

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

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 equal⁴) 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

directions. This potential conflict between the criminal law, on the one hand, and social morality and/or objective morality, on the other, raises issues of profound importance. Consider the laws prohibiting voluntary euthanasia or ones instigating mandatory sentencing of juveniles for minor crimes. Should doctors engage in voluntary euthanasia in some cases, for example where terminally ill patients are suffering great pain, especially if there is a widespread view in the community that they should? There is evidence that some doctors do just this, and in violation of the law. What of judges, lawyers, and police in relation to crimes that they know are subject to mandatory sentencing? Should police officers on occasion turn a blind eye to an offense subject to mandatory sentencing, if they know that the outcome of making an arrest in such an instance will be far worse for all concerned, including the community? More generally, should police themselves on occasion breach the law for the greater good? Consider in this connection Case Study 1.2.1 below, The “Granny Killer,” in which – according to the author of the case study – the detectives confront the option of breaking the law against trespass in order to avert the possibility of someone being murdered.

Notwithstanding the fact that law and morality are not necessarily the same thing, it is nevertheless true – at least in the case of the criminal law – that law and morality often coincide. Here we have in mind the coincidence not only between the criminal law and subjective social morality, but also between the criminal law and objective morality. For example, there are laws against theft, fraud, assault, and murder, and theft, fraud, assault, and murder are both widely believed to be morally wrong and morally wrong as a matter of objective truth.

This coincidence or overlap between much of the criminal law and central moral principles suggests that an important purpose of the criminal law is to maintain a community’s minimum moral standards.⁶ Naturally, some of these are contentious and, as society undergoes change, some of these hitherto socially accepted moral norms change too – for example, moral attitudes in relation to homosexuality have changed. However, there is evidently a core of widely accepted moral norms that there is reason to believe will never change or ought not to change, for example, the right to life and physical security, and freedom of thought and speech; presumably, these are in part constitutive of objective morality. But how do we demarcate those moral norms that ought to be criminalized and do so on an objective basis?

One historically important attempt within the liberal tradition to delimit on an objective basis the sphere of moral norms that ought to be enshrined in the criminal law does so by recourse to the principle not to harm others. Key proponents of this view are J. S. Mill and Joel Feinberg.⁷ Here it is assumed, with some plausibility, that the notion of harm can be objectively

specified – physical harm certainly can be, as can some forms of psychological harm. Thus a form of behavior, on this view, ought to be criminalized only if it consists in harming others and, specifically, seriously harming others and doing so deliberately (or at least recklessly or negligently).⁸ Naturally, others (e.g., professional boxers) might consent to being harmed, or the harming in question might be morally justified, as in the case of harming in self-defense. If so, then the harming in question presumably ought not to be criminalized. So let us restrict the “Don’t harm others” principle to acts of moral wrongdoing that consist of seriously harming (nonconsenting) others, albeit we cannot here embark on the project of specifying what counts as serious harm or the circumstances under which inflicting serious harm might be morally justified.⁹

This view has been subjected to various criticisms including the need to criminalize behavior that consists in failing to assist others who are suffering severe deprivations (as opposed to harming them), for example, behavior that consists in failing to pay taxes the purpose of which is to provide medical and other welfare benefits to the needy.¹⁰ In short, the criminal law should attend not simply to the serious causing of harm but also to omissions in respect of serious deprivations.

Accordingly, another way to delimit the sphere of moral norms that ought to be enshrined in the criminal law is by recourse to the notion of moral rights with respect to serious harms and deprivations, specifically so-called basic moral rights.¹¹ Basic rights are those moral rights the enjoyment of which is necessary if ordinary humans are to be able to exercise their basic liberties and satisfy their basic needs in a social setting. Basic rights would include the right to physical security, food, water, shelter, essential medical assistance, elementary education, access to work opportunities that enable people to provide for themselves and their children, freedom of movement, thought, communication, and of association with others.

Notice that the moral rights in question include many enshrined in human rights legislation and like legal documents, notably the Universal Declaration of Human Rights. Here we need to stress the above-described distinction between the moral and the legal and, in this instance, between moral rights and legal rights. Although something might be a legal right and, indeed referred to as a legal *human* right – for example, in some legal instruments workers have what is referred to in these documents as a *human right* to a paid holiday¹² – it is a further question as to whether such a thing is in fact a moral right. Moreover, as will become evident below, there is a distinction to be made within moral rights between human (moral) rights – moral rights one has qua human being, such as the moral right not to be tortured – and institutional (moral) rights – moral rights one has in part by virtue of institutional arrangements, such as the right to a fair trial.¹³

Notice further that the rights in question are not restricted to rights not to be harmed by others; they include rights to assistance of various kinds when one is suffering severe deprivations, for example, rights to food when one is starving. Notice further that the rights in question can plausibly be given an objective basis in terms of the notion of harm (as we saw in relation to the “Don’t harm others” principle) and also the notion of the basic needs of a human being in a social setting. This can be done notwithstanding the vagueness of the boundary between basic and nonbasic; after all, there is a distinction between black and white notwithstanding the existence of grayness. The idea here would be that behavior that consists in the violation of basic moral rights ought to be criminalized. In so far as the violation of basic rights typically involves harming someone, then this conception captures a central moral intuition of the earlier “Don’t harm others” view. However, it is wider than this in that it includes rights to assistance when one is suffering severe deprivations.¹⁴

This rights-based view will be open to criticism from those who object for a variety of reasons to positive rights and, especially, to the enforcement of positive rights. Elsewhere Miller has elaborated a normative theory of institutions which tries to deal with this kind of objection.¹⁵

This rights-based view can also be criticized for setting the standard for criminality too low; surely there is behavior above and beyond that which violates basic rights, which ought to be criminalized. For example, should not the willful destruction or damaging of cultural objects, such as ancient cave paintings, be criminalized? Evidently, the notion of a moral right in play here needs to be extended to include moral rights above and beyond basic rights.¹⁶

On the other hand, if this view is adjusted so that it includes all moral rights, then it can be criticized for setting the standard for criminality too high. Arguably, there are some moral rights, violations of which ought not to be criminalized: specifically, those moral rights whose violation does not consist in causing serious harm and/or does not entail serious deprivation. Perhaps, under a university’s rules governing a series of public lectures on controversial topics, the main speaker has a right of reply to his or her commentators/critics. Suppose a particular speaker agrees (informally) to do a public lecture only on condition that he or she can exercise this right of reply, and the right of reply is a standard institutional, and thus moral, right in the forums in question. Suppose, further, that the chairperson arbitrarily refuses to allow the speaker to exercise their right of reply. Surely we would not want to criminalize such a minor rights violation.

What criterion ought we to use to adjudicate between moral rights the violations of which ought to be criminalized and those for which this is not the case? We have already helped ourselves to the notion of rights violations that consist of causing serious harm and/or entail serious deprivations.

Accordingly, the question becomes: What criterion can be used to demarcate rights violations involving serious harm or deprivation – violations that, therefore, warrant criminalization – from less serious ones (that do not warrant criminalization)?

Ultimately, the harms/deprivations in question will have to be subject to scrutiny on a case by case basis. However, one candidate general criterion is morally justifiable enforcement (understood as coercive enforcement).¹⁷ If the violations of a right are regarded as sufficiently egregious to warrant coercive enforcement, then the right in question is, at least *prima facie*, of sufficient moral weight for violations of it to warrant criminalization.

Here there are three points to be made. First, the level of force that is morally justified is on a sliding scale depending on the moral weight that the right has. For example, the right to life justifies the use of lethal force in its enforcement, but minor property rights might only justify the use of nonlethal force in their enforcement.

Second, aggregated violations of a right might justify a high level of coercive enforcement even though one-off violations do not (e.g., the use of plastic baton rounds fired from a baton gun against a mob engaged in looting might be justified, but not such use against a one-off offender).

Third, an agent might perform an action that is not in itself a direct rights violation but is, nevertheless, an action that the agent knows, or should know, will indirectly cause harmful or other rights violations (e.g., provoking others to commit unjustified violence). Various acts which cause damage to institutions evidently fit into this category (see Section 1.5 below). Use of coercive force in relation to such indirectly harmful actions might well be morally justified.

Here we note the distinction between moral rights and other kinds of moral or ethical consideration.

An obvious contrast here is between behavior in compliance with rights and behavior expressive of virtue. Kind or generous behavior is an expression of the virtue of kindness or generosity. One person does not necessarily have a moral *right* to another person's kindness or generosity, notwithstanding that it is a good thing to be kind or generous.

Another contrast is between moral rights and intended or otherwise aimed at good outcomes. Perhaps it is a bad thing not to assist one's profligate friend with his rental payments; a bad thing because the friend will be forced to seek accommodation with his aging parents who already live in cramped quarters. But surely one's friend does not have a moral *right* to such financial assistance.

We have distinguished between basic moral rights and (in effect) nonbasic moral rights. A further distinction, which cuts across this one, is between human rights and institutional rights (some basic rights are human rights

but some are evidently institutional rights, e.g., the right to receive elementary school education).

Human rights are moral rights that individuals possess solely by virtue of properties they have as human beings, for instance, the right to life and the right to freedom of thought.¹⁸

Institutional (moral) rights are moral rights that individuals possess in part by virtue of rights-generating properties that they have as human beings, and in part by virtue of their membership of a community or morally legitimate institution, or their occupancy of a morally legitimate institutional role defined by specific moral purposes. Thus the right to vote is an institutional right, since it exists in part by virtue of possession of the rights-generating property of autonomy, and in part by virtue of membership of a political community. Again, the right, indeed duty, to arrest and charge someone for assault is a moral right and duty possessed by police officers that is not necessarily possessed by ordinary citizens in the same circumstances. This institutional right and duty is derived from the moral purpose that defines the role of a police officer, namely, to protect the rights of citizens and, in this particular case, to protect the human right of the victim not to be assaulted.

Moreover, we are assuming the following properties of moral rights.¹⁹ First, moral rights generate concomitant duties on others: A's right to life, for example, generates a duty on the part of B not to kill A. Second, human rights and some, but perhaps not all, institutional moral rights, are justifiably enforceable: A has a right not to be assaulted by B, and if B assaults or attempts to assault A, then B can legitimately be prevented from assaulting A by means of coercion.²⁰ An example of a justifiably enforceable institutional moral right is the right to vote; it ought to be a criminal offense to prevent someone from exercising their right to vote. Again, it ought to be a criminal offense to commit perjury in a court of law, even in a civil case in which the matter in dispute involves no criminal behavior. Arguably, the underpinning moral rights in play here are those of the citizenry with respect to those who appear before their courts. Third, bearers of human rights, in particular, do not necessarily have to assert a given human right in order for them to possess it, and for the right to be violated: for instance, an infant may have a right to life even though it does not have the ability to assert it (or, for that matter, to waive it).

Above, we distinguished between law and morality (and within morality between moral rights and other moral phenomena). Moreover, we have argued that the criminal laws can usefully be understood as embodying justifiably enforceable moral rights not to be seriously harmed or suffer serious needs-based deprivations, and that the latter moral rights are objective in character. It follows that we have provided, at least in principle, an

objective basis for the content of much of the criminal law.²¹ However, this is not the end of the matter, since the criminal law has various other dimensions (e.g., a semantic dimension in so far as laws need to be framed in a language and interpreted), and relies for its application on nonlegal considerations (e.g., testimonial evidence), and these, it might be argued, being necessarily subjective in character continue to threaten any claim that the criminal law is objective, even in principle. Accordingly, we need to discuss further the (alleged) subjectivity of the criminal law, notably in relation to so-called facts, and in the light of the important distinction made by the courts between law and fact. Given the already established relation between criminal law and morality, this will in turn raise the question of the distinction between morality and fact. Before engaging in this discussion, we present some case studies that might help to illuminate these matters in a policing context and illustrate, in particular, the centrality of human and other moral rights to criminal investigation and the disparate attitudes of criminal investigators to such violations, that is, to breaches of criminal law, on the one hand, and to their own breaches of criminal procedures (in the investigation of breaches of criminal law) on the other. We begin within a case study involving a serial murderer, the so-called “Granny Killer.”

1.2 Case Studies

Case Study 1.2.1 The Granny Killer

Ritualistic offender behaviors, that were his signature, marked the 1 March 1989 murder of an 84-year-old woman. Signature behaviors that reappeared in many of the thirteen subsequent vicious and brazen daylight attacks on elderly women in populous areas of Sydney’s North Shore in the late 1980s and early 1990s. Attacks resulting in five murders, eight assaults, indecent assaults and robberies—committed by an offender tagged by the media the ‘Granny Killer’.

The investigation was conducted, first, by the North Region Homicide Squad, then the North Shore Murders Task Force—eventually to number 70 police—assembled, on 3 November 1989, following the second of two murders of elderly women, perpetrated consecutively on 2 and 3 November.

John Wayne Glover, a husky, 58-year-old Mosman salesman, seemingly happily married father of two girls, first made it onto the 470-names-long Task Force suspect list when he came to police attention following a suspected indecent assault on 11 January 1990 on

an elderly female patient in a Greenwich private hospital. Glover was placed under covert police surveillance.

At 1026 hrs on 19 March 1990, Glover, who purchased a bottle of whisky from a Mosman bottle shop, was observed by police who followed him from his home to enter, with the ease of long familiarity, a property in Pindari Road, Beauty Point. The door opened and they heard the sound of a woman's voice before the door was shut. Glover was inside the home of Joan Sinclair, a 60-year-old divorcee, with whom he had, for some years, conducted a liaison.

As the autumn day stretched out, unease overtook the surveillance team. Task Force members traveled from their Chatswood office to Mosman Police Station, to await developments. Enquiries indicated the Pindari Street house was owned by Joan Sinclair—still police hesitated to call at the house. They claimed that they worried that 'they would have been up for unlawful entry' if they had tried to enter the property uninvited. But uppermost in their minds seems to have been the fear of tipping their hand to Glover. According to one Task Force member, 'all that mattered to me, to all of us, was catching Glover'.

The Task Force commander is reported as saying, 'With nothing to connect Glover to a single murder, we had to have a legitimate reason to speak to him . . . If he knew he was a suspect, he may never have put a foot out of line again and the Granny killings could well have remained unsolved'²²

At 1520 hrs a teacher from the local school brought Joan Sinclair's grandchildren—whom she had failed to collect after school—to her home. Finding the gate locked, she left a note indicating that the children were next door with a neighbor.

At 1800 hrs, two uniformed police were ordered to knock on the door, with the excuse that neighbors were complaining about a dog barking.²³ Unable to gain entry through the locked front gate, they climbed a neighbor's fence. Peering in through the French doors at the rear of the darkened house, they could detect no sign of life—but saw a bloody hammer, the Granny Killer's weapon of choice, lying in plain sight. Their report brought Task Force officers to the scene in minutes.

Entering, Joan Sinclair's body was discovered, exhibiting, post-mortem, the serial killer's ritualistic, signature behaviors; she appeared to have been dead at least six hours. The effect of the discovery of this needless murder—and its implications—upon the Task Force officers was crushing. Glover was located, partly conscious in a tepid

(Continued)

bath, a whisky bottle and empty phials lying nearby indicating a suicide attempt. The police strove to preserve his life, a senior detective reputedly saying, 'I was obsessed by a feeling that we had to save him to stand trial. If he died, all the other murders would remain unsolved even though we knew he was our man'.²⁴

Glover recovered, to stand trial. This was the Granny Killer's sixth and final murder and police were now in possession of the evidence necessary to secure his conviction.

(Extract from John Blackler's case study, *The Granny Killer*, in John Blackler and Seumas Miller (2000) *Police Ethics (vol. 2): Case Studies for Police Investigators*, Wagga Wagga: Charles Sturt University and NSW Police Service, pp. 15–16)

Case Study 1.2.2 Two Models of Criminal Process

A prominent professor of law has concluded that there are two prevalent models of criminal process in the United States, the 'due process' model and the 'crime control' model.²⁵ The due process model views the criminal process as conforming to the rule of law. It is a model stressing the possibilities of human error, especially the frailty of authority under pressure. Above all, it is a model emphasizing *legal* guilt over *factual* guilt. Thus an accused is held to be guilty if, and only if, the factual determinations made against him have been presented in a procedurally regular fashion by lawfully constituted authorities acting within duly allocated competences . . .

The crime control model, by contrast, emphasizes *factual* guilt. Its chief principle is efficiency through rational administration or 'the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses became known.'²⁶ This model stresses social control over individual justice. Its operative norms are those of a productive enterprise; its success is gauged by a high rate of apprehension and conviction in the context of mass administration of the criminal law.²⁷

The police officer views criminal procedure with the *administrative biases of a craftsman*, a prejudice contradictory to due process of law. That is, the policeman tends to emphasize his own expertness and specialized abilities to make judgments about the measures to be applied to apprehended 'criminals', as well as the ability to estimate

accurately the guilt or innocence of suspects. He sees himself as a craftsman, at his best, a master of his trade. As such, he feels he ought to be free to employ the techniques of his trade, and that the system ought to provide regulations contributing to his freedom to improvise, rather than constricting it . . . Like other doers, he tends to be resentful of critics who measure his value by abstract principles rather than the ‘reality’ of the world he knows and lives and sees.

To further understand the consequences of his ‘craftsman’ bias, it must be understood that he draws a moral distinction between criminal law and criminal procedure . . . The distinction is drawn somewhat as follows; the substantive law of crimes is intended to control the behaviour of persons who wilfully injure persons or property, or who engage in behaviours eventually having such a consequence, as the use of narcotics. Criminal procedure, by contrast, is intended to control authorities, not criminals. As such, it does not fall into the same moral class of constraints as substantive criminal law. If a policeman were himself to use narcotics, or to steal, or to assault, *outside the line of duty*, much the same standards would be applied to him by other policemen as to the ordinary citizen. When, however, the issue concerns the policeman’s freedom to carry out his *duties*, another *moral* realm is entered.²⁸

(Extract from John Blackler’s case study, Two Models of Criminal Process, in John Blackler and Seumas Miller (2000) *Police Ethics (vol. 1): Case Studies in Street Policing*, Wagga Wagga: Charles Sturt University and NSW Police Service, pp. 154–155)

1.3 Law, Morality, and Facts

Thus far we have explored the relation between the criminal law and morality, including the extent to which the moral principles typically enshrined in the criminal law are objective and, therefore, the extent to which the criminal law might have an objective basis. A good deal of our discussions has centered on the notions of moral rights, harms, and severe deprivations as potential sources of objectivity in this regard. It is now time to bring in other dimensions of the criminal law, notably the relations between laws and facts (so-called), albeit once again with an eye to the objectivity or otherwise of the criminal law.

Before turning to the relation between laws and facts, we note the distinction made in Case Study 1.2.2 above between substantive and

procedural criminal law. To an extent procedural criminal law functions as a means to facilitate the upholding of substantive criminal law and, therefore, one can understand the disparate attitudes of investigators to these bodies of law. If x is merely a means to y then one might abandon x if and when it ceases to be an effective means to y . However, this attitude is morally problematic in so far as criminal procedure is not merely a means to an end (substantive law) but embodies *moral* rights, notably the moral rights of suspects, such as to be free from unreasonable searches and seizures. We return to the issue of rights of suspects in later chapters.

The distinction between fact and law is a familiar one made in a variety of criminal justice contexts. Thus in jury trials juries are supposed to adjudicate on questions of fact, judges on questions of law (and give direction to juries to enable the latter to arrive at their final verdicts). Of course in one sense the existence of a law is itself a fact of sorts and so perhaps the distinction is really between legal and nonlegal facts.

Here we need to distinguish further between, on the one hand, a legal fact in the sense of a law or other legal instrument that actually exists (as opposed to, for example, an imaginary law or one that some person falsely believes to exist) and, on the other hand, a state of affairs that is not in itself a law (or other legal instrument), but is specified, or otherwise referred to, by a law, for example, lawful or unlawful behavior. What, then, is this distinction?

On the one hand there are particular (as opposed to general), concrete (as opposed to abstract) facts. An example is the fact (let us suppose) that John J. Jones III is driving his red Ford Fiesta with license number ABC123 at 55 mph. in the built-up area of downtown Boston on Monday, January 1, 2012 at 11a.m. On the other hand, there is the content of laws, including with respect to driving motor vehicles. Consider, for example, a law that states that car-drivers ought to drive under 60mph. in built-up areas.

The first point to notice is that the form of this law is normative (as opposed to descriptive). Accordingly, it does not just describe or refer to some fact or facts with respect to driving behavior; it prescribes or proscribes certain forms of driving behavior.

The second point is that the content of this law refers not simply to a particular, concrete fact, such as the one mentioned above involving John J. Jones III. Rather, the content of the law is general and abstract. As such it refers to a whole set of potential concrete facts involving different drivers, cars, locations, and times.

The third point is that the law divides this set of potential concrete facts into two categories, namely, lawful states of affairs and unlawful ones, depending on whether the drivers in question are driving above or below 60mph.

If the content of a law is able to categorize particular, concrete facts in this manner, then it must do so in large part, if not wholly,²⁹ by way of the semantic meaning of this law in a particular language, such as English. Notice that the same facts could be referred to by a law in French as by one in English. This raises the question of the interpretation of laws: what is the precise meaning of the law (in some language) in some specific context of application?

This is a complex issue that cannot be dealt with in any detail here. Suffice it to say that, although there is some room for vagueness in respect of the meaning of given laws, there needs to be a verifiable fact of the matter in relation to what any given law states and, in particular, what the legislators who enacted the law *intended* it to mean; that is, there must be verifiable semantic and associated psychological facts.³⁰ The associated psychological facts in question include *intended* meanings, for instance, the meaning intended by the legislators when they enacted the law. For, if this were not so, then citizens would not have a common and correct understanding of the content of laws and, therefore, could not reasonably be expected to comply with the law. So, on pain of the citizenry not being able to comply with the law, there must be legal facts in the sense of objectively verifiable interpretations of the law, and such interpretations are, in turn, dependent on verifiable semantic and associated psychological facts (notably the intended meanings of the legislators).

Notice that for the same reason there must also be objectively true statements of logic or reason. For, if the citizenry is to be able to comply with the law, then each citizen must not only be able to understand the meaning of given laws, each must be able to apply the law to him or herself on particular occasions. Such application involves a process of deduction or logical inference-making, albeit often of a quite straightforward kind. Here is an example: (i) the law prescribes that persons with a blood alcohol level above 0.5 do not drive; (ii) I now have a blood alcohol level above 0.5; therefore, (iii) the law prescribes that I do not drive at this time. So, on pain of the citizenry not being able to comply with the law, there must be objectively true statements of logic and, specifically, logical inferences that are objectively true (or objectively false).

Thus far in this section we have discussed the distinction between laws and fact, yet seen that laws are in a range of important ways themselves factual. Let us now turn more directly to a consideration of the notion of a fact.

Facts are often contrasted with theories. Facts are also contrasted with values – moral values, in particular. What is this contrast or set of contrasts? Roughly speaking, factual statements supposedly describe independently existing states of affairs that are, at least in principle, verifiable (and/or falsifiable); these states of affairs exist independently of anyone's

judgment, belief, or statement that they exist or do not exist. Accordingly, a factual statement is objectively true (if the state of affairs exists) or false (if it does not). The paradigm cases are statements about ordinary, middle-sized, physical objects and their causal relations with one another, for example, the gun discharged a single bullet which entered the head of the victim killing him instantly. Such states of affairs obtain (or do not obtain) quite independently of whether or not anyone judges, believes, or states – let alone desires or hopes – that they obtain (or do not obtain). Indeed, the truth or falsity of any such judgment, belief, or statement itself depends on the obtaining (or not obtaining) of the state of affairs in question.

Earlier we distinguished between objectivism and subjectivism with respect to truth and falsehood. If someone holds that a class of statements is objectively true or objectively false, then that person is an objectivist with respect to that class of statements. Subjectivists hold the contrary view, namely, that with respect to a given class of statements there is no objective truth or falsehood.³¹ So most people are objectivists with respect to statements about the ordinary physical world. Moreover, we have seen reason to hold that moral beliefs can be provided with an objective basis, for instance, by recourse to the notion of harm and/or of needs-based moral rights. Accordingly, moral beliefs can be held to be true or false, and the behavior they prescribe or proscribe, objectively correct or incorrect. That said, many people, especially social scientists, claim to be subjectivists with respect to moral beliefs and statements of moral value.

We cannot pursue these philosophical issues in any detail here.³² Nevertheless, it is important to understand what is potentially at stake for criminal investigations in these controversies between objectivists and subjectivists. If subjectivism with respect to facts about the ordinary physical world were true, then, presumably, investigators could simply make it up as they go along; there would be no fact of the matter for them to discover. Criminal investigation would simply be a species of “creative writing”; the distinction between fact and fiction would have been extinguished. Perhaps this obvious “downside” of subjectivism with respect to facts about the physical world explains why its advocates are few and far between. What is perhaps less obvious is that subjectivism with respect to theories (theory subjectivism), and ultimately moral value claims (moral subjectivism), is also problematic.

Theoretical claims are likely to be regarded as objectively true to the extent that they are based on, for example, objectively true empirical claims, such as observational ones, about the ordinary physical world. So scientific theories in relation to DNA, for example, are at least in large part based on empirical evidence.

More generally, if there are physical *and* psychological statements of fact (e.g., with respect to human intentions and beliefs), and if there are logically valid processes of reasoning (as we saw above), then there is no barrier to there being objectively verifiable theories, namely, theoretical claims that are derivable from physical and psychological facts on the basis of principles of logical reasoning (including not only deduction but also induction).³³ If so, then subjectivism with respect to theoretical statements is false, and objectivism is true.

Of course, subjectivism with respect to theoretical claims, but not observational claims, seeks to sever the connection between the theoretical and the empirical and thereby undermine the objectivity of theoretical claims. If it were to succeed, there would be profound implications for criminal investigations. For example, the use of DNA evidence by investigators and courts would no longer be tenable, if the scientific theories upon which this use is based were no longer regarded as being objectively true.

In the last section we outlined some candidates for providing an objective basis for the criminal law, namely, the notions of harm and that of needs-based deprivations (in so far as these harms and needs-based deprivations are ones that generate enforceable moral rights). We are not going to revisit those arguments here. Rather we conclude this section by pointing to the implications of moral subjectivism for criminal investigations, given the relationship between the criminal law and moral principles outlined in the last section. Specifically, moral subjectivism threatens to undermine the authority of criminal law by undermining the objectivity of the moral principles upon which the criminal law is based.

If, for example, the moral principle that it is wrong to kill the innocent is not objectively true, indeed, no more true than the contrary principle that it is morally right to kill the innocent, then the legitimacy of the law prohibiting the killing of the innocent is called into question. Now consider penal sanctions such as imprisonment. Here we reiterate and amplify a point made above. Unlike many social rules, an individual's noncompliance with the criminal law is intended by the community to lead ultimately to bad consequences for that individual, notably loss of freedom. It is surely problematic, to say the least, to hand out a lengthy prison sentence for noncompliance with a law proscribing some form of behavior unless there is an objective basis for enacting that law in the first place. If there is no objective basis for believing the behavior in question to be morally unacceptable, how can we reasonably take away someone's freedom for engaging in that behavior? Fortunately, as we saw above, there are objective bases, for example, the behavior in question is extremely and verifiably harmful, and to this extent we can justifiably enact laws proscribing such behavior and apply sanctions to those who breach these laws.

1.4 A Normative Theory of Policing

Thus far we have distinguished between law and morality, and have discussed the relationship between, in particular, the criminal law and moral principles. In doing so we have offered some candidate objective bases for criminal law and, therefore, criminal investigations, namely, harms and needs-based deprivations which generate enforceable moral rights. We now need to situate criminal investigations – criminal investigations undertaken by police investigators, in particular – within the larger context of police organizations. Accordingly, let us now turn to a consideration of the role of the police, including the role of police investigators, with respect to the criminal law (and, therefore, with respect to those moral principles that are and ought to be embodied in criminal law).

On the account proffered above, the criminal law exists to protect certain moral rights, and therefore, arguably, the central and most important moral purpose of police work is to protect these same moral rights, albeit the pursuit of this purpose ought to be constrained by the law.³⁴ So, while police institutions have other important purposes that might not directly involve the protection of moral rights – to enforce the adjudications of courts in relation to disputes between citizens, to settle disputes between citizens on the streets, or to ensure good order more generally and so on – these may well turn out either to be derived from the more fundamental purpose of protecting moral rights or to be (nonderivative) secondary purposes. Thus, laws against speeding derive in part from the moral right to life, and the restoring of order at a football match ultimately, in large part, derives from moral rights to the protection of persons and of property. On the other hand, service of summonses to assist the courts is presumably a secondary purpose of policing.³⁵

This conception of policing is a teleological one; it is a conception in terms of the ends or goals of policing.³⁶ Moreover, it is a teleological conception according to which the most important end or purpose of policing is the protection of moral rights.

On this view, while police ought to have as a fundamental purpose the protection of moral rights, their efforts in this regard ought to be constrained by the law. In so far as the law is a constraint – at least in democratic states – then our view accommodates “consent” as a criterion of legitimacy for the police role.³⁷ However, on our view legality, and therefore consent, is only one consideration, for we are insisting that police work, including police investigations, ought to be guided by moral considerations – namely, moral rights – and not simply by legal ones. This enables us to avoid the problems besetting theories of policing cast purely in terms of law enforcement, or protection of the State, or even peace-keeping.³⁸ Such theo-

ries are faced with the obvious problem posed by authoritarian states, or sometimes even democratic states, that enact laws that violate human rights – human rights being, as we saw above, a species of moral rights. Police officers in authoritarian states simultaneously violate human rights and abrogate their primary professional responsibility as police officers to protect human rights.

Further, we reiterate that, on the view that we are advocating, police engaged in the protection of moral rights ought to be constrained by the law, or at least ought to be constrained by laws that embody the will of the community in the sense that (i) the procedures for generating these laws (e.g., a democratically-elected legislature) are more or less universally accepted by the community, and (ii) the content of the laws are at least in large part accepted by the community (e.g., they embody general policies with majority electoral support or reflect the community's moral beliefs).³⁹ So we are in part advocating a broadly contractarian moral constraint on policing, namely the consent of citizens; although by our lights consent is not the *raison d'être* for policing, rather it provides an additional (albeit necessary) condition for the moral legitimacy of police work. Moreover, we are refraining from providing police with a license to pursue their (possibly only individually) subjective view of what counts as an enforceable moral right. What counts as an enforceable moral right is an objective matter. Nevertheless, some particular person or group has to specify what are to be taken to be enforceable moral rights and what are not to be so taken; and, in our view, ultimately this is a decision for the community to make by way of its laws and its democratically elected government. Here we take it that, in a properly constituted democracy, the law embodies the will of the community in the sense adumbrated above. Moreover, we can further distinguish between local, regional, and national communities, especially in states that have subnational elected bodies such as local councils. This enables us to give substance to notions of community-based policing or partnerships between police and local communities. For at the subnational level, and especially the local level, it becomes feasible for police to consult and work with communities to address law enforcement issues in a consensual manner.⁴⁰

There is a further point to be made here. The law concretizes moral rights and the principles governing their enforcement, including human rights as well as institutional moral rights. To this extent, the law is very helpful in terms of guiding police officers and citizens in relation to the way that abstract moral rights and principles apply to specific circumstances. For example, there is a human right to life that can be overridden in accordance with certain moral principles, such as self-defense or defense of the lives of others. However, it is the laws governing the use of deadly force by police officers that provide an explicit and concrete formulation of these moral

rights and principles, and thereby prescribe what is to be done or not done by police officers in specific circumstances.

In short, in our view police ought to act principally to protect certain moral rights, those moral rights ought to be enshrined in the law, and the law ought to reflect the will of the community. Should any of these conditions fail to obtain, then there will be problems. If the law and objective (justifiably enforceable) moral rights come apart, or if the law and the will of the community come apart, or if objective moral rights and the will of the community come apart, then the police may well be faced with moral dilemmas. There are no neat and easy solutions to all such problems. Clearly, if the law and/or the citizenry require the police to *violate* moral rights, or at least not to uphold them (e.g., health and safety legislation forbidding personnel to put themselves at risk to save the lives of others under some circumstances), then the law and/or the citizenry will be at odds with the fundamental purpose of policing. Accordingly, depending on the circumstances, the police may well be obliged to disobey the law and/or the will of the community. On the other hand, what is the appropriate police response to a citizen violating someone else's objective moral right in a community in which the right is not as a matter of fact enshrined in the law, and the right is not supported by the community? Consider, in this connection, women's rights to (say) education under an extremist fundamentalist religious regime such as the former Taliban regime in Afghanistan.⁴¹ Under such circumstances, an issue arises as to whether police are morally obliged *qua* police officers to *enforce* respect for the moral right in question. Again, we suggest that they may well be obliged to intervene to enforce respect for such a moral right.

Normatively speaking then, the protection of fundamental moral rights – specifically those *justifiably enforceable* moral rights enshrined in the criminal law – is the central and most important purpose of police work, including police investigations. As it happens, there is increasing recourse to human rights legislation, in particular, in the decisions of domestic as well as international courts. For example, in accordance with the European Human Rights Convention and its enabling UK legislation, the Human Rights Act of 1998, police in the UK are now *explicitly* required to comply with the principle of reasonable use of force and this principle is enshrined in their use of firearms guidelines.

Recourse to human rights legislation is an interesting development. However, it must also be pointed out that the criminal law in many, if not most, jurisdictions already, in effect, constitutes human rights legislation. Laws proscribing murder, rape, assault, and so on, are essentially laws that protect human rights, as are longstanding domestic laws governing the rights of suspects, for instance, with respect to police use of force. So, for example, prior to the above-mentioned UK Human Rights Act of 1998,

there was an understanding and (at least) implicit commitment of UK police to the principle of the reasonable use of force.

We also note that whatever the historical importance of the “Statist” conception of human rights – human rights as protections of the individual against the State – such a conception is inadequate as a *general* account of human rights. As laws against murder, rape, assault, and so on illustrate, human rights in particular, and moral rights more generally, also exist to protect individual citizens from their fellow citizens, and individual citizens from organizations other than the organizations of the State.

1.5 Criminal Investigations

Thus far in this chapter we have (i) provided an account of the relationship between, in particular, the criminal law and moral principles according to which the criminal law and, therefore, criminal investigations, have a normative basis in objectively correct moral principles – a key candidate here being justifiably enforceable, moral rights not to be harmed and to be assisted in respect of needs-based deprivations; and (ii) situated criminal investigations within the larger context of a normative theory of police organizations according to which policing is the protection of justifiably enforceable, legally enshrined moral rights. In what remains of this chapter, and in the light of (i) and (ii), we now need to sketch in general terms the purposes of, and the constraints on, criminal investigations undertaken by police investigators and to do so in the context of the traditional distinction between reactive and preventive criminal justice mechanisms and in the light of the above-adumbrated normative theory of policing. This sketch functions as a preliminary to the more detailed treatments in the following chapters of specific moral issues confronting police investigators.

As is obvious and has already been stated, combating crime and enforcing the criminal law involve conducting criminal investigations. Of course, criminal investigations are not the only way to combat crime. Indeed, they are arguably less effective in the long run than various preventative measures. Perhaps reducing levels of drug addiction is one such preventative measure in relation to burglaries. Whether or not this is so, criminal investigations are a necessary means of combating crime. More generally, there is a need for both reactive measures (e.g., the rape victim’s report of the crime should be followed by an investigation), as well as preventative measures (e.g., locked doors and high fences). Moreover, reactive measures, including criminal investigations, need to be integrated with preventative measures.

As just mentioned, criminal investigation is often a reactive mechanism; typically, an investigation is triggered when a crime is reported or a

complaint made.⁴² However, the distinction between reactive and preventative mechanisms is somewhat artificial, and the likelihood of being the subject of a criminal investigation is an important deterrent. Moreover, so-called proactive, intelligence-based investigations ideally precede any actual offense, or at least the major crime in prospect. Further, many reactive investigations are also preventative in so far as the offender is likely to continue to offend if not apprehended. The “Granny Killer” is a case in point (see Case Study 1.2.1 above). This is perhaps most evident in terrorism investigations in which a principal aim is to save lives (see Chapter 7). So criminal investigations are preventative as well as being reactive.

A further point is that sometimes a choice has to be made between reactive-driven actions and prevention-driven ones. On occasion, such a choice can take the form of an acute moral dilemma. In the above-described “Granny Killer” case, for example, there was a reactive-driven non-intervention prior to enough evidence being gathered to convict the “Granny Killer” for past crimes; alternatively, there was the prevention-driven intervention to forestall a (possibly) imminent crime (the murder of Joan Sinclair). Of course, non-intervention might be, in the long run, preventative (as well as reactive), given that, once imprisoned, the “Granny Killer” would not be able to commit these crimes. Such choices are often the result of a process which involves both the calculation of the probable outcomes of the available actions (including inaction) and the weighing of the moral costs and benefits attendant upon those outcomes.

The reactive way of dealing with crime is perhaps the one that first comes to mind. The logic is direct: the activity is defined as one that is not acceptable (e.g., unlawful); an individual engages in that activity and, as a direct result, an investigation is conducted; the individual, if found guilty, is punished in some way. The rationale for the reactive response for dealing with criminality is threefold: offenders are held to account for their actions; offenders get their just deserts; and potential offenders are deterred from future offenses.

Reactive mechanisms for dealing with crime are fundamentally linear: setting out a series of offenses (usually in legislation or regulations), waiting for an individual to transgress, then investigating, adjudicating, and finally taking punitive action. The criminal justice system in many jurisdictions largely consists of reactive institutional mechanisms. As noted above, these systems are also preventative mechanisms by virtue of their deterrence role; however, the adequacy of this deterrence role is typically dependent on their effectiveness *qua* reactive mechanisms, that is, their success in detecting, investigating, and prosecuting offenders.

As already noted, reactive mechanisms, and criminal investigations in particular, are a necessary part of any feasible criminal justice system.

Sometimes, however, if too much reliance is placed on them the weaknesses of the reactive approach are made manifest.

One obvious weakness is the passivity of the approach; by the time the investigators swing into action, the damage has been already done. An obvious example of this is terrorist acts, such as those committed by suicide bombers. While it is important to investigate a suicide bombing after it occurs, it is far more important to prevent its occurrence, albeit preventative measures give rise to their own problems (see Chapter 7). Another problem stems from the fact that unlawful behavior such as bribery and drug dealing is often secretive, and so may never be discovered.

Yet a further problem stems from the inadequacy of the resources to investigate and successfully prosecute; investigation and prosecution are resource-intensive. Consider in this connection the crime of fraud. Fraud is widespread in modern economies, yet police and other agencies simply do not have the resources to investigate adequately all the reports of fraud brought to their attention. Moreover, in all probability an even greater number of cases simply do not come to attention as a result of decisions on the part of banks, credit card providers, and the like not to report them. Yet if the chances of being caught or complained about are relatively slight due to underresourcing and/or underreporting, then the deterrent effect is undermined, which, in turn, means that there are an even larger number of offenses and offenders for investigators to deal with (see also Chapter 6).

Of course, the effectiveness of a reactive approach requires that significant detection mechanisms and applicable sanctions are available. If so then those who engage in criminal behavior have good reason to believe that (i) they will be caught and (ii) they will be appropriately, perhaps severely, punished. The punishment might include a lengthy term of imprisonment. Offenders might also attract moral sanctions emanating from work colleagues, the community, and from significant others, such as friends and relatives. Moral sanctions may be considerably less effective than punishment in the case of, for example, members of criminal families.

Criminal investigations typically rely on a number of sources of information. One of the most important is victims, albeit this is often absent in the case of some crimes such as so-called “victimless” crimes like drug selling. It is necessarily absent in the case of murder. Other important sources of information are citizens who may witness crime and neighbors or fellow-workers who may report crime or suspicious activity to police or to their superiors.

Criminal conduct embraces a wide variety of activities ranging from serious criminal offenses, such as murder and major fraud, through to minor offenses, such as minor assaults and shoplifting. The latter may warrant interventions of a nonpunitive kind, for example, cautions, counseling,

especially in the case of first offenders and juveniles. Our concern in this book is principally with serious criminal offenses, although we note that minor criminality, for instance, minor welfare benefit fraud, if engaged in by large numbers of people may in aggregate do great financial and other harm and, as such, warrant significant attention from criminal investigators. Finally, we note that the criminal justice system – and criminal investigations in particular – represents the most salient and sophisticated, reactive institutional response to combating serious crime.

Almost every jurisdiction has criminal laws against self-evident forms of serious immorality by members of the community, such as murder, assault, rape, fraud, theft, offering or soliciting bribes, or abusing the power of a public office.

While it is common for criminal laws to be consolidated into a criminal code, it is almost universal that legislation dealing with particular areas of activity, like the regulation of companies and corporations, will also consist in part of criminal offense provisions. In essence, these provisions will be dealing with criminality of a particular type and conducted in a specific context, for example, abuse of office, bribery, theft, fraud (as opposed to, say, murder, assault, rape).

In relation to the purposes of criminal investigations, in general terms – and in keeping with the normative account of policing proffered above – the investigation should be in the service of protecting justifiably enforceable, legally enshrined moral rights. Clearly homicide and rape investigations satisfy this desideratum. On the other hand, the investigation by police of dissidents for unlawful political activity in the context of an authoritarian state, such as China, may well not satisfy it. Nor might the keeping of files by organizations such as the UK's MI5 on the activities of leading members of the Labour Party during a Tory government's period of office.

In the light of the normative account of policing adumbrated above, evidently there is a public interest in criminal investigations in the service of the protection of justifiably enforced, legally enshrined moral rights. For violations of such rights, that is, criminal acts, are at one level acts in defiance of the community and, specifically, the state. Accordingly, there is legitimate public interest in criminal investigations, notwithstanding the fact that the wrongdoing in question might, in large part, consist only in harm done to one individual person, as in a case of assault.

On the other hand, there is also legitimate public interest in investigations of crimes in which there is no direct rights violation of any particular individual person. An example of police wrongdoing that needs to be investigated because it is in the public interest to do so, even though the wrongdoing in question does not necessarily violate any individual's rights is police corruption, for example, police officers accepting bribes (see Chapter 8). Here there is direct damage to an institution, namely a police organization, rather

than to an individual person or persons. However, the institution in question exists, as we have seen, to protect justifiably enforced, legally enshrined moral rights. Accordingly, such corruption indirectly harms individual persons and, in so doing, results in infringements of their moral rights. Likewise, acts that damage institutions with respect to which individuals have property rights, such as stealing from a bank or defrauding a mining corporation, can indirectly cause harm to, for example, depositors or shareholders, and the harm in question can constitute an infringement of their moral rights, specifically, their property rights. So the investigation of crimes that consist of damage to institutions may well ultimately serve the protection of the rights of individual human beings; or at least, this is so in so far as those institutions exist to protect moral rights (e.g., police organizations), or are, at least in part, the objects of the property rights of individual human beings (e.g., private sector businesses). Nor are these the only kinds of case. Consider willful damage to public sector institutions – other than security agencies – which exist to fulfill purposes the non-fulfillment of which would consist in infringements of a moral right. Many schools and hospitals fall into this category, since, arguably, schools exist to provide for the aggregate needs-based right to education and hospitals to provide for the aggregate needs-based right to health care. If so, then an arson attack on a school or the theft of drugs from a hospital has untoward moral rights implications; other things being equal, such crimes, at least if conducted on a large scale, lead to a reduction in the fulfillment of moral rights. Accordingly, investigations of such crimes indirectly contributes to the protection of moral rights.⁴³

In relation to the constraints on criminal investigations and, again, speaking in general terms, the investigation ought itself to be lawful and morally permissible. This raises a host of moral questions in relation to the process of investigation, for example, regarding suspect's rights. Many of these questions will be taken up in subsequent chapters. It also raises moral questions in relation to the investigator. For example, the investigator ought to have been properly authorized to undertake the investigation, so that it is not simply, for example, an unauthorized investigation embarked upon for personal reasons. Here we note that an investigation might be lawful and even morally permissible considered on its own terms, that is *qua* investigation, but the particular investigator might still not have been authorized to undertake it. This raises the important question of who ought to be entitled to authorize a criminal investigation.

A further constraint on criminal investigations is resources, a constraint which is especially salient in the post-GFC period of austerity in many jurisdictions in the United States, United Kingdom, and Europe. This constraint has moral significance given the implication that some crimes (e.g., minor property crimes) will not be able to be investigated or at least not

be able to be thoroughly investigated. In the context of scarce resources priorities need to be determined in relation to investigations. These priorities ought to be determined by a variety of criteria including not only the seriousness of the crime and the likelihood that it might be resolved if investigated, but also by a variety of corporate priorities. For example, there might be a need to focus on crime reduction, targeting, say, organized crime, rather than on fear of crime, ensuring, say, a visible police presence in areas of petty crime, notwithstanding greater public concern with the latter.

An important corporate priority, albeit one sometimes not explicitly prioritized, is organizational reputation. To what extent is organizational reputation factored in explicitly and given reasonable, but not overriding or unreasonable, weight? Certainly, police chiefs and commanders benchmark their forces against other forces in part on the basis of organizational reputation. To this extent reputation is an implicit criterion in “performance measurement.”

Investigations should be conducted within budget and use the appropriate number of personnel (avoiding undermanning or overmanning). More generally, the resources used should be appropriate to the investigations: there should, for example, be appropriate use of resource-intensive intrusive surveillance methods. Here it is important to distinguish the budget set aside for an investigation and the budget available for conducting all investigations over the budgetary period in question. The budget for a specific investigation might be adequate even though the overall budget for investigations is not – and vice versa. We note that a large number of high-profile investigations can quickly destroy a budget, even one thought originally to be adequate.

The larger context for the efficient and effective use of public resources by investigators is the overall quantum of resources made available to the police organization by government. Naturally, appropriate resourcing of investigations cannot be achieved, absent the existence of adequate resources within the police organization, or at least within the investigative division of the police organization. Accordingly, an issue arises in relation to the system for allocating scarce resources within the police organization as a whole, and within the criminal investigations department itself.

Notes

- 1 At least ideally or by the lights of the standard theory of representative democracy, according to which, although the law *directly* reflects the will of the legislators, it *indirectly* reflects the will of the citizenry who elected the legislators to govern in accordance with *their* (the citizenry’s) will and, for that matter, *their* (the citizenry’s) interest. In practice, of course, many laws are in part

reflective of powerful sectional interest groups who successfully lobby, or are otherwise able to influence, democratically elected governments. For example, perhaps laws, or at least regulations, in the area of white collar crime have historically been less stringent than they ought to be. Moreover, laws undergo change as a result of moral progress. For example, pollution and health and safety infringements were formerly breaches of civil or administrative, rather than criminal, law.

- 2 For a sustained philosophical defense of objectivity in relation to these various categories of propositions see Thomas Nagel (1997) *The Last Word*, Oxford: Oxford University Press.
- 3 The subjective social morality/objective morality distinction is related to, but is not the same as, the so-called positive morality/critical morality distinction. Subjective social morality is roughly the same as positive morality; but critical morality is the structure of moral principles and so forth that a society uses to critique its prior beliefs and behavior. However, critical morality is not necessarily objective in character; moreover, some elements of positive morality will be elements of objective morality (namely those that are objectively correct).
- 4 Obviously, other things might not be equal. For example, other relatives or the state might provide for their needs, if the parents do not.
- 5 There is an important conceptual and normative issue as to what counts as bribery. See Stuart P. Green (2010) *Lying, Cheating and Stealing: A Moral Theory of White Collar Crime*, Oxford: Oxford University Press, Chapter 16, Bribery.
- 6 Patrick Devlin (1968) *The Enforcement of Morals*, Oxford: Oxford University Press.
- 7 John Stuart Mill *On Liberty* (any edition) and Joel Feinberg (1987) *Harm to Others: The Moral Limits of the Criminal Law*, Oxford: Oxford University Press.
- 8 Roughly speaking – and other things being equal – one’s action is morally wrong if one intentionally harms another (and one’s intention is under one’s control), or one knowingly causes harm to another (and could have done otherwise), or one unknowingly causes harm to another, could have done otherwise, and should have known that one’s action would cause the harm in question. For a detailed recent account of causation and responsibility in the law and morality see Michael S. Moore (2009) *Causation and Responsibility: An Essay in Law, Morals and Metaphysics*, Oxford: Oxford University Press. On the more specific notion of collective moral responsibility see Seumas Miller (2006) Collective moral responsibility: an individualist account, in Peter A. French (ed.) *Midwest Studies in Philosophy*, 30, pp.176–193. See also the discussion in Chapter 7, Section 7.6 in relation to terrorism.
- 9 But see Feinberg (1987).
- 10 Taxes typically provide for goods to which the citizenry have basic rights and goods to which they do not. On the view under consideration, there would presumably be a different moral justification for the enforcement of taxes to provide for goods in respect of which the citizens did not have basic rights, that is, to levy taxes above and beyond those required to ensure basic rights are respected.

- 11 Henry Shue (1984) *Basic Rights*, Princeton: Princeton University Press.
- 12 See, for example, Article 24 of the Universal Declaration of Human Rights.
- 13 The terminology used to refer to these various categories of legal and moral rights can be confusing. For a recent account of this issue see James W. Nickel (2007) *Making Sense of Human Rights* (2nd edn), Oxford: Blackwell Publishing, Chapter 1. Some legal rights and duties are also moral rights and duties but were not moral rights and duties prior to being legal rights and duties; to this extent the law “creates” morality. Such legal rights and duties are a species of institutional (moral) rights and duties. See discussion below.
- 14 Or at least rights to such assistance when it can be relatively easily provided.
- 15 See Miller (2010a).
- 16 Another important set of rights sometimes neglected are the rights of future generations. These rights are highly germane in relation to laws enacted to protect the environment.
- 17 See Seumas Miller and John Blackler (2005) *Ethical Issues in Policing*, Aldershot: Ashgate, Chapter 4.
- 18 The intuitive idea is that there are certain properties that individual human beings possess that are at least in part constitutive of their humanity. Naturally, there is room for dispute as to what these properties are; indeed, some putative properties might be criteria rather than defining properties. Moreover, while some putative properties, such as the capacity to reason, are more salient than others, such as the capacity for bodily movement, we do not have a worked-out theory to offer. However, the main point to stress here is that the properties in question are ones that are held to have *moral* value, for example, individual autonomy or life. This conception is consistent with a view of human beings as essentially social animals. See Seumas Miller (2003) Individual autonomy and sociality, in F. Schmitt (ed.), *Socialising Metaphysics: The Nature of Social Reality*, Lanham, MD: Rowman and Littlefield.
- 19 Typically, a distinction is made between claim rights (e.g., one’s right to one’s own body) and liberty rights (e.g., a right to sit on a park bench in a public area). If A has a claim right to *x* then B has no right to *x* and, indeed, B has a duty to refrain from taking *x* (or otherwise interfering with A’s enjoyment of *x*). If A has a liberty right to *y* then B may well also have a liberty right to *y*. But perhaps B has a duty to refrain from preventing A from exercising A’s right to *y* (other than incidentally by B exercising B’s right to *y*).
- 20 Note that we are here asserting a *normative* conceptual connection between *human* rights and enforcement. We are not making the more familiar (and controversial) claim that for something to be a moral right, it must be able to be enforced. Here it is also useful to distinguish between different orders of rights and duties. For example, the right to life gives rise to the duty not to kill, but also the duty to protect someone from being killed.
- 21 Or at least for much of the substantive, as opposed to, procedural criminal law. See Sections 1.2.2 and 1.3 below.
- 22 L. Writer, S. Barrett, and A. Bouda (1992) *Garden of Evil: The Granny Killer’s Reign of Terror*, Sydney: Ironbark, p. 147.
- 23 W. Brown (ed.) (1995) *Australian Crime*, Sydney: Book Company International, p. 240.

- 24 See Writer, Barrett, and Bouda (1992).
- 25 H. L. Packer (1964) Two models of criminal process, *University of Pennsylvania Law Review*, 113, November, pp. 1–68.
- 26 See Packer (1964), p. 10.
- 27 Jerome Skolnick (1977) *Justice without Trial; Law Enforcement in Democratic Society* (2nd edn), New York: Macmillan, pp. 196–197.
- 28 Skolnick (1977), p. 196–197
- 29 No doubt the legal context, including other laws, plays a role here.
- 30 Some of the complexities here are as follows. Words and sentences have meaning in a language to some extent independently of any given speaker's *use* of those words and sentences. Moreover, context to some extent determines meaning. The precise relationship between so-called “speaker-meaning” and “sentence-meaning” is a matter of dispute between philosophers of language. See, for example, Paul Grice (1968) Utterer's meaning, sentence meaning and word meaning, *Foundations of Language*, 4. Further, there is a dispute among legal theorists as to the degree of importance that ought to be attached to the original legislator's intended meaning (leaving aside questions of speaker-meaning versus sentence-meaning). Some theorists hold that legislation needs to be “reinterpreted” in the light of contemporary circumstances, notably in respect of its current relevance. Nevertheless, the original and, for that matter, current meaning of the legislation is in large part dependent on the original legislator's intention. It should also be noted that deviation from that intended meaning for the purposes of ensuring the current relevance of the legislation – whatever one thinks of the merits of such a process – is something above and beyond interpreting the original meaning. See, for example, Ronald Dworkin (1998) *Law's Empire*, Oxford: Hart Publishing.
- 31 Those who reject objective truth and falsehood are also referred to as relativists; we are using the terms subjectivism and relativism more or less interchangeably to refer to those who reject objective truth. It is important, however, to distinguish between subjectivists (relativists) and skeptics. Skeptics do not necessarily deny the existence of objective truth; rather they deny that we could *know* that we ever possessed objective truths. Some subjectivists (relativists) hold that there are *no* statements, including statements about the physical world and mathematical statements such as that $2 + 2 = 4$, that are objectively true (or objectively false). This view is implausible not the least because it is evidently self-refuting. It is self-refuting because the very statement of this view cannot – according to this view itself – be objectively true (or objectively false) on pain of contradiction. If the statement of this view is objectively true then it contradicts itself; it turns out that there is, after all, at least one objectively true statement, namely, the statement that there are no objective truths. On the other hand, if the statement of this view is not objectively true then there is no need to pay any attention to it; it is not, after all, making the objectively true statement that there are no objective truths.
- 32 As already noted, the terms “subjectivism” and “relativism” are often used interchangeably but there is a need to distinguish individualist from collectivist forms, such as cultural relativism. Moreover, sometimes subjectivism is used to refer to an individualist (rather than a collectivist) doctrine – and vice versa for

- relativism. For an introductory discussion of moral subjectivism (i.e., moral relativism) see in particular Alexandra and Miller (2009), Chapter 2. For a general defense of objectivism see Nagel (1997).
- 33 Theoretical claims in the sphere of criminal justice are, we take it, typically not deductively derivable from factual statements or, at least, not thus derivable in any nontrivial sense. Rather the argumentative form that such derivations take is typically that of evidential weight, including the weight of inductive evidence. Nor do such theoretical claims make use of so-called theoretical entities in the sense that that term has in the natural sciences, e.g., statements with respect to non-observable, subatomic particles. Theorists of a behaviorist bent have on occasion sought to present statements about mental states as theoretical in this sense but this ignores introspection as a legitimate mode of access and, therefore, flies in the face of common sense and of the law.
- 34 Earlier versions of this normative account appeared in Miller (2010a), Chapter 9, Miller and Blackler (2005), Chapter 1, Seumas Miller, John Blackler, and Andrew Alexandra (2006) *Police Ethics* (2nd edn), Sydney: Allen and Unwin, Chapter 3, and Seumas Miller and John Blackler (1995) *Police Ethics*, Wagga Wagga, Keon Press, Chapter 3.
- 35 Naturally, we acknowledge that many laws do not derive from moral rights, and also that those that do often do not do so in any straightforward manner.
- 36 Miller has elaborated a teleological account of institutions in his 2001 work *Social Action: A Teleological Account*, New York: Cambridge University Press, Chapter 6 and also in *The Moral Foundations of Social Institutions* (2010). See especially Chapter 9 on policing as an institution.
- 37 We acknowledge that in common law countries the law reflects tradition, and therefore perhaps “consent” in another sense. See John Kleinig (1996) *The Ethics of Policing*, Cambridge: Cambridge University Press, Chapter 2.
- 38 See Kleinig (1996), Chapter 2. For a different kind of account in terms of the use of coercive force see Egon Bittner (1980) *The Functions of the Police in Modern Society*, Cambridge, MA: Oelgeschlager, Gunn, and Hain, 1980. See also Peter Neyroud and Alan Beckley (2001) *Policing, Ethics and Human Rights*, Cullompton, Devon: Willan Publishing, Chapter 2.
- 39 Here we are assuming that large fragments of a legal system can consist of immoral laws, and yet the system remain recognizably a legal system. See Dworkin (1998), p. 101. We are also assuming that, for a legal system to express the admittedly problematic notion of the will of the community, it is at least necessary that the overwhelming majority of the community (not just a simple majority) support the content of the system of laws taken as a whole – even if there are a small number of individual laws they do not support – and support the procedures for generating laws, for example, a democratically elected legislature, see Miller (2001), pp. 141–151. Finally, we are assuming that the fact that a party or candidate or policy or law secured (directly or directly) a majority vote is an important (but not necessarily decisive) consideration in its favor, and a consideration above and beyond the moral weight to be given to the existence of a consensus in relation to the value to be attached to voting as a procedure.

- 40 Moreover, community-based policing might reconstitute itself as problem-based policing, and thereby be more effective. See Herman Goldstein (1990) *Problem-Oriented Policing*, New York: McGraw-Hill, and Team Policing, in Steven G. Brandl and David E. Barlow (eds) (1996) *Classics of Policing*, Cincinnati, OH: Anderson Publishing Co., p. 86f.
- 41 Regarding the role of the religious police of the Taliban in the Department of the Promotion of Virtue and Prevention of Vice, see Ahmed Rashid (2001) *Taliban: The Story of the Afghan Warlords*, London: Pan Books, Chapter 8.
- 42 An earlier version of the material in this section appeared in Seumas Miller, Peter Roberts, and Edward Spence (2005) *Corruption and Anti-corruption; A Study in Applied Philosophy*, Saddle River, NJ: Prentice Hall, Chapter 7.
- 43 See Miller (2010a) for a general normative theory of social institutions which lends support to this claim.