Morality and Police Conduct: a way forward for ethical policing

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Abstract

At times the police make headline news for the wrong reasons having violated a rule or procedure, overstepped their powers in investigating a crime or broken the law. Sometimes, however, police behaviour, which is dubious, improper or unethical, is accepted by the judiciary. This paper explores the disjuncture between universal moral principles found in the Western Australian Police Code of Conduct and improper police conduct that discretionary decision making allows. This paper contends that although some universal moral principles are violated with apparent impunity, moral principles serve to provide an external morality guide to police. As a way forward, Habermas' theory of discourse ethics may assist in bridging the divide between moral principles and police practices.

Introduction

Codes of conduct are readily accessible electronically on the home pages of corporations and government departments, including the Western Australian Police. A code of conduct with its universal moral principles sends a message of the standards expected of employees of these organisations. The efficacy of having a code of conduct becomes questionable, though, when employees are found to have behaved unethically or illegally. Policing is no exception. But trades such as policing and nursing, unlike the professions of medicine, law and theology, have not until recently formalised ethical principles in codes of conduct.[1] The recent emphasis on ethics in policing is one among many reforms that Australian policing has been undergoing in the last two decades since Fitzgerald found:

> To a large extent, attempts all over the world to combat police misconduct locally have revealed similar and recurrent problems: police culture, lack of effective control of internal investigative of internal investigative resources, organizations and procedures which inhibit honest police, and lack of public confidence in the Police Force's ability to investigate complaints against its members.[2]

The success of these reforms is limited,[3] although Chan found recent evidence of 'tightened accountability' and 'increased reporting of police misconduct by police'.[4] No claim can be

[1] See for example: The Hon Sir Gerard Brennan AC KBE *Ethics and the Advocate*, Bar Association of Queensland, Continuing Legal Education Lecture No. 9/92 – 3 May 1992 http://www.nswbar.asn.au/docs/professional/pcd/brenan.pdf (accessed March 4, 2010); For a discussion of nursing's relatively recent engagement with ethics see Tom L. Beauchamp and James F. Childress *Principles of Biomedical Ethics* (5th ed. 2001).
[2] G. E. Fitzgerald, Report of a Commission of Inquiry Pursuant to Orders of Council (1989) at 285. http://www.cmc.qld.gov.au/data/portal/00000005/content/81350001131406907822.pdf
[3] Janet Chan , *Making Sense of Police Reforms* Theoretical Criminology 11 323- 345 (2007).
[4] *Id.* 343.

made, however, as to any direct relationship between having a code of conduct and recent reforms. Nevertheless, universal moral principles provide a reference point for discretionary decision making. The task at hand is how abstract moral principles might be anchored in police practice.

Using the ethical requirements of Western Australian Police (WAPOL) as an example, this paper first explores instances where the police have failed in varying degrees to uphold moral principles stipulated in the WAPOL Code of Conduct (WAPOL Code). To do this, in section two, the paper identifies the breadth of judicial discretion and how it affects policing practices. Section three explores police discretion and instances of improper and illegal police conduct. We then propose that practical insights from Habermas' theory of discourse ethics may be helpful to police despite O'Neill's claim that 'moral universalism is struggling for survival in the current cultural climate'.[5] Habermas' version of everyday ethical principles, an ethics of discourse, provides a bridge between universal moral principles, which are abstract, aspirational and general, and police practices. Building the bridge is required to keep relativism at bay in criminal justice decision making. We accept that there is a place of discretionary decision making, but actions that derogate from moral principles must be justified to those whose interests are affected. Excluding all unethical and illegal evidence would send a clear message to police but possibly at the expense of community interests in seeing justice served.

Western Australia Police: moral responsibilities

Over a century ago, the *Police Act 1892* (*WA*) established, albeit indirectly, the requirements for the police to adhere to moral principles, to act with integrity and honesty or risk losing their job. Part 11 of the *Police Act,*[6] for example, covers enquiries into misconduct and penalties. Specifically, section 33L establishes ethical standards in a Notice of Loss of Confidence Statement:

> If the Commissioner of Police does not have confidence in a member's suitability to continue as a member, having regard to the member's integrity, honesty, competence, performance or conduct, the Commissioner may give the member a written notice setting out the grounds on which the Commissioner does not have confidence in the member's suitability to continue as a member.[7]

Over a century later, the Western Australia's Police Commissioner, Dr Karl O'Callaghan, promoted his Frontline First Policy with the slogan, 'right people in the right place at the right time doing the right thing'.[8] These sentiments are also endorsed in the recent WAPOL

[5] Shane O'Neill, *Morality, Ethical life and the Persistence of Universalism* Theory, Culture & Society 129 (1994).
[6] *1892* (*WA*).
[7] *Id*.
[8] Karl O'Callahan *Getting the right people for the Western Australia Police* WA Commissioner of Police Summary of Keynote Address http://www.docep.wa.gov.au/LabourRelations/PDF/Work%20Life%20Balance/Commissioner_O'Calla.pdf at 1. Also see an older version of the Western Australia Police Code of Ethics (2005) at 8.

Code that stipulates 'honesty, respect, fairness, empathy, openness and accountability' as core values of WAPOL.[9] The following statement also appears:

> The Code also complements the 'Our Values' document and the Western Australian Public Sector Code of Ethics…The Western Australian community is entitled to the highest standards of ethics, integrity, impartiality and professional conduct. We need to be open and honest in all that we do.[10]

The writers of the WAPOL Code clearly saw ethical behaviour, based on a values or virtue system, as integral to policing practice. Discretionary decision making is acknowledged in the following statement: 'In exercising discretion within the law take heed of relevant facts, be honest, impartial and consistent, and never act arbitrarily or with malice'.[11] The Code also identifies the other side of the ethical coin: 'criminal action, corruption, dishonesty, unlawful conduct, conflicts of interest, and failure to report unethical or corrupt conduct…are examples of unprofessional conduct' that the police have a duty to report.[12] Support for including negative as well as positive versions of moral principles is found in Habermas' words,

> Negative versions of moral principles are a step in the right direction. They heed the prohibition of graven images, refrain from positive depiction, and as in the case of discourse ethics, refer negatively to the damaged life instead of pointing affirmatively to the good life.[13]

In an attempt to reinforce ethical conduct, recruits also receive some ethics training at the Western Australian Police Academy. But as Habermas points out, moral principles are 'deontological, cognitivist, formalist and universalist'.[14] How these moral principles are incorporated into everyday policing practices is a challenge that police authorities face.

The next two sections identify contradictions in practices where the application of moral principles is found wanting with judicial support.

Relativism and judicial discretion

This section explores the complexities and implications or the 'performative contradictions'[15] that flow from the exercise of judicial discretion regarding contested evidence put forward by police. The exercise of discretion involves two steps. If a contested fact is submitted by the police, the judge will decide whether the police acted legally, improperly or illegally. The

[9] Western Australian Police Code of Conduct http://www.police.wa.gov.au/LinkClick.aspx?link=PDFs%2fWAPolice_Code_of_Conduct_Sept08.pdf&tabid=1295 at 2 (2008).
[10] *Id.* at 1.
[11] *Id.* at 11.
[12] *Id.* at 4.
[13] Jurgen Habermas, *Moral Consciousness and Communicative Action* (1990) at 205.

[14] *Id.* at 210.
[15] *Id.* at 88. A term borrowed from Habermas.

judge will then decide whether the fact should be admitted into evidence in criminal proceedings.

Internationally, judiciaries deal variously with illegally obtained evidence; but Cross [16] identifies two principle approaches. The first approach is best illustrated by the "Fruits of a poisoned tree"[17] metaphor. Under this approach, illegally or improperly obtained evidence is not tolerated. The second approach considers the use of improperly or illegally obtained evidence on a case by case basis.

Australia tends to follow the second approach. The rules of evidence in Australia do not require the mandatory exclusion of any evidence obtained improperly or illegally. Judges exercise discretion to admit such evidence. We submit that improperly or illegally obtained evidence breaches ethical codes of conduct, for example, WAPOL Code. When contested evidence or evidence alleged to be improperly or illegally obtained, a court of law exercises its powers to exclude it. Three key arguments are raised:

(a) Unfairness: An accused person's right to a fair trial may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement.[18] If this evidence is obtained in breach of Australian law it can be excluded. [19] See for as in the *Arthurs* case.[20]
(b) Public policy issues: Competing public requirements of the need to convict those who commit criminal offences, balanced against the need to protect individuals from unfair and unlawful treatment. Public policy issues may require evidence to be excluded.[21]
(c) Prejudicial effects versus probative value occurs when balancing the damaging effects of receiving contested evidence upon an accused person in a trial, against the need for the State to put all relevant evidence before the court.[22]

These bases for arguments are deemed necessary to further the ideal of justice. But this approach introduces a form of relativism that does not sit comfortably with universal moral principles contained in police codes of conduct. The following two contrasting cases illustrate this point.

The *Arthurs* case is an instance where the unfairness argument came into play. The judge found in favour of the accused against the police who behaved improperly. In 2003, after the alleged offender assaulted an eight year old girl, 'the Director of Public Prosecutions deemed

[16] John Dyson Heydon , Cross on Evidence 7th Australian ed. at 903 (2004).
[17] *Id*. at 904.
[18] see *Van der Meer v R* 62 ALJR 656 (1988) at 666; *Swaffield & Pavic v R* 151 ALR 98 (1988).
[19] See, for example; discretion to exclude improperly or illegally obtained evidence see s. 138 *Evidence Act* 1995 (Cth); *Evidence Act* 1995 (NSW).
[20] *Arthurs v State of Western Australia* [2007] WASC 182.
[21] *R v Ireland* (1970) 26 CLR 3231 at 334-5; *Bunning v Cross* (1978) 141 CLR 54.
[22] See, for example *R v Christie* [1914] AC545; *Driscoll v R* (1977) 137 CLR 517 at 541.

his [the accused's] video confessions inadmissible'.[23] Arthurs, the accused person, walked free. The Department of Public Prosecutions [DPP] determined that the judiciary would make a ruling against admitting the record of the second interview. Two outcomes followed. One, the accused was in a position to murder an eight year old girl [a different victim] in 2006. Two, the police used overbearing interview techniques again during the second interview. Martin CJ[24] in the Supreme Court of Western Australia ruled that large portions of the police record of interview were inadmissible due to improper police behaviour.

Allegedly, *inter alia*, 'aggressive police tactics' had been used in the *Arthurs* case an attempt to secure a confession.[25] Western Australia's police commissioner Dr O'Callaghan reportedly said, 'had Arthurs been convicted of the 2003 attack, to which he has since admitted and for which he has received indemnity from prosecution, "a whole series of different events might have taken place"'.[26] On the basis of unfairness to the accused, the first confession and parts of the second interview were inadmissible as evidence in a court of law. The police had violated the fairness principle in the WAPOL Code.[27]

The second case, *Tofilau and Others v The Queen*[28] *(Tofilau)* exemplifies (b) and (c) arguments where the majority of the judiciary seemingly excused police violations of universal moral principles to secure a conviction. In *Tofilau*, the police used the scenario technique imported from Canada, to obtain evidence they could not obtain legally.[29] The scenario technique allowed police to avoid legislative and common law impediments set up to protect citizens. In *Tofilau,* their honours acknowledged police use of subterfuge and deception,[30] inappropriate police action[31] and the conflict between admitting evidence and/or 'disciplining police or controlling investigative methods'.[32]

The *Tofilau*[33] case is important for the comments by the High Court of Australia about improper and illegal police behaviour. For example, Callinan, Heydon and Crennan JJ explained that '…undercover police officers participated with Hill in 19 "scenarios" involving various types of apparent illegality and impropriety in order to gain his confidence'.[34] They continued on with:

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[23] Buckley-Carr, Alana *Bungle left Molester Free to Murder* The Australian November 09, 2007 http://www.theaustralian.com.au/news/nation/bungle-left-molester-free-to-murder/story-e6frg6pf-1111114835259

[24] *Arthurs v State of Western Australia* [2007] WASC 182.

[25] Buckley-Carr, Alana *Bungle left Molester Free to Murder* The Australian November 09, 2007 http://www.theaustralian.com.au/news/nation/bungle-left-molester-free-to-murder/story-e6frg6pf-1111114835259

[26] *Id.*

[27] WAPOL Code at 2.

[28] (2007) 81 ALJR 1688.

[29] see, for example: *Tofilau and Others v The Queen* (2007) 81 ALJR 1688 Kirby J at 153 and 164 (7).

[30] *Id.* Glesson CJ at 4, 5.

[31] *Id*. per Gummow and Hayne JJ at 43.

[32] *Id*. at 68.

[33] *Id.*

[34] *Id*, 234.

> These submissions (those of the Appellant) should be rejected. The police officers committed no crimes or civil wrongs or other illegalities…In the circumstances, the means employed, while deceitful, cannot be described as "improper".[35]

This position, though, did not have unanimous support. Kirby J stated in dissent:

> This Court should not authorise such operations as within the common law where they derogate so seriously from basic individual common law rights which it is normally the province of courts to defend and uphold.[36]

Notwithstanding the caveat[37] at the conclusion of Callinan, Heydon and Crennan JJ's judgment, however, the High Court has given implied consent to police officers acting 'deceitfully'. When judges exercise discretion in admitting evidence obtained by dubious, improper or illegal police conduct without criticising such conduct, they give implied consent to these types of unethical behaviour.

The *Tofilau* findings also illustrate the dynamic nature of law and its shifting ethical grounds. Implied consent for the police to act in an improper manner, which was confirmed in the *Tofilau*[38] case, does not sit comfortably with earlier decisions including *Williams,*[39] *McKinney and Judge*[40], *Foster*[41] and *Ridgeway v The Queen*[42]. This can be explained in part by the issues involved and the associated charges. In *Williams,*[43] the charge was theft and stealing, in *McKinney and Judge* it was breaking and entering, in *Foster* it was maliciously setting fire to a public building and in *Ridgeway* it was the prohibited importation of drugs. In *Ridgeway*, a majority of the High Court of Australia held that, at common law, there is 'discretion to exclude evidence of the accused's guilt either of an alleged crime or of an element of it in circumstances where the actual commission of the crime was procured by such unlawful conduct'.[44] But in *Ridgeway,* although the police conduct involved the illegal importation of prohibited substances and was found to be illegal, it was not sanctioned by the court. Mason CJ, Dawson and Deane JJ extended this statement of principle when they stated:

Circumstances can conceivably exist in which a law enforcement officer intentionally brings about the opportunity for the commission of a criminal offence by conduct which is not

[35] *Id*, 359.
[36] *Id*, 209.
[37] *Id*, 416 – Nothing said above should be taken as a warrant for any undiscriminating reception of evidence gathered by police officers operating covertly.
[38] *Tofilau v The Queen; Marks v The Queen; Hill v The Queen; Clarke v the Queen* [2007] HCA 39 (30 August 2007).
[39] (1986) 161 CLR 278.
[40] 171 CLR 468.
[41] (1993) 67 ALJR 550.
[42] (1995) 184 CLR 19.
[43] *Williams v R* (1986) 161 CLR 278.
[44] *Ridgeway v R* (1995) 184 CLR 19 at 16.

criminal but which is quite inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement.[45]

Whereas *Ridgeway* was concerned with illegal police conduct that led to a criminal offence and the *Tofilau* case with police conduct that solved a criminal offence, the definition of what is improper and/or illegal conduct is not consistent. In *Ridgeway,* the illegal police conduct in question led to the exclusion of obtained evidence, whereas in *Tofilau* the majority found the conduct of police was not improper and the evidence obtained was admitted. Had the Mason CJ, Dawson and Deane JJ principle stated above been applied in *Tofilau,* it would at the very least have resulted in a greater emphasis on 'the minimum standards which a society such as ours should expect and require of those entrusted with the powers of law enforcement'.[46]

The common element in these cases is police conduct. Except for Kirby J's dissenting position in *Tofilau,* the application of any principle was governed initially by a subjective interpretation of the facts with a hint of discretionary principle. This approach is not unusual in Australian law. The problem with this approach is that it shifts analysis from the overarching moral principle that some conduct will not be tolerated by a court regardless of outcomes to the subsidiary principle where some conduct will be tolerated, dependent upon a subjective factual analysis. The approach is justified on a 'lesser of two evils' argument. Where the judiciary falls back into relativist positions, however, the police are hard pressed to anticipate how their conduct in collecting evidence will be received by the judiciary.

These cases raise many questions about police actions. Why did the police act as they did on these occasions? Were the police aware that their conduct was violating moral principles? Was their behaviour simply incompetence in failing to apply police procedures appropriately? Did they at any time consider the ethics or legality of their behaviour? Were they taking short cuts to finalise their work after a long emotionally charged shift? Were they desperate to secure a conviction? Did the police confuse their role as an investigator of a crime with that of a judge in anticipating how a judge or jury might decide? Were others consulted as to an appropriate approach? We will never know why the police behaved improperly or unethically during their investigations. Whereas the *Arthurs*' case illustrates that unfairness to the accused on the part of the police may have serious consequences, the *Tofilau* case overrides any unfairness issue in favour of deceit and lies to secure a conviction, albeit as a last resort.

The issue of discretion available to the judiciary warrants further elaboration. For example, section 138 of the *Evidence Act* 1995 (*Cth*) confers upon trial judges a discretion to exclude improperly or illegally obtained evidence. The balancing test in section 138 is not dissimilar to the competing requirements expressed at common law in *Bunning v Cross*[47] where the High Court of Australia indicated that competing public policy requirements on the one hand must be balanced with the police task of convicting criminals, while not giving judicial approval to police who behave unlawfully.

[45] *Id,* 23.
[46] *Id*. Mason CJ, Deane and Dawson JJ, at 23.
[47] (1978) 141 CLR 54.

A similar point was recently canvassed in *Gedeon v Commissioner of the New South Wales Crime Commission*[48] wherein the court noted:

> *Ridgeway* established two important propositions in the law of evidence as understood by the common law in Australia. The first proposition, negative in nature, is that the substantive defence of entrapment by government officers or agents, as applied in criminal trials in United States federal courts, has no application in Australia. The second proposition is that the discretion given trial judges by the common law to exclude evidence on the grounds of public policy extends to the exclusion of evidence of an offence, or an element of an offence, which has been procured by unlawful conduct by law enforcement officers.[49]

Simply, entrapment is not a defence in Australia. However, evidence obtained by improper or illegal entrapment can be excluded under a public policy discretion. But discretionary decisions are not made of a judge's volition as precedent provides a necessary safeguard against wayward judicial decision making.

Police discretion, responsibilities and practices

Grounds for judicial discretion must be seen in light of police also exercising discretion about who and when to charge a suspect. For example, the police can arrest with or without a warrant. In the New South Wales cases of *DPP v Carr* [50] and *DPP v CAD,* [51] the police used arrest powers for minor criminal matters in lieu of a summons, resulting in further charges of resisting arrest and assaulting police. In *DPP v Carr*[52] the court held that subsequent offences were consequences of improper conduct during an arrest. The magistrate also relied on passages from the New South Wales Police Service Handbook:

Use arrest as the last resort in dealing with offenders. Detain in police custody only after considering all available alternatives e.g.: infringement notice, summons, court attendance notice etc. Do not arrest someone for a minor offence, when it is clear a summons or alternative process will do.[53]

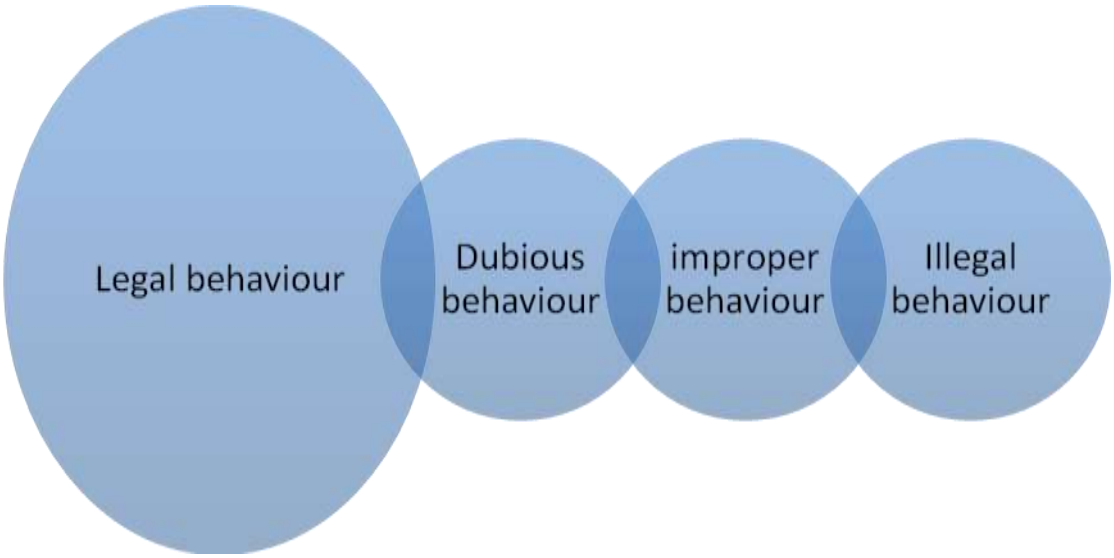
If a court finds the police use of the power of arrest constitutes 'improper conduct', does it also constitute 'unethical conduct'? Part of the problem lies in the use of terminology. Police misbehaviour is referred to as illegal and/or improper, rather than unethical even when the misbehaviour falls within all three categories. This leads to an artificial separation of illegal or improper behaviours from unethical behaviours by police who behave illegally or improperly. The compartmentalisation of behaviours arises in part because not all improper conduct (confessions involving deception on the part of the police) is considered illegal or

[48] *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43 (4 September 2008).
[49] *Id*. at 3.
[50] (2002) 127 A Crim R 151.
[51] [2003] NSWSC 196.
[52] *DPP v Carr* [2002] NSWSC 194 (25 January 2002).
[53] *Id*. at 4.

unethical.[54] Another way to articulate the relationship between police conduct, ethical behaviour and the admissibility of evidence is diagrammatically:

Figure 1: A representation of the relationship between ethical behaviour and police behaviour.

Ethical----------Ethical
Unethical----------Unethical



Other examples of improper police conduct include failure to provide adequate medical treatment. Bleby J in *Robinett v Police*[55] explains:

The appellant's increasingly offensive language and ultimately the threats directed at Senior Constable Smith would appear to have been a direct consequence of a number of factors. The first was the ongoing irritation to his eyes caused by the capsicum spray. Second was the ignoring by police of his concerns over asthma and his requests for a doctor. There was his enforced confinement in the holding cell and, of course, the appellant's intoxication. Absent any one of those factors, the words in question may not have been uttered. One would have to conclude that the failure to respond to the requests for assistance was a contributing cause to the ultimate threats and abusive language.[56]

The failure by the police to respond was not unlawful but certainly 'improper' and if the above had occurred in Western Australia would have violated WAPOL Code's principles of respect, fairness and empathy. Similarly, in *Cornelius and The King*,[57] the court said, '[B]ut a promise of advantage and a threat of harm are not the only matters which may deprive a

[54] See *Tofilau and Others v The Queen* (2007) 81 ALJR 1688.
[55] *No. SCGRG-00-110* [2000] SASC 405.
[56] *Robinett v Police No. SCGRG-00-110* [2000] SASC 405, 54.
[57] *Cornelius v The King* (1936) 55 CLR 235, 246.

statement of its voluntary character'.[58] Promises of advantage including offers by the police to grant bail and to not arrest family members amounted to improper conduct.[59] In contrast, threats of harm including beatings[60] are illegal or official misconduct. These examples illustrate unethical behaviour that if performed in Western Australia would violate WAPOL Code's principles of impartiality and unprofessional conduct.[61]

Unlike illegal conduct, which is relatively easy to identify, 'improper' conduct is elusive. In *Robinson v Woolworths*,[62] Basten JA explains improper conduct:

> First, it is necessary to identify what, in a particular context, may be viewed as 'the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement'. Second, the conduct in question must not merely blur or contravene those standards in some minor respect; it must be 'quite inconsistent with' or 'clearly inconsistent with' those standards. Third, the concepts of 'harassment' and 'manipulation' suggest some level of encouragement, persuasion or importunity in relation to the commission of an offence.[63]

Improper conduct may also be classified as illegal conduct but often police behaviour does not reach the threshold of illegality. Whereas Australian courts recognise illegal and/or improper police behaviour,[64] a majority of the present High Court of Australia accept that certain dubious police behaviours that 'blur or contravene those standards in some minor respect' may be acceptable in certain circumstances.[65] This acceptance, notwithstanding the factual circumstances surrounding the court's decision, highlights the fact that the balancing exercise required by *Bunning and Cross*[66] involving illegal and/or improper police behaviour may be excused by the judiciary with no apparent adverse impact or change in behaviour by offending police.

The High Court obligates the police to follow 'Police Instructions" and to make sure they are 'fully acquainted' with the limitations placed upon police powers of arrest by the community.[67] A constable's decision to arrest a person is a serious matter of individual responsibility.[68] For example, *Enever v R*[69] involved a wrongful arrest by a constable. Griffith CJ held that police officers are independent statutory officers of the Crown:

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[58] *Id.*
[59] *Commissioner of Customs and Excise v Harz and Power* [1967] 1 All ER 177.
[60] *Cornelius v The King* (1936) 55 CLR 235 at 246, *R v Zhang* [2000] NSWSC 1099 at 38, *Foster v R* 67 ALJR 550, McHugh J at 7.
[61] WAPOL Code at 1.
[62] *Robinson v Woolworths Ltd* [2005] NSWCCA 426.
[63] *Id.* at 23.
[64] See, for example: *Williams v The Queen* (1986) 161 CLR 278, *McKinney* and *Judge v The Queen* (1991) 171 CLR 468, *Foster v The Queen* (1993) 67 ALJR 550 and *MacGibbon v Warner* (1997) 97 ACR 430.
[65] *Tofilau and Others v The Queen* (2007) 81 ALJR 1688.
[66] (1978) 141 CLR 54.
[67] *Foster v R* (1993) 67 ALJR 550 at 14.
[68] *Enever v R* (1906) 3 CLR 969.
[69] *Id.*

> Now, the powers of a constable…whether conferred by common law or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself. If he arrests on suspicion of felony, the suspicion must be his suspicion, and must be reasonable to him.[70]

A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but 'an original authority', and the general law of agency has no application.[71] The effect is that if a constable commits a wrongful act under direction of a superior officer, the constable is personally responsible for the act committed.[72] By 'virtue of his office' and with 'original authority', however, does not mean he or she may act without restraint. But it does mean that each police person 'must rationally justify' his or her actions 'in solitary reflection'.[73]

As a general safeguard against inappropriate police behaviour in the event of an arrest or in evidence gathering procedures, the prosecution and the judiciary exclude evidence obtained illegally or improperly by the police. Evidence of improper police behaviour is referred to prosecuting authorities. But as we have shown, referral does not always occur. The police as with judges are able to exercise some discretion that in effect adds to the mix of ambiguities and uncertainty.

In summary, a majority of the present High Court of Australia accept that certain dubious police behaviour may be acceptable in certain circumstances.[74] Gleeson CJ acknowledges police use of subterfuge and deception,[75] whereas Gummow and Hayne JJ recognise inappropriate police action[76] and the conflict between admitting evidence and/or 'disciplining police or controlling investigative methods'.[77] This recognition of illegal and/or improper police behaviour has a long history[78] that continues as demonstrated in the recent decision in *Mallard v The Queen.*[79]

In the *Mallard*[80] case, Western Australian police stood quietly by as the Crown Prosecutor wrongly suggested that Mallard had used a wrench as the murder weapon.[81] Andrew Mallard spent 12 years in prison for a crime the police and the Western Australian Government now admit he did not commit. The High Court listed six instances of non-disclosure by the prosecution including two experiments, a missing cap, undisclosed sketches of a man seen in

[70] *Id. at* 977.
[71] *Id.*
[72] *Id.* at 980.
[73] See O'Neill, *supra* note 5, at 133.
[74] For example the use of the 'scenario technique' *Tofilau and Others v The Queen* to trick appellants into confessing to unsolved murders. The success of the scenario technique depended on undercover police deceiving and lying to the appellants.
[75] *Tofilau and Others v The Queen* (2007) 81 ALJR 1688 Gleeson CJ at 4, 5.
[76] *Id*. per Gummow and Hayne JJ at 43.
[77] *Id.* at 68.
[78] See, for example: *Williams v The Queen* (1986) 161 CLR 278, *McKinney v The Queen* (1991) 171 CLR 468, *Foster v The Queen* (1993) 67 ALJR 550 and *MacGibbon v Warner* (1997) 97 ACR 430.
[79] [2005] HCA 68.
[80] *Mallard v the Queen* [2005] HCA 68 (15 November 2005).
[81] *Id.* at 18.

the deceased's shop, deleted words from statements, and evidence about a man wearing a bandanna and behaving erratically within three kilometres of the crime scene.[82] In addition, the actions of the uncover police officer in befriending Mallard, supplying him with drugs and feeding facts about the murder when his mental state was fragile was unethical. To then conduct a recorded interview in which leading questions were put to Mallard, which were based upon information fed to him by an under-cover police officer, amounted further to unethical behaviour.[83] The High Court quashed the conviction and ordered a new trial. Regulations that appear in the Western Australian legislative requirements[84] and international obligations on the role of prosecutors[85] were not applied effectively. If nothing else, this suggests a conspiracy of silence to achieve a flawed conviction. Here, teamwork was used for the wrong reasons.

The *Mallard* case is not an isolated incident of police corruption. Issues of improper and/or illegal police behaviours were confirmed in the Fitzgerald,[86] Wood[87] and Kennedy[88] Royal Commissions that exposed entrenched unlawful or improper behaviour by police in Queensland, New South Wales and Western Australia respectively. As a consequence of these findings, the police hierarchy were to endorse and promote values to which the police must adhere, train recruits in ethical decision making, and scrutinise more tightly police work practices.

A way forward: from consciousness to intersubjective understandings

Having identified the ambiguities and complexities associated with the application of judicial and police discretionary powers, we turn now to consider the place moral principles and ethics have in procedural reform of police practices. We take moral principles to be abstract, context-independent and a neutral 'foothold' beyond all particular perspectives.[89] As such, these principles do not provide practical guidance for police action. Habermas' discourse ethics, which is an ideal type, provides the missing procedural step between moral principles and police practice.

The following summary of discourse ethics if nothing else leads us to consider how moral principles in a code of conduct might be less 'siloed' and more helpful for police in addressing their practical ethical concerns. As Habermas warns, 'noncontextual definitions of a moral principle… have not been satisfactory up to now'.[90] Police moral principles or

[82] *Id.* at 56.
[83] Australian Broadcasting Commission. *Australian Story* broadcast 27 September 2010.
[84] see s 24(1) *The WA prosecution guidelines*: Pursuant to the *Director of Public Prosecutions Act* 1991 (WA).
[85] *Mallard* , at 59-80.
[86] Fitzgerald, "Report of the Commission of Inquiry Pursuant to Orders in Council Date (1) 26 May 1987; (2) 24 June 1987; (3) 25 August 1988; (4) 29 June (1989).
[87] The Honourable Justice JRT Wood, "Royal Commission into the New South Wales Police Service Final Report" May 1997 Volume 1 Corruption Sydney: NSW Government http://www.pic.nsw.gov.au/files/reports/VOLUME1.pdf.
[88] Kennedy, G. A., AO QC *Final Report of the Royal Commission into whether there has been Corrupt or Criminal Conduct by any Western Australian Police Officer* Vol, 11 (2004).
[89] See O'Neill, *supra* note 5, at 129.
[90] Habermas , *supra* note 14, at 205.

imperatives—be honest, be impartial—are directives to achieve 'right' outcomes. But the means to achieve these ends as we have shown are confounded where discretionary decision making is available. Habermas proposes instead a procedure of moral argumentation that would 'meet with the consent of all affected as part in practical discourse'.[91] In other words, 'fair compromise calls for morally justified procedures of compromising'.[92]

Criticisms aside, Habermas' discourse ethics, a system of argumentation provides a procedural guide, an anchor, for ethical discretionary decision making. Police cooperation and commitment at all levels to ethical conduct, which was found lacking from evidence reported in the three Royal Commissions, is required. Habermas' system of argumentation scales down moral principles or 'categorical imperatives' to 'a principle of universalization (U)': 'For a norm to be valid, the consequences and side effects of its general observance for the satisfaction of each person's particular interests must be acceptable to all'.[93] In other words, 'practical discourse can also be viewed as a communicative process *simultaneously* exhorting *all* participants to ideal role taking' that 'transforms what Mead viewed as *individual, privately enacted* role taking into a *public* affair, practiced intersubjectively by all involved'[94] [Italics in the original].

For Habermas, 'the rights of the individual' cannot be protected 'without also protecting the well-being of the community to which he [sic] belongs'.[95] Police need to be extended via argumentation beyond the local limits of the entrenched police culture. To improve the moral tenor of policing, 'each participant [must] overcome an egocentric perspective by adopting the perspective of all the others. Solidarity and empathetic sensitivity among all participants is thereby built into the moral point of view'.[96]

To meet Habermas' requirements for argumentation at least two police are required to participate 'freely and equally, in a cooperative search for truth (over a disputed norm), where nothing coerces anyone except the force of a better argument.…it is a warrant of the rightness (or fairness) of any conceivable normative agreement that is reached under these conditions'.[97] As cooperation is required, autonomy needs to be 'reformulated in intersubjectivist terms'.[98] This reformulation requirement calls into question authority that is delegated to individual police officers. A more inclusive authority beyond the individual is required as is a set of rules established for this to happen. Thus, change is only possible with a paradigm shift from the 'philosophy of consciousness to the philosophy of intersubjective understanding'.[99]

[91] *Id.* at 197.
[92] *Id*. at 205.
[93] *Id*. at 197.
[94] *Id*. at 198.
[95] *Id.* at 200.
[96] O'Neill, *supra* note 5, at 137.
[97] Habermas, *supra* note 14, at 198.
[98] O'Neill, *supra* note 5, at 137; Habermas, *supra* note 14, at 207.
[99] O'Neill, supra note 5, at 137.

The argument would see 'all interests included that may be affected'.[100] Police would be made aware of the consequences of their decisions. For Habermas, 'U requires sensitivity to the results and consequences of the general observance of a norm for every individual'[101] to reach an understanding without manipulation or external pressure.[102]

For Habermas, 'any universalistic morality is dependent upon a form of life that *meets it halfway*. There has to be a modicum of congruence between morality and the practices of socialization and education'.[103] Also required is 'a modicum of fit between morality and socio-political institutions' when 'ideas about law and morality have already been institutionalized to a certain extent' [104] and where all are equally accountable for the actions they take. On a cautionary note, Habermas claims, 'discursive justification of norms is no guarantee of the actualization of moral insight' [105] without institutional facilitation and support. Where the demands of police work 'make a mockery of the demands of universalist morality, moral issues turn into issues of political ethics'.[106]

Conclusion

Each decision made by police whether individually or with others shapes the ethical landscape of policing. Where unethical behaviour by the police is deemed necessary to secure a conviction, ambiguous messages are sent as to the ethical standards required of police that conflict with the ethical principles in the Code of Conduct. But without some discretionary decision making, justice may be threatened where unfairness, public interest considerations, and prejudicial effects versus probative value are found. For justice to be served, the community relies upon the courts to protect citizens accused of criminal offences where the police have acted unethically or fabricated evidence. But where the application of a legal principle is governed by the nature of the offence, however, justice is on shaky ground.

There is a place for a police code of conduct with its universal moral principles providing there is institutional support for all interests affected to participate in moral discourse. But a code with abstract moral principles on a web page does little to improve the ethical climate of policing where unethical behaviour is sometimes legitimated by the judiciary. Habermas' theory of discourse ethics provides a bridge between moral principles and socially inclusive decision making procedures by delegating responsibilities to all involved and requiring the police to justify their means for accumulating evidence. Without serious institutional support, moral principles will remain as wall paper.

The police know courts will at times excuse without penalty improper or illegal conduct especially if an offence is serious and violent. The mandatory exclusion of all illegally obtained evidence by police regardless of outcome would send a clear, unambiguous message

[100] Habermas, *supra* note 14, at 207.
[101] *Id.* at 206.
[102] *Id.* at 134.
[103] *Id.* at 207.
[104] Id. at 208.
[105] *Id*. at 209.
[106] .*Id.* at 209.

to police who engage in such behaviour. But the Australian judicial system does not support excluding all improperly obtained evidence. At the very least, then, improper conduct by police should be without exception commented upon unfavourably by the judiciary notwithstanding conflicting public policy requirements. Nevertheless, we might take heed of Habermas'[107] suggestion that perhaps the 'historical and social sciences can be of greater help' than philosophy (discourse ethics) in the 'face of moral-practical issues of great complexity'.

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