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Policing and Ethics with Ekow Yankah

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Policing and Ethics with Ekow Yankah

[music: Blue Dot Sessions, Gullwing Sailor]

Christiane Wisehart, host and producer: I'm Christiane Wisehart. And this is Examining Ethics, brought to you by The Janet Prindle Institute for Ethics and DePauw University.

On today's episode of Examining Ethics, legal scholar Ekow Yankah discusses the ways policing and state power affect every person living in the United States.

Ekow Yankah: There's a sense in which the police acting in our name, imposing unjust structures, ethically indicts our life, so long as those structures are in our name and we are not sufficiently dismantling them.

Christiane: Stay tuned for our discussion on policing and ethics on today's episode of Examining Ethics.

[music fades out]

Christiane: Police have had a fraught relationship with communities of color since the earliest days of law enforcement in the eighteenth century. Our guest today, professor of law Ekow Yankah, argues that police power has often been deployed in a misguided attempt to solve deep economic and social problems. And this typically comes at the cost of harming people from marginalized communities. Instead, he argues, we need to imagine healthy communities where police play a background role. Here's our interview on policing and ethics from the summer of 2021.

[interview begins]

Christiane: So a lot of times in the world of ethics, we talk about how something should work or how people should behave. So when we're talking about policing as it exists in the United States, how do you think it should operate?

Ekow Yankah: Policing ethically of course is a difficult question and one that lots of people have tried to answer. I think a couple things we can be sure of is that the way we police today is not a sustainable or ethical way to police.

First and most obviously, something to which I think most people should be able to agree, our policing often throws state power and punishment at deep social problems. Now, sometimes that's necessary as a temporary matter, if you have current, overwhelming violence in a neighborhood, you might need policing to deal with it. But what we know is that policing rarely

solves those deep ethical problems, and indeed our histories tell us that over and over and over, right?

In the poorest places where immigrants moved in, people forget once upon a time Italians were considered slum dwellers, or the Germans were suspicious. What we did, we invested in those communities, we allowed them to economically integrate and succeed, and of course we aimed our social and governmental and personal wealth at relieving the deep underlying social problems. We didn't police our way out of the slums of Little Italy or the Lower East Side. So one kind of question is what do we aim policing at and understanding that we can't police our way out of social problems.

The second is, I think in America, too often we think of policing as what did somebody do to violate another person's rights or did the police have the right to do this and we rarely think about the way policing affects entire communities and entire structures. One way to put it is we often take the benefits of policing without counting the costs, or we only think of the cost-benefit as individual rights kind of violations and we don't think well, if we're policing entire communities and arresting people and jailing them, what does that mean for this entire community. We've started to talk about that a little bit with mass incarceration. So I think that's one side of policing, the way we police ethically, including what we ask police to do.

We also shouldn't be shy to recognize that what we ask police to do is deeply affected by race in America. So lots of the things that we see as social problems when they affect the white community, we see as criminal law problems when they affect the black community and nowhere is that more evident, for example, than in our drug wars.

Now, I know there's a great and robust academic debate about the role drugs have played in, for example, mass incarceration. I think it's a really live debate, whether or not the drug wars are a mere contributor or the main driver's a serious debate, but here's what's not up for debate: when America has been faced with the most overwhelming drug epidemic it has seen probably in its history with the opioid epidemic, because that epidemic has been viewed as affecting white Americans, people next door, the Rust Belt, we have quickly changed our minds and come to see it as a social problem.

But what's clear is that the way we responded has been deeply affected by the fact we think, "Oh, nice, ordinary people, i.e, white people are being affected," and you saw none of that when the same drug problems for the same reasons hit the black community. That being said, I also think there's a second feature of policing which ethics does not focus on. I think one thing people have not thought much about is whether or not we can live ethical lives in the shadow of certain police structures.

I'll put the example just very plainly. It's very easy now to understand that if you live in 1855 Alabama, or Louisiana, there's a sense in which you just can't live an ethical life if your life is propped up by slavery, the brutality of slavery and the slave patrols that policed and terrorized

the black community. That is, even if you're trying to be a good person, even if you're not directly involved, the mere fact that you live under such unethical policing means that there's a real sense in which you are ethically indicted, there's a real sense in which it is difficult for you to live an ethical life because the basic structure is so deeply unjust.

If you live in 1955 Alabama in the Jim Crow era, or Mississippi, you have to understand even if you wake up, go to work, come home and try to take care of your kids, the fact that you live in such a racially unjust police state means that there's a real sense in which you can not live ethically. And it's also true if you understand that your wealth in New York in 1865 depends on poor immigrants being locked into a garment factory producing goods for you.

The basic idea is you understand that if you live in 1865, Alabama, or New York and you know that, say, Italian immigrants are being kept out of your neighborhood by police cracking heads on the Lower East Side, even if you wake up, go to work, try to be a good parent, there's a sense in which your life is being sustained by this incredible, cruel political structure and that makes it hard to imagine that you're living ethically if you're not dedicated to dismantling that. So I think that link between policing and ethics is rarely focused on. There's a sense in which the police acting in our name, imposing unjust structures, ethically indicts our life, so long as those structures are in our name and we are not sufficiently dismantling them.

Christiane: If you've just woken up somehow and you've realized what an unjust, cruel, unethical society we're living in right now, what role could or should the individual have in fighting injustice when it comes to policing in the United States?

Ekow Yankah: Obviously like most things, the big question is what are we going to do as political actors? The interesting thing is many questions of ethics are small scale questions, they're about how you treat people ethically, individually, or how you build a good life with things worth living. In this sense though, our ethical commitments and our political commitments, our political theory, have to be somewhat attached to each other. So part of what it means to live ethically in an unjust state is in what ways are you acting in your role as a citizen to alleviate those injustices. Sometimes it just means thinking more carefully about who you vote for and the things that they support. Is going along with the status quo because that's the way it's always been done an ethically defensible position?

And I think, by the way, this is one place where history offers a great deal of help. It can be very easy to say, "Well, it's not that bad," or, "What am I to do?" And I always try to think well, would we excuse the person who lived in 1955 Alabama who said, "Well, of course I'm voting for Wallace because sure I recognize these warts on him, but after all ..." No, we think that's ethically unsustainable. It's not just morally wrong, it's corrodes something in them.

So it could be who you vote for, it could be what causes you support, it can be lending money for those who can afford to, it can be writing letters or op-eds for those who are in a position to do so, it can be joining protests and marching. All these things we do as political actors I think are the main core way in which we try to change these things. But I also think in small ways they

can be ethical demands on us. They really are ethical because they reflect the way that we want to live, not our clear moral duties, so sometimes that means things like what things are you going to aim the police at with your private power. Put plainly, when you see certain problems, are you going to call the police and do you think calling the police will be a productive and right thing to do?

Now, obviously there are times when one ought to call the police, you're seeing violence occur in front of you. But there are a lot of times when you see a social problem, you see increased drug use in your neighborhood park, should you call the police? It's a much tougher call to me. Should you call the police or should you start trying to gather up your neighbors to think about how you could build social help? If you think calling the police will just lead to those same people being essentially gathered up and thrown someplace else without any real help, that's an ethical moment. That's an ethical moment about how you will deploy the power of the state.

You see something going on in your local school, you're now in the PTA meeting, it's very tempting to say, "Let's just call in more police," but part of what you're ethically required to do is to think, "Will that really solve this problem or will that perpetuate this problem by just adding a layer of state threat?" I think those are all ethical questions, not just moral questions. There are things that you're permitted to do that you ought not do and these are moments that call those kinds of things into question when it comes to policing.

Christiane: I'm white and so a lot of the people in my social world or a lot of people around me, calling the police is often a way of dealing with discomfort rather than a lack of safety, and so a check that I always have, as somebody who was raised to be comfortable with calling the police, is am I uncomfortable or am I actually in a truly unsafe situation where my life is in danger or somebody else's life is in danger?

Ekow Yankah: There's no question and part of that, we have seen, especially over the last couple of years and particularly with this strange new world in which everybody carries a video camera that we're suddenly seeing that ethical border and how often it's abused. Now, just to be plain spoken, black people have known this for a long, long time, the way in which the police are often used to enforce, as you so well put it, mere discomfort. You're at a park, one group wants to play soccer and grill, you would rather have it be quiet and drink your rosé and suddenly that normal social tension turns into a policing moment.

What was that about? That's not about policing, that's about one group demanding deference over another, and typically a white group saying, "I would like you to behave as I would want." But look, it's a park, some people want to ... some people want to have it be quieter. There's nothing weird about that disagreement, what is strange is deciding that you should cast your hand and elevate the stakes.

Those are ethical decisions, right? Those are decisions about how you allow power to affect the way you think people should interact with you, that changes the kind of character you become.

We use technical terms like white supremacy, but they sound awfully grand and powerful, when ethics gives us a nice way to look at that in a small way. What kind of character are you becoming that you believe that policing is something at your disposal to impose, not just order, but your order.

Christiane: There's oftentimes a misunderstanding about the amount of power that police actually have in this country and I think as you mentioned before, the black community very much understands how much power and what type of power and state force is behind the police. So could you speak a little bit more to that.

Ekow Yankah: I think it's an interesting question, do people misunderstand the power of the police? I'm not sure, I'm not sure. I think if we want to talk about ethical behavior, I think what we see is something closer to recklessness or negligence or maybe willful blindness. Let's take one of the most famous examples of casual police abuse in the last five years, so that would be Amy Cooper, the Central Park dog owner who met Mr. Cooper the birdwatcher. This is actually a story that touches upon exactly what we're talking about.

She was breaking the rules, he was upset about it because it scared off his birds. In a city of eight million people this is going to happen. She probably shouldn't be breaking the rules, I think there's nothing wrong with him enforcing the rules, but notice he didn't elevate it to the level of policing. His behavior wasn't totally impeccable, he says, "Look, if you're not going to behave, I'm going to show you, I'm going to make you behave," he's reaching for a dog treat. What he intimates is I'm going to put the leash on your dog for you or something like this.

She of course either decides or reads that he's threatening her life. I think we all know that she didn't really think he was threatening her life, she was just upset that he was demanding that she behave. To bring the point really home, he's also there with his sister who's videotaping the entire incident, so the idea that she really thinks this man is going to kill her in broad daylight with his sister next to her is so absurd as to not deserve any real consideration, right? She calls the police and she grows theatrically hysterical saying, "This black man," and says, "this black man is threatening my life."

And so one question is do people not know the power of the police? I don't know. I remember in the public storm immediately afterwards, lots of people said, "She was trying to kill him," I think that's hugely implausible. She's not trying to kill him, what she is willing to do is to call the police to enforce her comfort, to push back on some black man holding her accountable, making her follow the rules when she doesn't feel like it, and she's willing to throw state power into the mix, policing power in the mix, in this hysterical, highly dangerous way, ignoring what might happen.

And then if something were to go wrong, i.e., the police were to shoo him off, she'd be satisfied, if the police were to wrestle him to the ground, she'd be ... If something were to go really wrong, the police were to beat him or kill him, maybe some dark part of herself would be satisfied, but what she would really affect, I presume, would be this incredible naivety, this negligent, "Oh,

who could have seen it coming? Oh, who knows?" And that's the kind of cavaliness that she's allowed to have, a kind of, as I say, either recklessness, negligence or willful blindness.

Christiane: Could you also maybe talk a little bit about the Fourth Amendment too, because I feel like that has to do with the relationship between policing and power in the United States.

Ekow Yankah: The questions about the Fourth Amendment are important and in particular to legal scholars because as your listeners may know, the fourth amendment is what sets a bar for what counts as reasonable behavior of police and then of course each state has its own Fourth Amendment and can interpret that individually, so long as it does not violate the constitutional Fourth Amendment. And so those tend to tell us what police can do when they are reasonable in searching or seizing people and they do draw limits on policing power.

That being said, one of the things that frustrates those of us who teach the Fourth Amendment is, first of all, and this is true even in our Fourth Amendment jurisprudence which often puts an emphasis on the rules being clear so they can be followed by police officers who have to make often fast decisions, my students who take six months of Fourth Amendment law in criminal procedure know vastly more about the Fourth Amendment than your average police officer. My students spend more time learning about the Fourth Amendment in law school for one semester, which for many police departments would cover the entirety of police training, six months, a year on the outside. One of the things that frustrates my students is that we start off with this robust Fourth Amendment and throughout the semester I then teach them exception after exception, after exception. And I tell them this at the beginning of the semester, "By the time we're done, you're going to be frustrated, you're going to wonder if the exceptions obviate the rules. Some of you will blame me, though I assure you I did not do this myself." And so that the amount of restraint the Fourth Amendment actually applies is remarkably little.

And lastly, police officers often don't care about the Fourth Amendment. Police officers often just ... I don't even mean this cynically, I don't mean they're out to violate it, a police officer faced with a beat often is not thinking in terms of a justifiable arrest that will stand up in court and lead to conviction. If you talk to police officers, if you interview them, all the research on this, police officers view themselves as doing one of two things, managing social conflict and getting the bad guys. And frankly, often they're doing so because we've put them to this task. The wealthy neighborhood has said, "We don't want these guys here anymore, take care of it." And the fact that as a law professor I'd have to think very long and hard about exactly what Fourth Amendment regime applies here, whether this is just community care taking, those niceties are not important to the police officer. He knows his job, his job is to manage the social conflict in this neighborhood.

Let me put it simply. I don't think citizens can just avail themselves of saying, "I don't know what's happening, I'll let the law do its work here. It's not my fault, it's the fault of the Fourth Amendment or something like that." One of the problems of having a legal structure which is not

working well is that one of the things we count on the law to do, which is carry some of our ethical burden, can't be done.

Christiane Wisehart: There's a side of people or a group of people who would say that it's pointless to talk about ethical policing, policing itself can never be ethical and what might you say to those people?

Ekow Yankah: So while modern policing is new, what I would say is I do not know of any political community in my historical research that has not had to have a way of dealing with those who are violently antisocial. Punishment is not a new phenomena, punishment is as old a phenomena as there is, so in that sense, I think we're unlikely to get rid of policing entirely. There are some people whose violence and antisocial behavior means they can't be among us, or at least they can't be among us for some time. If your response to somebody cutting you off in traffic is to open fire on a car, you can't be among us, you're not ready to be a citizen, we need to make sure that we're safe from you.

That being said, where I do deeply agree with those who make a claim like policing can't be ethical, if I don't agree with the most extraordinary version of that view, what I do agree with is in our imagination of a healthy ethical society policing is a very distant kind of project. As a friend of mine once put it very elegantly, when you think of your dream community, whether it be an incredible city, living downtown among shops and cafes, a small college town where you walk among the buildings, or a quiet rural suburb, you think about the trees, the parks, the culture, the nature, whatever you think about, it's rarely the case that when you think of this ideal community you're thinking about the police.

When you think about your dream town, do you see a police officer in it? And that's not to say you wish the police away it's to say that the impulse when you're thinking of how to build a healthy, wonderful, vibrant community is to build it such that the police play as little a structural role as possible. That is a very natural impulse and there's something sad and disappointing about the fact that so many people can't imagine that for our distressed communities.

When we think of our distressed communities, people think, "Oh, and then they need police to keep everything in order," rather than what we all naturally do for ourselves which is think, "How can we build this community to be healthy enough that the police play a quite background role?" And we should not lack that imagination for our poorest communities, our black communities, our brown communities.

Christiane: If our listeners are curious about more of your work and more of your work in this vein of the relationship between policing and ethics, where might you point them?

Ekow Yankah: I've written several articles on policing, in particular the question of whether or not policing should be only focused on individual rights or whether or not policing should think more about the cost of policing to our sense of equality. That piece called "Pretext of Justification" is a highly technical piece on Fourth Amendment law and philosophy.

But a more accessible piece that I might offer would be a piece I recently wrote on “Whose Burden to Bear” it's called. That piece deeply links to our question about ethical policing because one of the arguments I take up there is that we so often think about policing as unjust for minority communities and then we ask what rights or burdens do those minority communities have, what obligation do they have to respond to this unjust policing and I think that's just the wrong question.

We don't think the question about the Nazi occupation of Warsaw and the Jewish ghetto to be a question of what should the Jews have done in that ghetto. But the obvious question is what should Germans have been doing about the occupation of the Warsaw ghetto, what are your obligations as a citizen of a state that's acting unjustly in your name.

So in that article I explore the question of what should those of us who have the privilege of wealth, political connections and racial privilege be doing to dismantle unjust policing. Should we call the police on this crime, if we genuinely believe it's a crime of poverty? Do we call the police on somebody who's working under the table when we know that they're working under the table because they live in communities that are treated unjustly by the state? There are times when it's obvious it's the right thing to do, to call the police, but there're times when you really have to think is it worth what's going to happen to this person to involve the police.

I don't think there's an easy answer to this, I'm not trying to be Pollyannaish about it, but the article tries to explore the hard questions of when it is our burden to bear the kinds of interactions people have with the police under unjust conditions.

Christiane: Why do you care about this? Why is policing something that you have focused much of your work on?

Ekow Yankah: I think there are a couple of answers to this. One is an intellectual passion, which is not surprising for somebody who does political theory. I think policing is in some sense the sharp end of our political philosophy. It might not even be the most important thing we do. How we build structures of just housing, of employment, of civil rights, of education, all those things are probably in a sense more fundamental, but policing is where we cash out our thoughts about what the state is permitted to do in a true rubber-meets-the-road kind of way. Policing is when we say what is it that we so believe that we are justified in doing that we will allow large men and women, who are armed, to enforce this and throw you in a cage. I think that is a question that deserves a huge amount of attention, and so that's the kind of intellectual passion that makes me care about it.

But of course the others, they're just deeply personal reasons. I think policing is something that, as I've said, deeply implicates my ability to live ethically in my society. Whether or not we are policing our way out of some problems just reflects on the kind of society I am the citizen of, that these are the police that are called to do things in my name.

Third, as a young black person ... Well, I should be more clear. I am less young now, but I'm still black. As a rapidly middle aging black man, I think policing has these deep effects on not just my community, but on who I am. A country in which black people are seen as the natural object of policing means that all black people feel themselves to be policed in a sense. And I don't want to be melodramatic about it, I've had some financial success, I've had enough academic success, I move in class spaces where I am not under great distress, indeed, I'm quite privileged in my class.

But what is true is it doesn't take very much for me even as my walking around to be an object of suspicion, or frankly almost every black person and certainly every black man I know has internalized ways of constantly signaling that they shouldn't be an object of suspicion. So you spend a lot of psychological energy in the back of your mind in a sense warding off the threats of being considered a black criminal. And all of those things and the kind of psychological cost those impose and frankly the anger they impose, not from my life which has turned out well. But one funny thing, once you have children is that things you were willing to bear for yourself, you are unwilling to let them bear. And so those things make this a passion of mine, that my children ought not grow up relating to police in the same way we have, that I at least in my very obscure academic way chip in, in the way that generations before me chipped in such that policing is less onerous for me, that I ought to contribute my little bit as well.

[Interview ends]

[music: Blue Dot Sessions, Gullwing Sailor]

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