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Virtue Ethics: Analysing emotions in a police interview with a crime suspect

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Ann-Claire Larsen and Michael Crowley

Abstract

Justice goes some way to being served when statements from police interviews with suspects are admissible as evidence in court. Admissible evidence confirms that the police have worked within legal constraints and satisfied universal ethical principles that appear in the police code of conduct. Conversely, when police behave improperly and an accused person walks free, police authorities have needed to placate an outraged public by promising reforms. This paper explores sections of *Arthurs'* case to illustrate differences between legal and illegal police conduct when interviewing a murder suspect. Parts of the interview were admissible as legal evidence; the majority was not. This paper then considers the practical relevance of ethical constraints formalised as universal moral principles in the police code of conduct. It suggests that Aristotle's virtue ethics may be a more appropriate ethical response than referring to abstract moral principles in analysing police/suspect interviews. The paper concludes by calling for police to include virtue ethics as part of conversation management strategies when analysing police/suspect interviews.

Key Words: impartiality, confessions, police, sentiments, training.

Introduction

In 2003, a young girl was assaulted in Perth, Western Australia (WA). Dante Arthurs was taken into police custody and interviewed. As the police were 'too aggressive' in questioning, the police record of interview was inadmissible as evidence in court (Fitzsimmons, 2007). The charge against Arthurs was dropped. Three years later Arthurs aged 21 years was again interviewed following a young girl's murder at a shopping centre (O'Connell, 2009). Detectives again failed to meet the legal requirements for voluntariness. In the words of Blaxell J, the judge ruling on the admissibility of a video record of the police/suspect interview at trial, they exercised 'persistent importunity, or

sustained or undue insistence or pressure' (*Arthurs v The State of Western Australia)*[1]. Police behaviour had exceeded 'acceptable boundaries' (Fitzsimmons, 2007).

Police are required to work within 'acceptable boundaries' of conduct to meet requirements for voluntariness in police interrogations. Whether a suspect's statements were made involuntary at the behest of police affects the admissibility of the evidence at court. An analysis of 'acceptable boundaries' and voluntariness are considered here in light of ethical principles codified in the WA Police's code of conduct together with legal constraints enforced by the judiciary. Couching police conduct within an ethical context is a recent addition to police training concerns. For our purposes here, Arthurs' case, given its uniqueness in illustrating both ethical and unethical behaviour, provides a talking point for law in action. How the police may maintain acceptable boundaries in a system that allows a 'wide scope of subjective discretion' (McBarnet, 1981, p. 29) is discussed later in this paper.

McBarnet's (1981, p. 6) early research called on police work to be analysed within the 'legal context in which the interaction takes place'. This is necessary because 'inadmissibility is the major weapon available to the court to control police practices' (McBarnet, 1981, p. 66). Requirements for admissible evidence, however, are unclear. In the English context, for example, Judges' Rules are guidelines for police, not law (McBarnet, 1981, p. 66-67). The Judges' Rules, for example, granted the trial judge 'discretionary power to exclude any incriminating admission obtained' (Kennedy, 1992, p. 7). Further, rules are 'apt to be quite technical, leading to a certain number of good-faith mistakes' (Packer, 1968, p. 178). Judges' rules, however, have been superseded by

[1] 209 WASC 10 2007 para. 9.

the *Police and Criminal Evidence Act* 1984, which 'tightened the rules on what was admissible, but there is still plenty of leeway for the miscreant police officer' (Kennedy, 1992, p. 7). Similarly, in WA in the interests of public policy, confessional evidence may be inadmissible (Mellifont, 2010, p. 111). Dixon, though, suggests 'state courts have a poor record in accepting this responsibility' (Dixon, 2008, p. 3).

In addition to legal constraints, WA police are required to consider the ethical context of their interactions with crime suspects. Codes of conduct typically promote consistency, equity, honesty, empathy, respect, openness, fairness, accountability, rights, impartiality and integrity that apply to everyone in all circumstances. These moral principles or imperatives, which display a 'high degree of abstraction' (Habermas, 1996, p. 153), are goals not guidelines, providing little practical direction to change any 'previous practice of reasoning or speaking' (Habermas, 1974, p. 23). 'Am I being impartial?' is a question police are required to ask of themselves. If being impartial means police must be unbiased, objective, and detached then all feelings must be controlled during a police/suspect interview. Officials are to set aside self-interests to 'act out the ethical commitments attached to the assigned role' (Ashworth and Redmayne, 2005, p. 61). Yet, to assist their cause during interviews police officers create an atmosphere of guilt (McBarnet, 1981, p. 61) by being verbally persistent. Knowing where to draw the line between permitted and prohibited levels of verbal persistence during the police/suspect interview is a challenge police now face.

The *Arthurs*' case has significance for discussing these issues for two reasons. First, the conduct of the WA police in dealing with Arthurs in 2003 was investigated by the Corruption and Crime Commission that found that police had made "an honest error"

in not having Arthurs' blood spattered shorts forensically tested and being 'heavy handed' during the interview (Cox, 2009). Second, little had been learned from the 2003 'honest errors' as most of the 2006 interview was inadmissible in court. The WA public's outrage about this case were inflamed by rumours, which police quickly debunked, that Arthurs was one of Jamie Bulger's killers, that he had been investigated by British police in 2001, and that he had planned further crimes against children (Gosch and Buckley-Carr, 2007).

This paper considers the legal and ethical contexts of police interactions with Arthurs. It focuses on voluntariness and 'impartiality', the universal moral principle stipulated in the WA police code of conduct but found wanting in *Arthurs'* case. It explores how virtue ethics offers an ethical approach and language that may assist in analysing police/suspect interviews. The paper explores how police conduct during interrogations affects the admissibility of the evidence at court. It shows how Dante Arthurs appears to have been vulnerable though was not legally defined as such.

The matter of voluntariness

There is much to gain from police/suspect interviews. In the *Morris*[2] case, for example, no force, no probing, was necessary as the suspect simply nodded affirmatively when asked by a customs officer: 'Are you carrying drugs?'. Conversely, there is much to lose if a suspect's statements were made involuntarily. The question at law is 'whether the answer was given voluntarily' (McBarnet, 1981, p. 48) and 'admissibility depends on the fairness of the circumstances' (McBarnet, 1981, p. 49). The term 'voluntariness',

[2] *Morris v R* (2006) 201 FLR 325.

however, is 'not self-evident but subject to interpretation of the court' (McBarnet, 1981, p. 50).

Australia's High Court judges called attention to the 'observations to the effect that voluntariness is a flexible principle' (*R v Swaffield*; *Pavic v R*[3] at 123). As Ashworth and Redmayne (2005, p. 77) also point out, despite 'masses of legislative rules' there is and must be 'wide areas of discretion'. Discretion, which is paramount for fairness, however, opens the door to possible misuse of power. The High Court judges added, 'failure on the test of voluntariness is fatal to the admissibility of a confession' (*R v Swaffield*; *Pavic v R*[4] at 123).

If suspects are unlikely to make incriminating statements without inducements or threats, the question becomes where should the line be drawn between permissible bargains and threats, and impermissible bullying, pressure and third-degree methods? (see McBarnet, 1981, p. 60). Bargains and threats, however, fuelled by uncontrolled emotional responses by police, complicate matters. The line between ethical and unethical behaviour drawn in *Arthurs*' case is discussed below.

Nevertheless, police have the weight of institutional authority on their side. As McBarnet (1981, p. 61) confirms, 'the formal structure creates an informal situation of unilateral power' where the police set about constructing an atmosphere of guilt as part of the 'degradation ritual'. Degrading and formidable strategies, including 'arrest, search, fingerprinting, questioning', and 'being charged', work to 'construct an atmosphere of guilt' (McBarnet, 1981, p. 89).

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[3] [1998] HCA 1.

[4] [1998] HCA 1.

To constrain police powers, Australia has legislated protections allowing the accused to request a lawyer's presence (see s 138 (2)(c) *Criminal Investigation Act 2006*) (WA)). Further, police interviews are video-recorded, unless there is a reasonable excuse (*Criminal Investigation Act* 2006 (WA), s118(3)(a) & (b)(i)). Electronic Recording of Interviews with Suspected Persons was introduced to address 'verballing' or fabrication of confessions. Consequently, involuntary confessions have declined and 'public debate and concern about verballing' have virtually ended (Dixon, 2008, p. 6). Ashworth and Redmayne (2005, p. 90) also confirm that accurate records of all interviews is a safeguard against verballing.

The common law also protects Australian citizens from police abuse. A judge's discretion to admit statements is a means for courts 'to control police practices' (McBarnet 1981, p. 66). For example, *McKinney v R*[5] held that a fabricated interview record could mean that 'the atmosphere, including the isolation and powerlessness of a suspect held in police custody, … may also be conducive to the suspect signing a false document' (at 15). Though these measures partially redress the power imbalance, it remains incumbent upon the judiciary not the police to decide whether statements are made voluntarily.

Context of the police/suspect interview with Arthurs

The detectives' conduct during their interview with Dante Arthurs in 2007 was Judge Blaxell's concern as voluntariness 'is a strict precondition to admissibility of a

[5] [1991] HCA 6.

confession' (Mellifont, 2012, p. 115). Three issues, though, need clarifying. The first was Arthurs' vulnerability. On Arthur's capacity, Blaxell J wrote:

> [Arthurs] demeanour on the video suggests that he is not sophisticated or highly articulate, and that he is what I would describe as a fairly simple person. (para 18)

No more was said about Arthurs' vulnerabilities. The press though reported that Arthurs has Asperger syndrome (see Gosch and Buckley-Carr, 2007). The basis for that report was not made clear and no mention was made in the case as to whether or not Arthurs was handicapped. In Western Australia, legislation has it that:

> If under this Act an officer is required to inform a person about any matter and the person is for any reason unable to understand or communicate in spoken English sufficiently, the officer must, if it is practicable to do so in the circumstances, use an interpreter or other qualified person or other means to inform the person about the matter. (*Criminal Investigation Act 2006* (WA), s 10)

The WA Police Code of Conduct also requires that people with disabilities can expect:

> • The right to be treated with dignity and respect and to have all reasonable attempts made to accommodate the specific needs of their disability
> • In the case of people with psychiatric or intellectual disability, the right to understanding of their disability and their legal rights protected accordingly
> • In the case of people with a psychiatric or intellectual disability, a right to an advocate when dealing with police. (2008, p. 9)
>
> Members need to be mindful of their obligations when interviewing people with special needs, which include people with physical, intellectual or psychiatric disabilities. (p. 10)

Bartels (2011, p. 4) also refers to a WA Police policy entitled *Questioning Children and People with Special Needs*, 'which defines people with special needs as children, people with physical, intellectual or psychiatric disabilities...'. The policy requires that in such circumstances,

> More persuasive evidence is generally required to prove that a confession was voluntarily made and that is was obtained in circumstances that were fair to the accused. (cited in Bartels, 2011, p. 9)

The question of Arthurs' vulnerability was not raised beyond Blaxell J's point made above that Arthurs was a 'fairly simple person'. Thus, Arthurs' vulnerability was not in legal contention in the court. Without further information as to Arthurs' communication difficulties and an assessment as whether he was a person with special needs, it is not possible to say conclusively that police policy requirements had been met. But the caution had to be read out twice, indicating that Arthurs has some difficulties in comprehending what he was being told. Blaxell J, however, was satisfied that the detective had adequately explained the caution the second time to Arthurs (para 60). Thus, the police had partially safeguarded Arthurs interests by cautioning correctly the second time.

Second, Blaxell J was not asked to exclude the video record of interview on the ground that it 'was unfairly obtained'. On that basis, Blaxell J did not further consider the fairness issue. Instead, the focus turned to considering whether Arthurs' statements were made involuntarily (para 6).

Third, the detectives ignored Arthurs' repeated requests for a lawyer. Under s 138 (2)(c), 'an arrested suspect is entitled 'to a reasonable opportunity to

communicate or to attempt to communicate with a legal practitioner' (*Criminal Investigation Act 2006*) (WA). Again, on face value, it would seem that Arthurs' rights here were not respected. According to Blaxell J, the two interviewing detectives testified that the applicant did not request the presence of a lawyer prior to the interview. When Arthurs first mentioned a lawyer during the interview (ts 31) he stated:

> I am going to say this *again* if I've done something wrong then I'd like a lawyer. (emphasis added). (para 58)

An inference could be made from this statement that Arthurs had requested a lawyer before the interview began. However, it was Blaxell J's view that,

> an alternative reasonable inference is that the applicant had overheard his parents demanding that a solicitor be present prior to him leaving the house. The two detectives impressed me as being reliable witnesses on this point, and I have no reason to disbelieve them when they say that there was no such prior request. (para 59)

The detective had dismissed Arthurs' further requests for a lawyer with, 'well a lawyer's always an option and we can arrange that but at this time in the morning none's going to be available all right' (para 37). The interview continued.

Voluntariness in practice: the case of Dante Arthurs

Having established that police conduct fails at times to comply with legal and moral norms, with serious consequences, we consider whether 'ethical discourses' may help in analysing police 'failures'. The WA Police Code of Conduct requires the police to, 'Be

objective and impartial in your investigations and presentations of evidence' (2008, p. 11). How then do ethical calls for impartiality translate into police practice and conduct that is acceptable at court? Is it a matter of knowing the law? No, the law offers little practical assistance. Having experience may help; but experience in serious criminal interrogations may be lacking.

Further, WA Code of Conduct requires police to be 'honest, impartial and consistent' (2008, p. 11). Yet, the High Court of Australia approves of entrapment involving deception and subterfuge (*Ridgeway v R*[6]; *Green v R*[7]). Ashworth and Redmayne (2005, p. 90) note further that in England, 'police must balance admissibility of evidence that might override ethical concerns'. Thus, it is mistaken to assume legal and moral principles are equivalent. Despite ambiguities, police are required to remain impartial, regulate their emotional states and express themselves in ways that will achieve voluntary statements at law (see Rafaeli and Sutton, 1987). In assessing whether a suspect has made voluntary statements, whether his or her will has not been overborne, Blaxell J (para 52) explained he was required to interpret 'the demeanour of the applicant' as well as what he termed the ''atmospherics' of the interview', two 'very important factors that can only be appreciated by viewing the video'.

Blaxell J found that early in the interview the detectives had achieved voluntariness in questioning Arthurs about his movements at the shopping centre. Following his arrest at 4.35am on 26 June 2006, Arthurs, whose parents were not at the interview, made certain admissions. When he was shown a floor plan of the shopping

[6] (1995) 129 ALR 41.

[7] SCL 970052; BC9700420.

centre where the child's body was found, detectives asked him to point out the toilets. He complied (at 29). After all, a suspect in custody is meant to comply with officers' directions (Holdaway, 1983, p. 27). At that point, the police though persistent worked within legal bounds:

> Q…some time after 3 o'clock that little eight year old girl has been killed in that toilet. What do you have to say about that?
> A. I don't have anything to say.
> Q. Why?
> A. I don't know what to say.
> Q. Well how about telling us your version of what happened?
> A. How, if I can't remember what happened?
> Q. Well you've remembered - - -
> A. If something's happened and I can't remember it how am I going to tell you what's happened?. (at 30)

These responses were made voluntarily and therefore legally.

Conversely, Dixon J in *McDermott v The Queen*[8] described improper behaviour on the part of police during interviews:

> If he [the accused] speaks because he is overborne his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary.

Where there is 'threat, inducement, or other forms of undue pressure' (at 7) the police have acted improperly. Thus, effects of 'the circumstances upon the will of the

[8] (1948) CLR 501 at 511.

confessionalist' are considered by the court (*Arthurs v The State of Western Australia)*[9] when determining whether statements were made voluntarily (Blaxell J citing Brennan J in *Collins v The Queen*[10]*).* Though the interview initially achieved a degree of voluntariness, officers soon began to place undue pressure on him in a variety of ways.

A little later, Blaxell J found the detective's questioning had become 'strident', 'very repetitive, very leading and persistent' (*Arthurs v The State of Western Australia*[11]*).* The police had failed to ask themselves, 'Is it legal and consistent with official policy?; am I acting impartially?; Can I justify my stance?; am I serving or injuring the public interest?'. These questions appear in the code of conduct checklist (See WA Police Code of Conduct 2008, p. 3). The detectives did not 'remain impartial' by avoiding 'harassment' (WA Police Code of Conduct, 2008, p.7) and violated a pledge not to 'permit personal feelings, prejudges, animosities or friendships to influence my decisions' (WA Police Code of Conduct, 2008, p.15).

The police act of 'crossing the line' warrants further analysis. The detectives resorted to 'bargaining' processes, to 'threats and promises' in their attempts to induce Arthurs to accept their claims. Once the police resort to 'threats', the already unequal relationship between police and the accused becomes coercive, rendering 'uncoerced consensus' impossible.

In developing an atmosphere of guilt (see McBarnet, 1981, p. 61), the police attempted to force Arthurs to agree with their version of events:

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[9] 209 WASC 10 2007.

[10] (1980) 31 ALR 257 at 307.

[11] [2007] WASC 209 55 2007.

> Q. And you've pulled her in to the cubicle, yeah? [at which point the applicant nodded] Okay. Locked the door? You obviously did because her brother couldn't get in.
> A. Probably. Yes. (at 43)

The interview's 'atmospherics', to apply Blaxell J's (para 52) term, deteriorated further with:

> Q. Did you mean to kill her or was it an accident, Dante? Did you kill her because you were angry with mum? Do you hate females? You don't hate females but you're very angry and you happened to get very angry with this little girl didn't you? Hey Dante, took your anger our (sic) on the girl didn't you? Isn't that right? Isn't that right? Hey, you must have been a very young man weren't you? Did you want to get back at mum and you took your anger out on that girl who is now deceased didn't you? Look at me. Hey look at me. Don't - don't go off in to the - you look at me and tell me why you did that and don't say I don't know because I'm sick of hearing that to be quite honest. You do know. So what happened? (ts 67 at 40)

In response to these ten questions, asked without stopping, Arthurs became increasingly unresponsive, holding his face in his hands, occasionally nodding or shaking his head and making almost imperceptible responses. One detective pulled Arthurs' right arm away from his face without effect. As Holdaway (1983, p. 27) reports from his findings in England, 'if he is co-operative, then the police are OK with him; if he is not co-operative, then he gets it'. Blaxell J concluded that the questioning had become 'very repetitive, very leading and persistent' (*Arthurs v The State of Western*

Australia[12]*).* The more angry the police became the more compromised the interrogation. The police had transgressed legal and ethical requirements.

Dixon J in *McDermott v The Queen*[13] described improper behaviour on the part of police during interviews:

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Where there is 'threat, inducement, or other forms of undue pressure' (at 7) the police have acted improperly. Effects of 'the circumstances upon the will of the confessionalist' are considered by the court (*Arthurs v The State of Western Australia)*[14] when determining whether statements were made voluntarily (Blaxell J citing Brennan J in *Collins v The Queen*[15]*).*

Managing emotions during a police/suspect interview

An analysis of *Arthurs'* case where the police over-stepped boundaries of aggression may be assisted by insights from Aristotle's (384-322 BC) virtue ethics. Attention is given as to how emotional responses on the part of the police might be restrained or self-regulated to conform to the provisions set out in WA Police Code of Conduct. Virtue ethics provides another angle to self-regulating emotional responses to trying situations. As a

[12] 209 55 WASC 2007.

[13] (1948) CLR 501 at 511.

[14] 209 WASC 10 2007.

[15] (1980) 31 ALR 257 at 307.

judge is required to assess the atmosphere in the interview room, which includes emotive responses on the part of police, virtue ethics may offer police more practical guidance for maintaining appropriate conduct than abstract moral principles set out in the WA police code of conduct.

Aristotle's work provides additional insights into how anger, though a necessary emotion, becomes excessive. For Aristotle (2000, p. 14, 28, 29), justice is attained when people act 'rightly', understood as involving feelings, capacities and states that form the mean between two vices: deficiency and excess. The virtuous person finds the mean, the middle ground of temperance (even tempered), whereas the excessive person is intemperate (quick tempered) and the deficient person is passive (slow tempered) (Aristotle 2000, p. 32). Achieving temperance requires a person to have feelings including anger and actions 'at the right time, about the right things, towards the right people, for the right end, and in the right way' (Aristotle, 2000, p. 30). Expressions of 'anger' require more self-awareness, control and insight than the intemperate or aggressive detective displayed.

> Once a person becomes emotionally involved, it is easier to be quick-tempered but difficult to return to passivity. The reason Aristotle may have given as to why the detectives who could not stop their 'strident' questioning was that 'people's activities give them the corresponding character … they become what they are (and) it is no longer possible for them to be otherwise'' (2000, p. 46-47). The detective was unable to stop, unable to lighten the atmosphere in the interview room that pushed Arthurs further into himself.

A virtue ethics approach emphasizes not only that individual character is a central concern requiring both training and practice; but, remaining impartial not angry is difficult when discretion is allowable though necessary. Nothing perceived by our senses is easily determined as our 'judgement about impartiality lies in perception' (Aristotle, 2000, p. 35-6). The detectives in *Arthurs'* case deviated from the mean of impartiality (temperance) and hit excess. An intemperate (angry, overbearing, pushy, quick tempered) police officer may push away the temperate (virtuous, competent, even-tempered) police officer calling him or her slow and incompetent. In the interview with Arthurs, the detectives' feelings and actions became evident in their excessive, strident and leading questions. They had crossed the line. By becoming 'angry or afraid' at the wrong time, they were left without rational choice (see Aristotle 2000, p. 29) and the interview suffered. Experiential training in knowing how to recognise personal excesses and how to withdraw from these emotions may have assisted the detective interviewing Arthurs.

Consequences of the defeat and reconciliation

Evidence was mounting against Arthurs before he pleaded guilty. He was told his fingerprint was found on the toilet's washbasin where the child's body was found (para 30). He admitted being near the crime scene when the crime took place. The police had confiscated clothing Arthurs wore the day of the murder. Eventually, Arthurs pleaded guilty, as most suspects do on the basis of 'the strength of evidence against them' (Ashworth and Redmayne, 2005, p. 83).

Arthurs is now serving a sentence of life in prison for unlawful detainment and murder and is not eligible for parole for thirteen years. Further fallout followed. Arthurs' lawyer pointed to the 'blatant failure in the system', a precursor to the 2007 case (ABC News, 2007), the public was 'outraged' (Taylor, 2007) and the Police Commissioner launched a 'blistering attack over the bungled 2003 investigation' that freed Arthurs and the police handling of the 2007 investigation (Taylor, 2007). In response, police officers and union officials expressed their concern for the 'welfare of those officers directly involved' (Taylor, 2007). As a consequence of these events, a public sex offender online register in WA will be established in July 2012 where 'the identities of child murdered will be posted on a public register' together with a 'register of pedophiles (sic) and sex offenders to come into force later this year' (Spagnolo, 2012). It is possible that Arthurs' details will not appear on the register 'under the model the Government proposes because he did not have convictions for sex offences before the killing' (Parker, 2011).

Promised also were 'four new levels of interview training', ranging from 'interrogations for basic crimes to those for murder' (O'Connell, 2009 with almost $1 million committed to 'improving investigative and interview practices of detectives' (Cox, 2010). Consequently, the Project Anticus team was established (Cox, 2010). Dixon (2008, p. 24) also recommends police training to include working rules that have 'statutory authority' with police involvement. WA police have since introduced the PEACE (Planning and Preparation, Engage and Explain, Account, Closure and Evaluate) training package of investigative interviewing at its academy (Grote and Mitchell, 2007, p. 101).

Thus, another near miscarriage of justice was required to shake policing institutions sufficiently to introduce changes. In this environment, Aristotle's virtue of temperance may assist analyses if not training and practice. In practical terms, this may require simulations obliging officers to undertake self-reflection, consider the ethical issues and hold their temper when facing an uncooperative crime suspect. Regulating the emotions may be difficult as a practised art but analyses of emotional excesses deserve a place in a Police Academy curriculum.

Conclusion

Virtue ethics may assist in circumscribing the boundaries of police coercion. It shifts the question from 'am I acting impartially?' to 'how much verbal force, how much 'atmospherics' may be admissible in this circumstance?' and 'how is the accused faring?'. Arthurs' case ended justly, but it could as easily have resulted in another miscarriage of justice. Though the detectives were pressured to find the murderer, believed they had him and were frustrated by Arthurs' lack of cooperation, they were still obliged to remain impartial. Neither the WA police Code of Conduct nor the use of video recording assisted in stopping police from 'crossing the line' into too much aggression. At the least, virtue ethics could be used to assist police officers in analysing requirements for voluntary statements to avoid repeating the errors that *Arthurs'* case exposes.

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