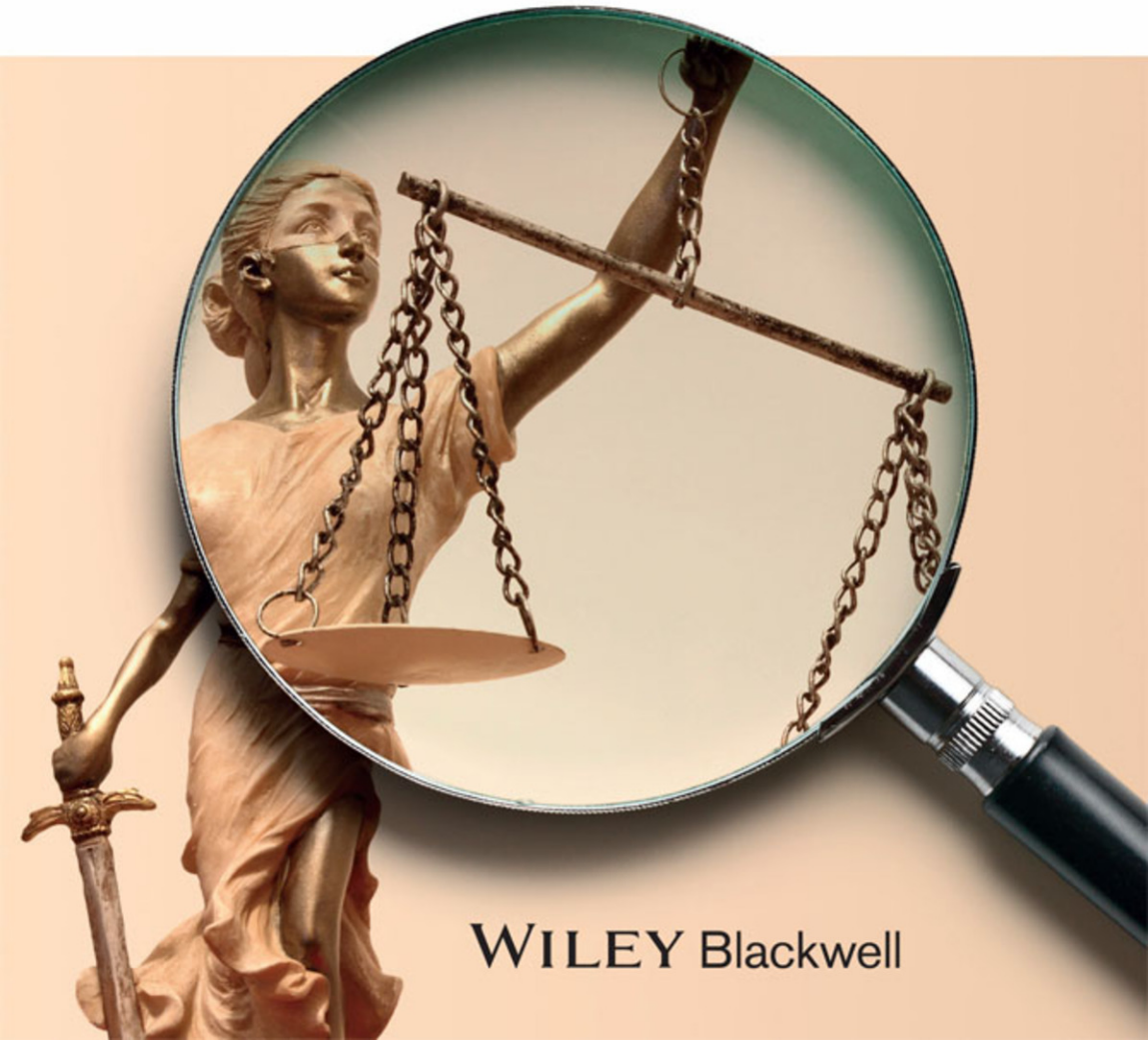
SEUMAS MILLER
AND IAN A. GORDON

INVESTIGATIVE ETHICS

ETHICS FOR POLICE DETECTIVES AND CRIMINAL INVESTIGATORS



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Investigative Ethics

Ethics for Police Detectives and Criminal Investigators

Seumas Miller and Ian A. Gordon OBE QPM

WILEY Blackwell

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In memory of John Blackler APM (1933–2010) a former police officer in the New South Wales Police

Contents

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Introduction
Ethics and the Role of the Investigator

This book is an applied philosophical study of some of the main ethical issues that arise in the context of investigations of crime by police detectives. As such, it is not a general guide to best practice in police investigations, so it will not provide novice investigators with technical expertise.[1] Nor is it a contribution to ethical theory *per se* – although it does offer philosophical theories of various aspects of criminal investigations, for example, knowledge as the defining occupational end of detectives, and the collective moral responsibility of detectives, prosecutors, jurors, and others for the outcomes of trials in the context of what we refer to as the "chain of moral responsibility." It will not, therefore, enable novice philosophers to become advanced ethical theorists either.[2] Rather it occupies the conceptual space where ethics or morality and police investigations intersect, and it attempts to shed intellectual light on some of the practical ethical problems in that space. Accordingly, if the book succeeds, it will assist police investigators to have a greater understanding of the ethical underpinnings of their work, and to reflect more profitably on the ethical issues that arise in the course of it. Moreover, it might coax more philosophers to seriously engage with criminal investigators and the complex and important ethical and philosophical problems that their work gives rise to.

While the book is serviceable as a text both for graduate and advanced undergraduate students and for police detectives, non-police crime and corruption investigators, and other criminal justice practitioners, it does offer an array of novel arguments, ethical analyses, and philosophical perspectives. This was inevitable given the paucity of scholarly work in investigative ethics and given, also, the intellectual complexity of many of the issues. We

Investigative Ethics: Ethics for Police Detectives and Criminal Investigators, First Edition. Seumas Miller and Ian A. Gordon.

leave it to others to judge whether or not the content of the book is sometimes illuminating rather than merely novel.

Investigation

Combating crime and corruption and enforcing the criminal law involves conducting criminal investigations. The categories of crime in question include crimes against the person such as homicide, rape, and assault (Chapter 5), and property crimes such as theft, burglary, and fraud (Chapter 6). Terrorism (Chapter 7) is a crime that is typically a crime against the person (detonating a bomb in a crowded train and thereby murdering innocent passengers), a property crime (destruction of the train carriage) and a political crime (committed with the intent of undermining the authority of the state). "Corruption" (Chapter 8), on the other hand, is a generic term that covers a wide range of moral offenses that are not always crimes, that is, legal offenses. (For the distinction and relation between the law and morality, see Chapter 1.) These offenses include bribery, nepotism, cheating, and abuse of authority. Our discussion in Chapter 8 focuses on police corruption.

In contemporary settings, the investigative capacity typically resides with the police service and, for major crimes, criminal investigation units within the police service. However, large public and private sector organizations often have their own investigative units, for example, fraud units, and in many jurisdictions bodies with the specific responsibility to deal with corruption have been established, for example, independent commissions against corruption.

Criminal investigators require knowledge (e.g., of the law), skills (e.g., how to conduct interviews), and experience (e.g., of efficiently and effectively conducting a successful investigation leading to prosecution). They also have to have legal powers, such as the power to question witnesses and suspects.

The various specialist areas within criminal investigation, like homicide, drugs, and terrorism, all require the exercise of generic investigative skills that are transferable from one area to another. However, each of these areas also requires a degree of specialized knowledge – for example, knowledge, on the part of drug investigators, of specific drugs and their means of production and distribution. Moreover, with the advent of computers, the growth of transnational organized crime, and so on, there is a greater need for specialized knowledge. Increasingly, therefore, investigators are required to undertake formal training and education programs.

The ethical issues that arise for criminal investigators are manifold. They include: investigative independence (Chapter 4); the use of criminals as

informants (Chapter 9); deception and the infringement of privacy rights in surveillance operations (Chapter 10), profiling (Chapter 5), undercover operations (Chapter 11) and the use of traps or "sting" operations (Chapter 11); and the use of deception and/or coercion in interviewing (Chapter 12).

Prior to the nineteenth century, law enforcement agencies had no detectives as such. Indeed, in the United Kingdom, the United States, and elsewhere people were deeply suspicious of the notion of a detective, or at least of those people who undertook some of the kinds of work associated with the modern detective. These early forerunners of the detective were, for the most part, entrepreneurs working for themselves, and they undertook a variety of forms of investigative work. They functioned as informants for the public police service, thief takers (a kind of bounty hunter), and agents provocateurs (who infiltrated and trapped suspects, including underground political groups).

The public, the government, and the ordinary police were understandably unhappy with these private entrepreneurs who often used dubious methods for private, or even political, interests. At the same time it was acknowledged that they played an important investigative role or roles.

Accordingly, in the second half of the nineteenth century in England – partly at the instigation of Richard Mayne, who was (jointly with Charles Rowan) the first commissioner of the Metropolitan Police,[3] a new vocational role was carved out, namely, the role of the detective. Moreover, it was a role destined to attract an enormous amount of attention from writers and film-makers. The image of the modern detective, far from that of his or her contemptible forerunners, is one of glamour and mystique. Indeed, even in reality detectives have often come to see themselves as an elite group within police services. Investigative agencies, such as the Federal Bureau of Investigation (FBI) in the United States, are known worldwide and have been the subject of numerous films, TV series, and the like.[4]

Here it is important to resist stereotypes and self-serving images, and focus on what the role of detectives ought to be, both within the police organization and within the wider criminal justice system. Note also that we are distinguishing between the *de facto* role and the role as it ought to be. (On these matters of occupational role see Chapters 1 and 2.)

There are a host of questions about the optimal forms of organization for police services. This has led to various institutional design initiatives. Thus there has been, and there continues to be, restructuring of criminal investigations departments/bureaux for purposes of specialization (e.g., into organized crime units), decentralization, a strengthening of the investigative capacity of patrol police (e.g., team policing) and (at times) a reinforcement of accountability (e.g., breaking up perceived powerful and/or corrupt detective groups). The desirability or undesirability of particular organizational changes is not our concern here. Suffice it to state the obvious. The

best organizational structures and mechanisms of cooperation are those that facilitate the purposes of, in this case, criminal investigations. Restructuring ought not to be simply the vehicle of some internal or external factional or political interest.

Particular organizational structures and cultures can either facilitate or impede police work, including criminal investigations work. For example, an "us–them" mentality can set police management against operational police, patrol police against detectives, and so on, thereby obstructing effective policing.

Again, the need for, and the dangers of, police discretion are things that organizational structures and mechanisms must accommodate. Curtailing discretion can simply disempower police. On the other hand, wide discretionary powers, especially in a context in which there is a lack of accountability in respect of their use, can be a recipe for disaster in high-risk areas, for example, corruption in drug investigations work.

In addition to the utility of particular forms of organization for criminal investigations within the police service, there is the question of the role and organization of criminal investigations in the larger context of the criminal justice system.

Principles of justice are inevitably imperfectly embodied in specific criminal justice systems and in the actual practices of criminal investigators. Arguably, the current criminal justice systems in the United States, United Kingdom, Australia, and elsewhere are in need of significant redesign in a number of respects. For one thing, certain kinds of crime, including in the drug and fraud area, are not being adequately combated. For another, incarceration rates over the past few decades appear to have risen inexorably in, for example, the United States, and yet the prisons in question do not seem to be having the required level of rehabilitative effect on offenders. Public concern in relation to the efficacy of contemporary criminal justice systems is manifest in the more focused criticism often directed at the adversarial character of criminal justice systems in the English-speaking world in particular.

Lustgarten gives this characterization of the adversarial system as it operates in the United Kingdom.[5]

> The English police operate in the context of an adversarial not an inquisitorial system. . . . In practical terms, this means a system in which the trial is of much greater importance. . . .The trial is governed by rules erecting relatively high evidentiary barriers to conviction: in the adversary system, 'there is a greater divergence between what the police actually know and what can be introduced as evidence at trial.'[6] Moreover, the verdict of that trial is reached by persons without legal training who, unlike mixed continental tribunals, need not give reasons for their decision. Thus the English police take an avowedly partisan stance in a system in which partisan contest is supposed to

> produce truth. And the evidentiary barriers reinforce bureaucratic and resource imperatives of avoiding trials in the vast majority of cases by producing guilty pleas. . . . This gives the English police substantially greater incentive to seek a confession from the suspect; more generally and ominously, it would seem to be a constant pressure leading them to overstep their powers against those they 'know' are guilty.

This adversarial system impacts on investigative attitudes and practices. Specifically, it may well be that there is – and many have claimed that this is, in fact, the case[7] – a tendency to forego even-handed, objective inquiry into the truth in favor of simply gathering evidence to establish guilt within the rules of the system. Even-handed, evidence-based testing for truth is a matter for the court, it is held. By contrast, the detective's job is, on this view, to "win" by ensuring the prosecutor has a sufficiently strong case to guarantee a conviction. Whether or not this tendency exists is in the end an empirical matter and needs to be settled on the basis of empirical evidence, rather than a priori judgments.[8]

In the United States, in particular, the picture is somewhat complicated by the large proportion of cases that are settled by plea bargaining: "winning" might now consist quite often in ensuring a conviction for a lesser charge or for only some of the offenses a suspect has been charged with.

The more general point to be made here is that investigation, including criminal investigation, takes place in particular institutional contexts, and those contexts shape and influence investigative attitudes and practices and, indeed, the likelihood or even possibility of successful investigations. The former point has already been made in relation to institutional structures within a jurisdiction, for example, the adversarial system in the United Kingdom. The latter point is obvious in relation to institutional resources; other things being equal, an under-resourced fraud squad, for example, is unlikely to have the same degree of success as a well-resourced one. But the point is also relevant to investigation units operating in transjurisdictional, and especially transnational, settings. If the tax avoidance, bribery, fraud, drug production/selling and so on in question is transnational, and conducted on a massive financial scale by powerful corporations or criminal organizations in cahoots with corrupt governments, then the best efforts of even well-motivated, relatively well-resourced, highly competent, state-based investigators may well be doomed from the start (Chapter 6).

A recent specific exemplification of this problem is that involving Prime Minister Tony Blair's interference with the UK Serious Fraud Office's criminal investigation into the British aerospace (BAE Systems) arms bribery scandal (Chapter 4).[9] More generally, consider the 'dirty money' that continues to flow from the exploitation of mineral resources in impoverished African states notwithstanding the enactment of various counteractive

international agreements, for example, in relation to "conflict diamonds"; or the international money-laundering activities of drug cartels, such as the Mexican-based cartels. The latter evidently used the multinational bank HSBC for this purpose over a 10-year period resulting in a US$1.9 billion fine for HSBC for failing to have in place effective anti-money-laundering measures and for failing to conduct due diligence on some of its account holders. However, the drug cartels continue to launder their money and, as for HSBC, it retained its license to operate having in effect been deemed "too big to fail."[10]

Outside police organizations investigators operate within both the private and public spheres. In the public sphere they are attached mainly to government bureaus such as welfare agencies, but also to tax offices, finance departments, defense departments, and so on. In the private sector investigators are attached to such industries as insurance, banking, law, debt collection, security, stockbroking, and many more. Indeed, we might say that investigators are required in any situation where an individual is in a position to engage in unlawful conduct or to unjustly gain some advantage over someone else. Of course, typically this will involve gaining some material advantage over another, as is the case where a person defrauds or blackmails another person or organization. However, investigators may also be needed where the issue is not material gain, such as illicit monetary gain, or not just that kind of gain. There are cases, for example, of sexual harassment or of bullying in the work place that come under this heading.

Investigators must tailor their activities to the needs of the institution that they serve, for example, a police organization or (more broadly) the criminal justice system. However, these institutions are quite diverse. Obviously an investigator within a large corporation will not only be motivated by his or her specific occupational function within the institution – to see to it that it functions properly in this regard, that its employees, for example, comply with the law – but the investigator will also probably recognize the reputational interests of that corporation. Or in the government sphere an investigator in, say, the social welfare area will recognize not just the needs of a disadvantaged citizen but also the need to insulate public funds from unscrupulous "welfare" claimants.

A further point to be made here is that, in the context of the Global Financial Crisis (GFC) and its aftermath of large government debt, the financial constraints on police organizations and other public agencies responsible for investigating criminal conduct are severe, and the process already underway in many jurisdictions in the United States, the United Kingdom and elsewhere of subcontracting elements of this function out to the private sector is likely to accelerate. This may well exacerbate the problem mentioned above of tensions between investigative ends and organizational goals.[11]

Ideally, members of occupations such as investigators should internalize the fundamental ends that define, or at least ought to define, their particular ongoing task. In the case of criminal investigators, as will be argued in Chapter 2, the fundamental defining end is the truth – or at least knowledge in the sense of justified, true, stated belief. Moreover, the knowledge in question – the who, what, when, where, how, and why of a crime – is not simply the defining end of investigative activity, it is the regulative ideal,[12] indeed the morally desirable end, that investigators morally *ought* to be aiming at. An investigator who abandons the pursuit of the truth in relation to some crime in favor of, for example, "framing" a suspect whom he or she despises, corrupts the investigative process by undermining its fundamental moral purpose, namely, to determine the truth.

This process of internalization of defining occupational ends may only be implicit. These ends can guide the actions of investigators even though investigators are not explicitly aware that they do. Most important, they must identify with these defining ends. That is, their self-worth must come to depend in part on their capacity to realize them. The good teacher is one who not only has a capacity to impart knowledge but who also suffers a loss in self-esteem when he or she fails to exercise this capacity successfully. Similarly, the good investigator is one who not only has a capacity to detect illegal activity but also suffers a loss in self-esteem if he or she fails to do so.

Practitioners are defined, in part, not only by the end at which their efforts ought to be directed, but also by the characteristic activities that members of their occupation engage in, or ought to engage in.[13] When members of an occupation habitually engage in these desirable activities in the service of the proper ends of that occupation, they are said to possess the virtues of that occupation. Accordingly, investigators need to have the virtues of a commitment to truth, capacity for systematic reasoning, suspiciousness, a capacity to win the trust of people from different walks of life, and so on.

Naturally, the possession of investigative virtues and/or vices is in part dependent on features of the operational and institutional investigative environment. Such features include organizational goals, for example, to reduce crime, and the subcultural attitudes and values within which the investigator works, for example, a results-driven, "bend-the-rules" mentality.

On the one hand, investigators can be in a difficult position by virtue of being, for example, under-resourced agencies confronting well-resourced corporate organizations. Moreover, in the case of investigators employed by some large corporations, in particular, there can be issues of investigative independence. To what extent is investigative independence compromised, for example, when the subject of their investigation is a very senior person

within the organization that employs them? Nor is the issue of investigative independence restricted to commercial organizations; political interference in publically funded police organizations is a very real and ongoing concern in many jurisdictions (see Chapter 4).

On the other hand, investigators and the agencies they work for are often in a very powerful position. They have access to an enormous amount of personal information, which could potentially be used to violate the privacy of citizens and employees (Chapters 3 and 10). Indeed, developments in information and communication technology have enabled a degree of access that is at times morally problematic. Consider, in this connection, the recent revelations concerning the collection by the US National Security Agency of the daily call records of millions of customers of Verizon and other telecommunication providers (see Case Study 3.2.3 in Chapter 3.)

By virtue of their crucial role in the effective handling of serious criminality, investigators are sometimes subject to significant pressures to engage in unethical conduct themselves. Accordingly, it is very important to have accountability mechanisms in relation to investigators and their agencies. Thus investigative offenses should be set down in legislation, there should be an independent authority with powers to investigate investigators in relation to serious criminality, and the provision of specific penalties (such as the loss of pension entitlements and other benefits, or even imprisonment), for investigators found to be corrupt.

As with most occupations, success or failure can impact positively or negatively on the dispositions and behavior of investigators, and these dispositions and behaviors can in turn impact on the likelihood of investigations succeeding or failing. Other things being equal, a well-trained and experienced investigator who is supported by his or her community (e.g., through the provision of information), employing organization and superiors (e.g., through the provision of adequate resources), is more likely to succeed and, therefore, less likely to develop dispositions or behaviors that are inimical to success. That said, notoriously in the history of policing there have been elite detective units that have bent or broken the rules, seen themselves as above the law, and ultimately engaged in serious and ongoing corruption (Chapter 8).

Obviously, investigators rely on victims, work colleagues of offenders, and ordinary citizens to report crime. However, there are other sources of information in relation to criminality that investigators can use to assist them in their task. The advent of computers has seen the capacity to record and track financial transactions accurately and speedily increase on an unprecedented scale. Countries such as Australia have stringent and elaborate arrangements for controlling the operation of accounts in financial institutions, as well as requirements for reporting cash transactions over a certain limit, identifying and reporting suspicious transactions, and moni-

toring all overseas money transactions. These provide an invaluable source of information that can be used to detect corruption and assist in its prosecution. As is the case with many of the mechanisms for dealing with criminality, transaction analysis is a very beneficial tool, but it comes at a moral cost: it impinges upon the privacy of members of the community. For transaction analysis involves vast amounts of information on citizens' financial activities being recorded and transmitted to enforcement agencies. We consider these important privacy issues in Chapter 3 and, especially, Chapter 10.

Ethics and Morality

Ethics or morality is about what actions an individual person or member of an occupation ought to do, and it is about what kind of character he or she ought to have. It is also about what features the organizations that employ members of specific occupations ought to have and, at a more fundamental level, what organizations there ought to be. These latter questions, or sets of questions, pertain to what might be referred to as institutional ethics, as opposed to the ethics of individual behavior and attitudes outside institutional contexts. Our concern in this monograph is principally with institutional ethics and, in particular, with the ethics of a specific occupational group, namely, criminal investigators. No doubt institutional ethics in this sense is directly or indirectly concerned with the behavior and attitudes of individual human beings; however, it is with the behavior and attitudes of individual human beings *qua criminal investigators* that we are principally occupied.[14]

Thus far we have used the terms "ethics" and "morality" interchangeably. However, sometimes ethics is distinguished from morality in the philosophical literature. One way of making the distinction is as follows. Morality is about minimum standards of behavior and attitude. Do not kill the innocent; do not tell lies; do not steal; do not commit fraud. These are all minimum standards of behavior; they are moral principles. Ethics – on this way of thinking – is a wider notion. Ethics involves ideals and aspirations; it goes beyond minimum standards. An investigator who was competent, and was not negligent might not be engaged in immoral behavior. Nevertheless, such an investigator might not be a good investigator. To be a good investigator implies doing more than merely complying with minimum standards. For example, a good investigator would be *scrupulous* in the gathering of evidence and *persistent* in the pursuit of the truth; a good investigator is not simply an investigator who is not negligent.

Henceforth, we will distinguish compliance with minimum standards (which we will normally refer to as morality) from ethics in the wider sense

of a field of value that also embraces notions of what is good and worth aspiring to, that is, ideals as well as minimum standards.

In thinking and reasoning about moral or ethical questions there are a number of key concepts, distinctions, and theoretical standpoints that are typically deployed. We will now introduce some of the more important of these.[15]

First, we need to distinguish between actions, habits, and attitudes. Actions are morally right (whether morally required or morally permissible), for example, arresting an offender; or morally wrong, for example, punishing the innocent; or neither, for example, drinking a cup of coffee. Here we need to distinguish between actions and their consequences. Arresting a suspect is an action that might have good consequences, for example, if the suspect is actually the offender, or bad consequences, for example, if the suspect turns out to be innocent.

Some actions are morally significant by virtue of complying or failing to comply with minimum moral standards, for example, refraining from stealing from one's employer or from murdering one's business competitor. Others are undertaken in conformity with ideals or aspirations – for example, engaging in unpaid voluntary work for charitable organizations, or not taking advantage of one's competitor when they are in an unfortunate situation due to bad luck.

Notwithstanding the distinction between minimum moral standards and ideals, the boundary between these is blurred: there is a considerable gray area. Moreover, it is important to note that attending only to minimum standards – and especially being a "rule addict" and eschewing ideals – is an ultimately unsustainable position. Rule addicts will tend to lose sight of the underlying principles and values, including the ideals, that inform even the rules embodying minimum standards; ultimately this is corrosive of conformity to minimum standards, as well as of the realization of ideals.

Habits are dispositions to action that are typically performed by a person. For example, Winston Churchill evidently had the habit of smoking cigars. Habits include virtues, such as courage, honesty, and determination, as well as vices, such as cowardice, corruption, and dishonesty. However, virtues (and for that matter vices) are more than just habits since, for example, virtues are ethically good habits practiced for good reasons, whereas this is not necessarily the case with habits. Winston Churchill was said to be a courageous leader because he frequently, indeed habitually, made hard decisions in the service of his country. In the 1990s the New South Wales police officer "Chook" Fowler was said to be corrupt because he consistently, indeed habitually, engaged in illegal activity to enrich himself (Chapter 11, Case Study 11.2.1, Chook Fowler and "Crotch-Cam"). Some habits are neither virtues nor vices. For example, the habit of having a coffee after one's meal would not normally be regarded as either a virtue or a vice.

Once again, vices tend to call for moral condemnation: people who are corrupt or dishonest fail to meet minimum standards. On the other hand, persons possessed of virtues tend to be seen as ethical: they have dispositions to do what is good. They do more than merely avoid wrongdoing. However, once again there is a gray area here between minimum standards and ideals.

As noted above, the key property of virtues and vices is that they are elements of character: they are to do with what a person is (and, therefore, what a person regularly, or at least reliably, does), as opposed to what a person might do on some particular occasion as a one-off, that is, as an "out of character" action. Clearly character, and thus virtues and vices, is of central importance in ethics, including institutional and, specifically, occupational ethics.

Affective attitudes, including feelings, sensations of pain and pleasure, and emotions, are not actions as such; nor are they habits or merely dispositions to act. A person can obey all the rules, even do so as a matter of habit, and yet have a "bad attitude," at least in the short or medium term. Of course, in the long term this inconsistency is much less likely, since emotions, including attitudes, tend to influence dispositions and actions.

As with actions and habits, affective attitudes can be classified into those that are by and large good, such as a caring or sympathetic or sensitive attitude, and those that are for the most part morally wrong, such as an attitude of hatred or contempt. Naturally, some attitudes would not normally be regarded as either good or morally wrong, for example, the attitude or feeling of excitement generated at the thought of being paid a large salary. Moreover, there is a gray area here between morally problematic attitudes, such as hatred, and attitudes that one ought ideally to have, but that one ought not to suffer moral condemnation for not readily experiencing, for example, friendliness.

In contemporary moral philosophy a threefold distinction is often made between so-called deontological, consequentialist, and virtue-based theories of morality.[16] Deontological theories emphasize the intrinsic moral properties of an action as opposed to its consequences: for example, an act of lying is morally wrong and ought not to be performed even if it has good consequences in some settings. Deontological theories are also typically defined, in part, by recourse to the so-called formal principle of universalizability in one or other of its variants, such as "Act only on a principle if you could will that everyone act on that principle." By contrast, according to consequentialist theories such as utilitarianism, what matters morally are the consequences of actions rather than any inherent properties they might have, for example, "An action is right if it maximizes the greatest happiness of the greatest number and wrong if it does not" (principle of utility). Finally, according to virtue-based theories an action is right or wrong if it

is the action which a virtuous person would perform. Deontological theories are associated with Immanuel Kant, consequentialist theories with J. S. Mill, and virtue-based theories with Aristotle.[17]

While there is a need to maintain the threefold distinction between actions, habits (including vices and virtues), and the consequences of actions, the construction of competing moral theories which give pride of place to one or other of these conceptual categories at the expense of the others is questionable.

Moreover, we suggest that the application of any of these theories to the behavior and attitudes of individual role occupants independently of adequate normative theories of the occupation(s) in question and the institutional settings in play is likely to yield impoverished and/or misleading results.[18] Hence our insistence in this volume and elsewhere on the provision of appropriate occupational and institutional normative theories, for instance, the normative theory of policing (Chapter 1).

As will become evident in the chapters below, we tend to favor teleological normative theories of social institutions, including police organizations, and of occupational roles, including the role of criminal investigator. Teleological theories give pride of place to the telos[19] or point or aims of actions and organizations. According to such theories, the identification of the virtues definitive of an occupational group will crucially depend on the aims of that occupation. If, as we will argue in Chapter 2, the fundamental aim of criminal investigators ought to be truth or, more precisely, knowledge, then many of the virtues of investigators will turn out to be *epistemic* or knowledge-based[20] virtues such as accuracy and logical thinking.

Here we note that, although teleological and consequentialist normative theories are often conflated, they ought not to be. According to consequentialism, the rightness or wrongness of actions, procedures, or policies is logically dependent only on their outcomes and, therefore, is not logically dependent on whether or not they were intended or otherwise aimed at. The arguments for and against consequentialism in its various permutations have a long history and are detailed and complex: far too detailed and complex to revisit here.[21] Rather, we simply record our view that consequentialism is committed to the implausible view that an action is morally right or morally wrong by virtue of its consequences, even though those consequences might be unknown and unknowable. This collapses the distinction between harmful actions and morally wrong actions (and also the parallel distinction between beneficial actions and morally right actions), and puts the moral rightness and wrongness of many actions beyond the epistemic reach of the moral agents who perform those actions. For the harmful or beneficial consequences of human actions over the long term, and even the short term, are quite often unknowable by the agents who perform the actions, either at the time of their performance or at any future

time. Consider a police officer whose quick action saves the life of a child trapped in a crashed and burning car. Suppose the child grows up to be an armed robber who shoots dead two bank employees during the course of a hold-up gone wrong. It is true that what the police officer did was a causally necessary condition for these future harmful acts; if the police officer had not saved the child the future deaths would not have happened. And perhaps, with the benefit of hindsight, the officer might even regret his action. Nevertheless, the claim that it was also morally wrong for the police officer to save the child's life is implausible; yet consequentialism seems committed to just this claim.

By contrast, according to teleological theories, the intentions and, in particular, the outcomes aimed at, the *ends*, are in part *definitive* of the rightness or wrongness of actions, procedures, and policies – and, indeed, of social institutions themselves. On this kind of view the outcome of an action cannot be morally significant – as opposed to good or evil in some more general sense – unless it was in fact intended, or could have been intended (or was, or could have been, otherwise aimed at or known about).

In relation to the alleged conflict between deontological theories and virtue-based theories, we see only a degree of congruence. We doubt that we can account for the moral rightness of an action simply in terms of its being one that a virtuous person would perform; for the notion of a virtuous person will itself be in part determined by recourse to a notion of morally right action (virtuous persons are persons who (at least) habitually perform morally right actions). On the other hand, the fact that someone habitually performs morally right actions does not necessarily make them virtuous in the required sense, since they might do so for the wrong reasons. So virtues are not reducible to right actions.

As will also become apparent in the chapters below, our own favored account of normative ethical theory is a species of *moral pluralism*. We see little prospect of the nontrivial accommodation of, for example, moral rights within virtue theory (or vice versa). In our view the distinctions between, say, intrinsically right action, virtues, and morally significant consequences are just that: conceptual and morally relevant distinctions that need to be respected as basic, rather than set against one another in the service of a monistic ethical theory that seeks to privilege one of these conceptual categories at the expense of the others.

Moreover, the moral pluralism that we have in mind is substantive, as opposed to formalist, in character. By this we simply mean that purely formal or otherwise highly abstract principles, such as the principle of universalizability and the principle of utility maximization, have a relatively minor role to play in theoretical and practical ethics, and, certainly, in individual and collective moral or ethical decision making.

Is there, for example, a viable criminal justice system anywhere in which the principle of utility is taken to override the principle of convicting the guilty and ensuring the innocent go free, utilitarian philosophers such as Jeremy Bentham notwithstanding? And in relation to policing as an institution, ought the principle of utility to override the principle of objective investigation, if and when they conflict? Arguably, a commitment to a principle of utility is part of the problem with some police organizations. For example, in maximizing clear-up rates and so-called stakeholder satisfaction police departments sometimes tolerate "bending the rules" in investigations and thereby abnegate their institutional responsibilities as protectors of the moral rights of citizens, notably suspects.

What of the principle of universalizability: does it provide much-needed guidance in the kinds of institutional contexts in question? No doubt the principle of universalizability has a contribution to make, but evidently it is a limited one. It appears to be little more than a consistency test, and, as such, it offers only very limited guidance to moral agents, including police investigators, seeking to know what they ought to do or not do. Moral decision making relies heavily on substantive principles; purely formal ones are largely impotent.

Having provided a brief introductory overview of criminal investigations and morality/ethics, let us now turn to a detailed consideration of the issues. We begin with the relationship between law, morality, and criminal investigations (Chapter 1).

We note that Chapters 1 and 2 are principally concerned with underlying philosophical issues (e.g., the relation between law and morality, normative theories of policing and of the occupation of criminal investigator), as opposed to more practical ethical problems. We regard these underlying philosophical issues as being of fundamental importance, especially given the tendency of criminal investigators to simply take the criminal law as a given not to be questioned. By contrast with this tendency, we want to insist that criminal investigators are under an obligation to reflect on the moral basis of the criminal law. After all, criminal investigators contribute significantly to the enforcement of the criminal law and, therefore, their work often has profound moral consequences, both for those who are the victims of crime and for those who suffer severe punishment, such as incarceration, as a consequence of being convicted of breaches of the criminal law. Surely, therefore, investigators ought to be able to provide themselves with good and decisive reasons for the enforcement of the criminal law in general and, for that matter, of particular criminal laws.

That said, the book has been written so that those readers who might on occasion simply wish to consider particular practical ethical issues faced by investigators, and bypass these more fundamental philosophical issues,

can skip the first two chapters and go straight to Chapter 3, or whatever chapter deals with the issues of particular interest to them.

Notes

1 For a useful such guide in the US context see Michael F. Brown (2001) *Criminal Investigation: Law and Practice* (2nd edn), Boston: Butterworth and Heineman, and in the UK context, Peter Stelfox (2009) *Criminal Investigation: An Introduction to Principles and Practice*, Cullompton, Devon: Willan Publishing. For an earlier empirical description of detectives at work, see Richard V. Ericson (1981) *Making Crime: Detectives at Work*, Toronto: Butterworths. For a set of more recent "rich descriptions" of detectives at work, see Robert Jackall (2005) *Street Stories: The World of Police Detectives*, Cambridge, MA: Harvard University Press.

2 For a useful introduction to ethics see A. C. Ewing (1953) *Ethics*, London: Macmillan, and in relation to more recent ethical theory see Bernard Gert (2004) *Common Morality: Deciding What to Do*, Oxford: Oxford University Press.

3 T. A. Critchley (1967) *A History of Police in England and Wales 900–1966*, London: Constable, p. 51.

4 Regarding the history of the FBI see Tim Weiner (2013) *Enemies: A History of the FBI*, New York: Random House.

5 Laurence Lustgarten (1986) *The Governance of Police*, London: Sweet and Maxwell, p. 2.

6 M. Damaska (1975) Structures of Authority and Comparative Criminal Procedure, *Yale Law Journal*, 80, p. 523.

7 See, for example, Candace McCoy (1996) Police, prosecutors and discretion in investigation, in John Kleinig (ed.) *Handled with Discretion: Ethical Issues in Police Decision Making*, Lanham, Maryland: Rowman and Littlefield, pp. 159–178.

8 See Robert Jackall (1996) Response to McCoy, in Kleinig (1996), pp. 179–182.

9 See *Guardian* (n.d.), www.guardian.co.uk/baefiles.

10 See Aruna Viswanatha and Brett Wolf (2012) HSBC to pay $1.9 billion US fine in money-laundering case, December 11, 2012, http://uk.reuters.com/article/2012/12/11/us-hsbc-probe-idUSBRE8BA05M20121211.

11 See, for instance, J. Ayling, P. Grabosky, and C. Shearing (2009) *Lengthening the Arm of the Law: Enhancing Police Resources in the 21st Century*, Cambridge: Cambridge University Press.

12 Philosophers have long held truth, for example, to be a regulative ideal. Naturally, it is possible on occasion to fail to realize a regulative ideal, either intentionally or otherwise. For example, speakers fail to realize the regulative ideal of truth when they lie or make an honest error. As we will see in Chapter 2, some regulative ideals, notably truth, are internal to the actions which aim

at them, and, therefore, in performing those actions one necessarily aims at the ideal. Acts of judgement are a case in point. In performing an act of judgment one cannot aim at falsity; one must aim at truth. Of course one can aim at truth and yet fail to 'hit' truth; one can make an error of judgment.

13 See, for example, Andrew Alexandra and Seumas Miller (1996) Needs, moral self-consciousness and professional roles, *Professional Ethics*, 5, 1–2, pp. 43–61, Seumas Miller (2010a) *The Moral Foundations of Social Institutions: A Philosophical Study* New York: Cambridge University Press, Chapter 6, and Andrew Alexandra and Seumas Miller (2010) *Integrity Systems for Occupations*, Aldershot: Ashgate, Chapter 1.

14 For detailed discussion of these issues see Miller (2010), Chapters 1 (pp. 52–54), 3, and 6.

15 The view presented here is derived from Andrew Alexandra and Seumas Miller (2009) *Ethics in Practice: Moral Theory and the Professions*, Sydney: UNSW Press, Chapter 1.

16 A further distinction is between objectivist and relativist – also referred to as subjectivist – theories. The latter, at least in their unsophisticated forms, are not influential among academic philosophers, although they have supporters elsewhere in the humanities and social sciences. See Alexandra and Miller (2009, Chapter 2) for standard criticism of relativist theories and an outline of the distinction between relativism and objectivism.

17 Aristotle *Nicomachean Ethics*, Immanuel Kant *Groundwork of the Metaphysic of Morals*, John Stuart Mill *Utilitarianism*. There are, of course, other theoretical positions, for example, contractualism. Moreover, the historical antecedents of contemporary theories are both complex and a source of controvery. For example, the tendency to render Kant exclusively, or at least predominantly, by recourse to some version of the principle of universalizability (roughly speaking, impartialism) arguably ignores the teleological aspect of his account, for example, as expressed in his principle of the kingdom of ends. See H. J. Paton's translation and analysis of Kant's *Groundwork of the Metaphysic of Morals*, entitled, *The Moral Law*, London: Hutchinson, 1948.

18 See Miller (2010). See also Seumas Miller (2009) Research in applied ethics: problems and perspectives, *Philosophia*, 37.2, pp. 185–201.

19 "Telos" is the ancient Greek word for point or purpose or aim.

20 "Episteme" is the ancient Greek word for knowledge. Epistemology is the philosophical theory of knowledge.

21 For useful discussions of consequentialism and its problems see Samuel Scheffler (ed.) (1988) *Consequentialism and Its Critics*, Oxford: Oxford University Press.

1

Law, Morality, and Policing

At the core of criminal investigations is the criminal law; criminal investigators play a key role in the enforcement of the criminal law. Accordingly, it is important in a book concerned with ethical or moral issues in criminal investigations to provide some theoretical understanding of the source, nature, and function of the criminal law, not the least because, as noted in the introduction, the outcome of criminal investigations often has profound moral consequences for victims and suspects alike.

Since the theory or philosophy of criminal law is a large area of academic inquiry in its own right, this chapter will necessarily be introductory and somewhat selective in its focus. Topics covered in this chapter include the relationship between the criminal law and morality, and the extent to which the criminal law has an objective basis. The objective basis in question pertains not only to the objectivity or otherwise of the moral principles the criminal law typically enshrines (as in the case of laws proscribing murder), but also to objectivity more broadly construed (such as the objectivity or otherwise of the scientific theory underpinning recent developments in DNA research). As will become clear, it is important for criminal investigators to attend to the question of the objectivity or otherwise of the criminal law, since they are a critical element of the system of its enforcement. Should criminal investigators be enforcing the criminal law if it has no objective basis? Arguably, not. But if it does have an objective basis, what is it?

Criminal laws, like other laws, are enacted by a legislature. Moreover, in a democracy, by virtue of being laws passed by the duly elected representatives of the polity, criminal laws, like other laws, reflect the will of the citizenry.[1]

Investigative Ethics: Ethics for Police Detectives and Criminal Investigators, First Edition. Seumas Miller and Ian A. Gordon.

However, it is often held that criminal laws, unlike many other laws, not only reflect the will of the legislators, and those who elect them, but also embody core socially accepted *moral norms* of the community. Here we need to draw attention to two sets of distinctions. The first distinction is between *subjective* social morality and *objective* morality. Subjective social morality is simply whatever putative moral principles and values the members of some social group happen to believe in and comply with: the social morality of contemporary western society is one instance of this; that of cannibalistic tribes in Papua and New Guinea is another. Objective morality is the structure of moral principles and values that the members of a given society *ought to* believe in and comply with because it is *objectively correct*.

Here we note that the notion of objectivity pertains to the truth/falsity or correctness/incorrectness of judgments, beliefs, claims, statements, principles, theories, and the like, and stands in contrast with the notion of subjectivity (or relativism). Roughly speaking, subjectivism or relativism holds that there is no truth or correctness to be had in relation to some class of judgments, claims, and so on. Such classes of statements might include moral statements, empirical statements, and mathematical statements.[2] As we will see, some social scientists, for example, reject the objectivity of moral statements, but accept the objectivity of empirical statements made by scientists.

The notion of objective morality is problematic and we return to it below.[3] Suffice it to say here that many widely held moral beliefs, albeit not necessarily all such beliefs, are susceptible to rational analysis and justification with respect to their truth and falsity. Consequently, the behavior which they imply is objectively correct or incorrect. Consider, for example, the widely held moral belief that parents ought to provide for the health, education, and emotional needs of their children, and ought not to physically, sexually, and in other ways abuse them. Evidently this *moral* belief is based in part on a second and *factual* belief, namely, that if parents neglect their children's needs, and physically, sexually (and in other ways) abuse them instead, then (other things being equal[4]) these children will suffer severe physical and/or mental harm.

This second belief is true and rationally well-founded. It is an objective fact that untreated children's diseases cause severe physical and, ultimately, mental harm; and the same point can be made with respect to the severe physical and/or mental harm done to children when their other needs are not met or they are physically or sexually abused. Moreover, the truth of the second (factual) belief provides rational support for the first (moral) belief and, therefore, has behavioral implications. Specifically, taken in conjunction with the general proposition that (other things being equal) one ought to prevent severe harm being caused and ought to avoid causing

severe harm, the second (factual) belief implies that children *ought* to be provided with an elementary education and with medicine when suffering from a disease, and *ought not* to be physically or sexually abused. It follows that the widely held belief that (other things being equal) parents ought to provide for at least some of the principal needs of their children and refrain from abusing them is a true belief, and behavior performed in accordance with this belief is morally correct behavior.

The second distinction is between the descriptive claim that criminal laws *in fact* embody core socially accepted moral norms of a community (its basic social morality) and a related normative one, namely, that they *ought to* do so. Certainly, there are many criminal laws that embody widely held moral attitudes, for example, laws against murder, assault, and theft, and it is agreed on all hands that such socially accepted moral principles do play a central role in the criminal law.

However, in the light of these two sets of distinctions we can now differentiate between two *normative* claims that are sometimes conflated. The first of these is the one just mentioned, namely, that the criminal law ought to embody (subjective) social morality. The second helps itself to the notion of objective morality and states that the criminal law ought to embody *objective* morality.

These preliminary remarks suggest that the relationship between the criminal law and morality is a complex one and warrants further exploration.

1.1 Criminal Law and Morality

As we have seen, the criminal law and morality are closely related. Indeed, many people conflate the criminal law and morality – they think that every act of compliance with a criminal law is morally right, and every act that is morally right is an act of compliance with the criminal law. So, if A assaults B without justification, then A's act is both unlawful and immoral. And if C bribes D to win a large government contract, then this act of bribery is both unlawful and immoral. Moreover, it is held that what makes such acts immoral is the fact that they are unlawful, rather than the other way around. This view is particularly common among people whose task it is to make or uphold the criminal law, such as lawyers and police officers. It is, however, a view that should be resisted: first, because law and morality are not the same thing and, second, because law to some extent reflects morality rather than the reverse.

Law and morality are not the same thing. Laws have properties that moral principles and values do not necessarily have. Thus, for something to be a law, whether it be a criminal law or some other kind of law, it must

have certain institutional properties not necessarily possessed by moral principles and values. For example, laws are enacted by some institutional authority (e.g., a parliament), in accordance with some valid institutional process (e.g., the legislative processes of the Australian parliament), and laws typically have an explicit formulation in a specified location (e.g., a law that is an explicit directive in the English language in the statute books of the Australian parliament).

The criminal law to a considerable extent reflects morality rather than the reverse. Certain acts are made unlawful – specifically, count as breaches of criminal codes – because they are regarded by the community as being serious forms of immorality; that is, the criminal law reflects (subjective) social morality. Thus murder, rape, and assault are unlawful, at least in part, because they are regarded as profoundly immoral. Again, bribery is unlawful because it is regarded as a serious moral infraction.

Further, at least some of these criminal laws not only reflect *subjective* social morality, they also reflect *objective* morality. Presumably, murder is a case in point.

We note that bribery is not unlawful in some jurisdictions; and, indeed, was not unlawful in many jurisdictions prior to the 1977 US Foreign Corrupt Practices Act that set in train a raft of anti-bribery legislation in various jurisdictions. If bribery is not unlawful in a particular jurisdiction, this might be because it is not regarded as a serious moral wrong there, but rather as a practice that facilitates commerce or as a legitimate form of gift-giving or some such.[5] On the other hand, it could be argued that bribery in commercial dealings is, objectively speaking, a serious moral wrong because – let us assume – it actually undermines free and fair competition in the economic sphere and, as a consequence, does great economic harm. If so, then enacting laws against bribery would reflect objective morality, but not necessarily subjective social morality.

Because law and morality – specifically, objective morality – are conceptually distinct notions, we find that not all laws are morally right. This is probably most clear in the case of repressive states such as Nazi Germany or South Africa in the apartheid era. In these states laws were enacted that discriminated against people on racial grounds. For example, blacks could not vote or own property. These regimes passed many laws that were valid qua laws, that is, passed by the legislature according to the proper procedures, yet were morally abhorrent. We also find that not all morally good actions are legally enforced and, indeed, not all morally good actions should be legally enforced. Parents should be kind to their children, but there is no law to this effect – nor should there be.

So law and objective morality are not the same thing; nor, for that matter are law and subjective social morality the same thing. From this it follows that sometimes the requirements of law and morality can pull us in opposite