

10 Deadlines

First drafts of chapters IV and II should be completed by the end of September and November 1994, respectively. I intend to collect data, read and write more or less simultaneously and shall structure my work along the following deadlines for the drafting of the remaining four chapters: May -95: chapter I; February -96: chapter III; December -96: chapter V; June -97: chapter VI. The final six months of the project period should be devoted to the editing and revision of the draft manuscript.

11 Presentation/Popularisation of Research Results

Since 1992 I have collaborated with Tore Lindholm at the Institute of Human Rights on giving a course in ethics for the students at the National Police College.

The ethics course at the National Police College no doubt provides an important opportunity to present and popularise, through lecturing and the production of written materials, the results from this project. In addition, I intend to publish articles in international journals like **Criminal Justice Ethics** and **Policing and Society** and Norwegian journals like **Politinytt** and **Lov og Rett**. Feature articles in Norwegian newspapers might provide another possibility of publication that should be explored. After completing my doctoral dissertation I shall look for a publisher willing to publish my manuscript.

12 Competence-building

At the end of 1991 I was accepted as an associate participant in The Norwegian Research Council for Science and the Humanities` (NAVF) programme on ethical norms and values. NAVF is now part of the recently established Norwegian Research Council (NFR). The programme`s most distinctive component is a series of doctoral courses which will increase the participants`

competence in research on ethical problems. So far, I have written eight essays which have been graded "satisfactory" or "satisfactory plus" and completed the following nine courses:

- Liberalism and its Critics (May 1992), with Charles Taylor and Stephen Holmes
- Introduction to Ethics (June 1992): Thomas Pogge
- Rawls` Theory of Justice (August 1992): Samuel Scheffler
- What Moral Philosophers should know about Economics* (November 1992): Aa. Hylland
- The Nature of Rationality (April 1993): Robert Nozick
- Discourse Ethics (September/October 1993): Mathias Kettner
- Law and Ethics (February 1994): David Lyons
- Law, Morality and Social Theory (April 1994): Jürgen Habermas
- Intention and Morality (June 1994): Michael Bratman

* no essay was written due to my full-time duties at The National Police College.

Moreover, within the frame of the ethics programme, a seminar network has been established, which will provide an excellent opportunity to present and discuss the various drafts of my thesis.

Chapters IV and V presuppose a firm grip on the legal basis of police work. Fortunately, the Faculty of Law at the University of Bergen offers a one-term intensive course on "police law", which is available to students from the other faculties. I intend to complete this course in November 1994. In 1985, I completed a similar course on the philosophy of law at the University of Oslo.

The Institute for Criminal Justice Ethics at the John Jay College of Criminal Justice, a specialized college within the City University of New York, offers courses in criminal justice ethics and is currently planning a training programme in ethics that can be employed by police academies throughout the USA. I shall explore the possibility of a one-term stay in 1995 at this institute, which no doubt is the most central forum in the world today for teaching and research on the normative dimensions of policing.

13 Bibliography (works referred to in the project sketch)

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