

POLICE MISCONDUCT IN QUEENSLAND: A PUBLIC WRONG

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Queensland's police officers swear an oath on assuming their duties.¹ The oath takes the form of one of the traditional oaths of allegiance.² Its language is antiquated, and it includes a promise that the officer will cause 'Her Majesty's peace to be kept and preserved'. Unlike its contemporary counterpart in the United Kingdom, the oath contains no reference to 'human rights', or to the 'equal respect' that is due to other members of the community that the officers volunteer to serve.³ The oath does, however, require officers to swear that they will uphold and obey the law in the pursuit of their duties. Officers swear to discharge all of the duties imposed on them 'faithfully and according to law'.⁴

In the past decade there have been a number of notable instances of Queensland police officers violating their oath. In the past year alone a number of high-profile allegations of police brutality have been made, largely focussed on the actions of police on the Gold Coast.⁵ These allegations have prompted Queensland's Police Minister to announce a fresh review of police culture on the Gold Coast.⁶ At present there are, however, no plans for a state-wide review. The death in 2006 of Mulrunji, an indigenous man in police custody on Palm Island, brought renewed attention to the interaction between the police force and indigenous communities, and the sometimes tragic costs of heavy-handed police intervention.⁷ The case of Bruce Rowe, a homeless man who was assaulted by a police officer while trying to change in a public bathroom in Brisbane, brought attention to the discriminatory impact that certain kinds of 'law and order' policing can have on those who are homeless or at risk of homelessness.⁸

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¹ *Police Service Administration Act 1990* (Qld), s 3(3); *Police Service Administration Regulation 1990* (Qld), r 2(2).

² The contemporary form of the oath of allegiance can be dated back at least to the *Promissory Oaths Act 1868* (UK).

³ *Police Reform Act 2002* (UK), s 83. Though both are acknowledged in the Queensland Police Force, 'Client Service Charter', <https://www.police.qld.gov.au/aboutus/the_service/charter/default.htm> (accessed 15 October 2015).

⁴ *Ibid.*

⁵ Rhian Deutrom and Jeremy Pierce, 'Gold Coast police brutality: Third alleged case in two weeks', *The Courier-Mail* (9 September, 2015) <<http://www.couriermail.com.au/news/queensland/gold-coast-police-brutality-third-alleged-case-in-two-weeks/story-fntwpug1-1227518333112>> (accessed 29 October 2015).

⁶ Minister for Police, Fire and Emergency Services and Minister for Corrective Services, 'Action Plan for Gold Coast' (Media Statement, September 09, 2015) t <<http://statements.qld.gov.au/Statement/2015/9/9/action-plan-for-gold-coast>> (accessed 29 October 2015).

⁷ For legal discussion of the Mulrunji case see Jennifer Corrin and Heather Douglas, 'Another Aboriginal Death In Custody: Uneasy Alliances and Tensions in the *Mulrunji* Case' (2008) 28(4) *Legal Studies* 531; for further discussion of the case see Chloe Hooper, *The Tall Man* (Penguin 2008).

⁸ See *Rowe v Kemper* [2009] 1 Qd R 247. The facts of the case are outlined in Crime and Misconduct Commission, 'Police move-on Powers: A CMC review of their use' (December 2010) Appendix 8. The police officer involved was successfully privately prosecuted; 'Constable loses appeal against assault conviction' *ABC News* (20 December 2011)

Allegations of police misconduct are obviously not unique to Queensland. Recent times have seen a renewed focus on, and debate about, police conduct in the United States and the United Kingdom. In the United Kingdom, the slaying of Jean Charles de Menezes by officers of the London Metropolitan Police Force in 2005,⁹ the killing of Ian Tomlinson at G20 protests in 2009,¹⁰ and the shooting of Mark Duggan in 2011,¹¹ each brought renewed attention to the sometimes tragic consequences of police misconduct. In the United States, a number of high-profile tragedies involving police killings, like those involving Eric Garner and Michael Brown in 2014, have given prominence to the increasing militarisation of the police force, and its tragic impacts on African-American communities.¹²

The allegations do, however, resonate with Queensland's history in a particular way. The state has a long and famous history of police misconduct, most notoriously during the Bjelke-Peterson government, culminating in the 'Fitzgerald report' into police misconduct and corruption.¹³ The report made findings concerning significant corruption and misconduct in Queensland's police force. In the process, it drew attention to a culture of widespread 'disdain for the law and rejection of its application to police, disregard for the truth, and abuse of authority'.¹⁴ More recent studies by Queensland's Crime and Misconduct Commission indicate that, although there have been marked improvements in the attitudes of police officers over the past several decades, a significant percentage of the police force still takes relatively lenient views towards improper behaviour, are still unlikely to report others' wrongdoing, and are still likely to express negative views about the value of reporting the wrongdoing.¹⁵

My purpose here is not to convince you that police misconduct is wrong. I hope you do not need convincing. The very fact that we are prepared to call it misconduct

<<http://www.abc.net.au/news/2011-12-19/constable-loses-appeal-against-assault-conviction/3739180>> (accessed 6 November 2015).

⁹ See Mark Hughes, 'Seven mistakes that cost De Mezenes his life', *The Independent* (23 October 2011) <<http://www.independent.co.uk/news/uk/crime/seven-mistakes-that-cost-de-menezes-his-life-1064466.html>> (accessed 5 November 2015). This article was partly provoked by John Gardner's reflections on the Menezes case, and its particular rule of law ramifications, see John Gardner, 'Criminals in Uniform', *The Constitution of the Criminal Law* (Oxford University Press 2013). The extent of my indebtedness to his arguments in that article should be obvious. Gardner resurrects, and defends, the Dicean 'citizens in uniform' doctrine, contrasting it with both Malcolm Thorburn's 'officials in plain clothes' doctrine, and the traditional alternative – a *droit d'administratif* monitored by special courts; *ibid* 97–103.

¹⁰ Damien Pearse and Matthew Weaver, 'Death of Ian Tomlinson – timeline', *The Guardian* (5 August 2013) <<http://www.theguardian.com/uk/2009/may/15/ian-tomlinson-death-g20>> (accessed 4 November 2015).

¹¹ Vikram Dodd, 'Mark Duggan's death: two shots fired and two conflicting stories', *The Guardian* (9 January 2014) <<http://www.theguardian.com/uk-news/2014/jan/08/mark-duggan-death-london-riots>> (accessed 5 November 2015).

¹² Jay Caspian Kang, 'Our Demand is Simple: Stop Killing Us', *New York Times Magazine* (May 4, 2015) <<http://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html>> (accessed 26 October 2015).

¹³ G.E. Fitzgerald, *Commission of Inquiry Into Possible Illegal Activities and Associated Police Misconduct* (Queensland Government, 1989).

¹⁴ *Ibid*, section 7.2.

¹⁵ Crime and Misconduct Commission Queensland, 'The ethical perceptions and attitudes of Queensland Police Service recruits and first year constables 1995-2008' (November 2010); Crime and Misconduct Commission Queensland, 'Monitoring police ethics: a 2013 survey of Queensland recruits and First Year Constables', Research and Issues Paper Series, No. 13 (October 2013).

indicates a widely shared belief that police officers who act in these ways are breaching their duties – police do not have a particular license for law-breaking. Wrongdoing is no less wrong when it is done by public officials who are acting in our interests.¹⁶ Instead, I hope to identify what I take to be the particular kind of harm and injustice that occurs when a police officer acts badly. Wrongs committed by police officers – whether serious or trivial – are a particular kind of *public* wrong. They harm, not just their immediate victim, but those of us who are entitled to expect them not to harm. More particularly, police misconduct threatens that particular virtue of legal systems often referred to as ‘the rule of law’. Moreover, and because of our interest in securing the rule of law, all of us have a special interest in holding its perpetrators to account. In ordinary cases of misconduct – those not involving police officers or other public officials – we do not have the same kind of interest in calling wrongdoers to account.

Again this proposition will strike many as nothing but common-sense, but I think that it requires defending. I do not think it is obvious. Or rather, I do not think it is as obvious as many of us who accept it would like it to be. I think there is a tendency to view the abuse of police power as a lamentable but inevitable by-product of preserving security and order, rather than as something that itself threatens to undermine that security and order. This kind of attitude is evident, for instance, when representatives of the police try to vindicate their wrongdoing on the basis of the difficulties of the role,¹⁷ and when politicians attempt to reduce scrutiny of police misconduct with the apparent aim of increasing public safety.¹⁸

In this essay I want to outline what I take to be the case for treating police misconduct as a public wrong.¹⁹ This argument has particular ramifications in

¹⁶ As I will argue below, at best, the fact that the officials in question took themselves to be acting in our interests provides a *justification* for their misconduct. It does not excuse or absolve them from responsibility. On the idea of justification (as opposed to excuse) see Kent Greenawalt, ‘The Perplexing Borders of Justification and Excuse’ (1984) 84 *Columbia Law Review* 1897; George Fletcher, ‘The Nature of Justifications’ in Stephen Schute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (Clarendon, 1996); George Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000) ch 10; John Gardner, ‘Justifications and Reasons’, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007); Malcolm Thorburn, ‘Justifications, Powers, and Authority’ (2008) 117 *Yale Law Journal* 1070.

¹⁷ For just one example, see recent statements by the President of the Queensland Police Union admitting to striking suspects who have already been apprehended; Mark Solomons, ‘QPU Boss Ian Leavers Admits Striking People While on Duty’, *ABC News* (9 September 2015) <<http://www.abc.net.au/news/2015-09-09/i-did-hit-back-qpu-head-admits-striking-people-while-on-duty/6762344>> (accessed 22 October 2015).

¹⁸ In Queensland, for instance, a number of steps were taken to remove police officers from public scrutiny. The *Public Service and Other Legislation (Civil Liability) Amendment Act 2013* (Qld) gave police officers immunity from civil suit, including for breach of a public duty.

¹⁹ On the rule of law more generally, see Lon L Fuller, *The Morality of Law* (Yale University Press, 1969); Joseph Raz, ‘The Rule of Law and Its Virtue’, *The Authority of Law* (Oxford University Press, 1979); Jeremy Waldron, ‘Why Law – Efficacy, Freedom, or Fidelity?’ (1994) 13 *Law and Philosophy* 259; Leslie Green, ‘Law as a Means’, *The Hart-Fuller Debate in the Twenty-First Century* (Oxford University Press 2010); John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 271–276; Scott Shapiro, *Legality* (Harvard University Press, 2011) ch 14; John Gardner, ‘The Supposed Formality of

Queensland. It gives us reason to scrutinise the conduct of our police force (and to reject claims for protection from such scrutiny made on behalf of its members) with even greater intensity. I will develop my argument in three stages. First, I develop an account of the rule of law which I take to be widely shared and *relatively* uncontroversial.²⁰ On this understanding of the rule of law, police officers have a special role to play in ensuring that the rule of law is secured. Second, I argue that, due to their assumption of the role, police officers have particular duties to promote the rule of law, principally, but not exclusively, by abstaining from law-breaking. Finally, I argue that police misconduct is a public wrong, in the sense that we have a collective interest in calling such wrongdoing to account. We have an interest in asking them to provide justifications or excuses for their wrongdoing, and, where justification or excuse is not available, in ensuring that they receive the appropriate legal response.

I THE RULE OF LAW

Philosophers of law sometimes worry that the concept of the rule of law is too indeterminate, or prefer to treat the rule of law as an ‘essentially contested concept’, which can only be applied by providing a contested conception of one’s own.²¹ Here I can only respond to these concerns by way of a stipulative definition: for my purposes here, the rule of law is an ideal that enables us to determine whether or not the law is functioning efficiently. Sometimes this particular account of the rule of law is expounded by referring to Lon Fuller’s eight desiderata. Efficient law is law that is general, promulgated, prospective, clear, non-contradictory, possible to conform with, and enforced congruently with its content.²² The rule of law is a particular ideal or virtue according to which law functions well *qua* law. It is not the only virtue that legal systems can exhibit. In addition to aspiring towards the rule of law, legal officials may aspire towards law that is democratic or just or otherwise morally desirable. Living-up to the virtue of the rule of law is not necessarily more important than these other virtues. It is sometimes justifiable to choose justice or security over efficacy. Sometimes advocates for the rule of law forget this, in otherwise admirable zeal to emphasise the doctrine’s importance.²³ Departure from the rule of law may well be justified, if the costs of conformity or the rewards for non-conformity are sufficient.

the Rule of Law’, *Law as a Leap of Faith* (Oxford University Press, 2012). On the particular role-based ethical responsibilities of police officers, and the significance of their undertakings, see John Kleinig, *The Ethics of Policing* (Cambridge University Press, 1996); John Kleinig, ‘Legitimate and Illegitimate Uses of Police Force’ (2014) 33 *Criminal Justice Ethics* 83; Seumas Miller, *Police Ethics* (Allen & Unwin, 1997); Malcolm Thorburn, ‘The Constitution of Criminal Law: Justifications, Policing and the State’s Fiduciary Duties’ (2011) 5 *Criminal Law and Philosophy* 259; Malcolm Thorburn, ‘Criminal Law as Public Law’ in Antony Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011); Gardner, ‘Criminals in Uniform’, above n 9.

²⁰ I say *relatively* uncontroversial, because I am sure there is no such thing as an uncontroversial account of the rule of law.

²¹ Most notably Jeremy Waldron; ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ (2002) 21 *Law and Philosophy* 137.

²² Fuller, above n 19, 39, 46–90.

²³ Thanks to Joseph Raz’s influential article, the usual whipping-boy is Friedrich Hayek, who is accused of fetishising the rule of law at the expense of any other virtue (his own particular bug-bear being legal intervention in the economy); Raz, above n 19; Friedrich Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960).

Many scholars divide accounts of the rule of law into ‘formal’ accounts of the rule of law and alternative, ‘substantive’ accounts of the rule of law.²⁴ In this schema, the account of the rule of law that I have developed here is often criticised as unduly ‘formal’. There are good philosophical reasons to reject this supposed division, which I will not dwell upon here.²⁵ But note that even the supposedly formal account of the rule of law reflects the fact that the law is made by and applied by legal officials – of which police officers provide one particularly pedestrian example. The rule of law reflects law’s status as a means of governing human affairs. As Fuller put it, the law is an ‘enterprise of subjecting human conduct to the governance of rules’.²⁶ His formulation takes for granted the fact that law is only made possible by the presence of legal officials. His reference to those *subjected* to human conduct presupposes the existence of those legal officials who are doing the *subjecting*.

Other major jurisprudential figures share Fuller’s presupposition. According to Hart, law was a specific ‘means of social control’.²⁷ The reference to law as control clearly presupposes a class that purport to do the controlling. Les Green likewise quotes Kelsen’s appraisal of law as a ‘specific social means, not an end’ (which again presupposes the existence of a class of persons who utilise law as a means).²⁸ Much controversy has been generated by the latter half of this claim – the claim that law is a means, not an end. It is thought to be a matter of large practical importance to determine whether or not law has only instrumental value, or whether it is an intrinsic good.²⁹ But we could just as easily dwell on Kelsen’s (and Hart’s and Raz’s) claim that the law is a specific social means. It is the sociality of law that gives the rule of law a particular dimension of public importance. The particular ideal of the rule of law is a virtue of law as a social institution – it is therefore a virtue possessed, not just by laws, but by law-makers and law-appliers. It follows that those tasked with applying the law are in a particular position to realise the rule of law. They have the ability to determine whether or not the law, as they apply it, is easy to follow and anticipate.

It follows from these observations that the rule of law can be applied, not just to the ‘form’ or ‘content’ of laws themselves, but to the actions of those who are tasked with applying the law. Fuller himself recognised the importance of official conduct in ensuring the rule of law, when he acknowledged the requirement that law be enforced congruently with its content.³⁰ Fuller’s explanation of this rule of law requirement, which he designated as ‘the most complex of all the desiderata’, makes it clear that ‘mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity,

²⁴ For representative endorsements of this kind of division see: Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] Public Law 467; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 91–113.

²⁵ The reasons are those outlined by Raz in his critique of Fuller in Raz, above n 19. See further Green, above n 19; Gardner, ‘The Supposed Formality of the Rule of Law’, above n 19.

²⁶ Fuller, above n 19, 106.

²⁷ HLA Hart, ‘Positivism and the Separation of Law and Morals’, *Essays on Jurisprudence and Philosophy* (Clarendon Press, 1983) 53.

²⁸ Green, above n 19, 169; Hans Kelsen, *General Theory of Law and State*, vol 56 (Lawbook Exchange, 1945) 20.

²⁹ See especially Tamanaha, Brian Z., *Law as a Means to an End: Threat to Rule of Law* (Cambridge University Press, 2006).

³⁰ Fuller, above n 19, 81–91.

and the drive towards personal power' all threaten the rule of law in a variety of ways.³¹ These vices belong, not to legal rules themselves, but to those who are tasked with applying and enforcing the legal rules. The evil of police law-breaking was, if anything, 'compounded by the tendency of lower courts to identify their mission with that of controlling the morale of the police force'.³² Though he recognised the importance of official conduct (especially police conduct) to the rule of law, Fuller arguably did too little to bring out this dimension of the rule of law. The requirement of 'congruence' in enforcement is only part of the responsibilities of the police force with respect to the rule. The basic idea of the rule of law as a standard of efficacy can never be enumerated in terms of a strict list, and Fuller's single desiderata of 'congruence' arguably understates the importance of official conduct to the rule of law.³³ Without a cooperative and lawful police force, it is impossible to shape one's life around conformity to the law's requirements – the effect of the law will vary with the whims of those tasked with its enforcement.

It should thus already be evident from this explanation of the rule of law that police have a particular role to play in its realisation. They are uniquely positioned, in terms of their skills and expertise, as well as in terms of the special powers and permissions that are given to them, to participate in the realisation of the rule of law. A police officer who does not envisage himself as having a duty to help secure the rule of law is something like a doctor who does not envisage herself as having a duty to provide emergency assistance. I will argue in the next section that police officers' duties towards the rule of law are grounded in more than just their special position with respect to the rule of law. The obligations of police officers are constitutive of their role – they are or ought to be part of a police officer's identity and self-understanding. Obeying the law, and applying it consistently and without discrimination, ought to be as important to the psychological make-up of a police officer as wearing a uniform or carrying a badge or weapon.

II THE RULE OF LAW AND THE ETHICS OF POLICING

Police are the front-line of law enforcement, and where necessary, of law interpretation. For many of us, they are the public face of officialdom. It is the on-duty police officer who decides whether or not a given annoyance is a public nuisance, where use of force is justified or unjustified, or whether certain behaviour is suspicious enough to warrant further investigation.³⁴ In many cases they act as the sole witness and complainant. Because they are the public face of officialdom, police officers are

³¹ Ibid 81.

³² Ibid 82.

³³ As Raz observes in his treatment of the rule of law, even construed narrowly as an ideal regulating the efficacy of law, the rule of law extends well beyond the eight desiderata identified by Fuller. It might, for instance, require courts to be easily accessible to the law's subjects by being timely and affordable; Raz, above n 20, 218.

³⁴ Malcolm Thorburn recommends an alternative view – according to which citizens themselves are the front-line of interpretation and application. Courts merely act as bodies of review with respect to this private decision-making; Thorburn, 'Justifications, Powers, and Authority', above n 16. In my view, one difference between citizens and legal officials is that officials have role-based duties to consider the legal justifications for their actions, where ordinary citizens usually do not. Citizens are merely permitted to consider such justifications, and in many cases they do not consider them.

also the public face of the rule of law. According to popular idiom, they represent the ‘thin blue line’ between order and disorder. That they will enforce and follow the law faithfully, without ‘favour or affection, malice, or ill-will’ is fundamental to their role.³⁵

What are the grounds for holding police officers to a higher standard? In my introduction to this essay I referred to the oath of service that is sworn by all police officers. In doing so, I risked suggesting that the oath was the source of officers’ particular duties. In actual fact, the duties of police officers are role-based, and they go beyond the content of any oath or written code of conduct. An officer who had not sworn any oath or signed any code of conduct would still be bound by his or her professional ethical responsibilities.³⁶ They are a reflection of the particular burdens of the decision to become a police officer. Officers are uniquely positioned to provide security and comfort to the rest of us. Their unique position brings with it responsibilities that are not incumbent on those who do not voluntarily assume the role.³⁷ Someone who takes on a role, and who fails to understand the duties incumbent on that role, has failed to understand the role itself. There is something paradoxical about a police officer (or another legal official like a judge or parliamentarian) who says, ‘I am an officer of the law but I don’t need to follow the law myself’.³⁸

Some people are suspicious of the kind of role-based ethics that I am appealing to here. The existentialist philosophers heavily relied upon the idea of authenticity (what Heidegger referred to as *eigentlichkeit*), which (they thought) ought to lead to a rejection of conventional role-based morality.³⁹ Role-based morality was the epitome of *bad faith* or self-deception. Sartre’s student – forced to choose between tending to his mother and joining the anti-Fascist resistance – only became free when he attempted to escape the confines of his role-based moral thinking.⁴⁰ But role-based obligations are defensible provided that the roles themselves are constitutive of a practice that is itself acceptable. Michael Hardimon refers to the need for roles to have

³⁵ *Police Service Administration Act 1990* (Qld), s 3(3); *Police Service Administration Regulation 1990* (Qld), r 2(2).

³⁶ See Michael Davis, ‘Thinking Like an Engineer: The Place of a Code of Ethics in the Practice of a Profession’ (1991) 20 *Philosophy and Public Affairs* 150, 156. Davis explicitly appeals to an analogy between what some lawyers have referred to as ‘quasi-contract’ – professionals are bound to their professional responsibilities in virtue of what it is fair to require of them given their conduct. The analogy is an interesting one, but now is not the time to explore its merits.

³⁷ The existence of role-based duties creates particular problems in situations where occupants of the role have not consented to or chosen their role. In warfare, for instance, it is tempting to conclude that combatants have assumed risks of injury or death that non-combatants have not assumed. But the possibility of conscripts muddies the waters.

³⁸ Gerry Cohen notes that statements like ‘John is a Barrister, but he does not have the right to plead in court’ or ‘Sir William is Chancellor of the Exchequer, but he does not have the duty to prepare a budget’ have a paradoxical ring to them; GA Cohen, ‘Beliefs and Roles’ (1966) 67 *Proceedings of the Aristotelian Society* 17, 21.

³⁹ ‘Authenticity’ and its dual ‘bad faith’ are important concepts in twentieth-century existentialism. See, *inter alia*, Jean-Paul Sartre, *Being and Nothingness* (Routledge, 2005); Martin Heidegger, *Being and Time* (Basil Blackwell, 1962); Simone de Beauvoir, *The Ethics of Ambiguity*, vol 46 (Philosophical Library, 1948). A useful survey of the concept can be found in Charles Taylor, *The Ethics of Authenticity* (Harvard University Press, 1992).

⁴⁰ Jean-Paul Sartre, *Existentialism and Humanism* (Philip Mairet tr, Methuen & Co, 1980).

‘reflective acceptability’, to be such that they would be judged ‘meaningful, rational, or good’.⁴¹ Something like this standard of reflective acceptability ought to be applied to the role of policing. This is the way around the existentialist challenge. Provided that the role itself is rationally defensible, then there is nothing inauthentic about conforming to role-based obligations. So long as policing has value, then the decision to become a police officer, or to continue to identify as one, is rationally defensible.

The value in policing is closely related to the value in having criminal law in general, since police are amongst the principal agents through which the criminal law is enforced. The coercive powers and special permissions that are given to police are justified by the same values that justify the other institutions of the criminal law. Part of the value of the criminal law lies in displacing certain kinds of non-official action – if the law is enforced and upheld, then there ought to be no need for vigilantes, lynch-mobs or ‘rough justice’.⁴² In the case of police officers, they are meant to physically displace this kind of conduct. Their physical presence offers affirmation that wrongdoing is being *lawfully* addressed. Police officers perform at least one additional function, however (and probably many more). They keep us safe by *preventing* wrongdoing – their role has a preventative aspect that is normally lacking from the criminal law, which focusses on wrongdoing that has already occurred. Police officers, in other words, are peace-keepers.⁴³ They are not only tasked with the responsibility of ensuring that wrongdoing is prosecuted and, where possible, prevented; they are also tasked with the responsibilities of preventing harm and providing emergency support. The task of peace-keeping includes the task of preventing non-lawful ways of securing the peace. Obedience to the law, and promotion of the rule of law, is constitutive of their role. It is part of what makes policing valuable, and thus part of what makes the decision to identify as a police officer rationally defensible.

Police in Queensland are given certain special permissions and powers to engage in what would otherwise be regarded as unlawful activity. They have a responsibility to use those extraordinary permissions and powers lawfully. Under The *Police Powers and Responsibilities Act*, for instance, they are given permissions to enter and inspect premises,⁴⁴ to assume identities,⁴⁵ to arrest and render into custody,⁴⁶ or to use force (even extraordinary kinds of force ‘likely to cause grievous bodily harm to a person to the person’s death’) to apprehend a wrongdoer or prevent that person’s wrongdoing.⁴⁷ The permissions and powers are also role-based – one must identify and be identified as a police officer in order to avail oneself of them.⁴⁸ These provisions are supposed to recognise the extraordinary needs of police employees who are pursuing their responsibilities in good faith. However, these features of the role are obviously not

⁴¹ Michael Hardimon, ‘Role Obligations’ (1994) 91 *Journal of Philosophy* 333, 348. I do not mean to uncritically endorse Hardimon’s reflective acceptability requirement. To my mind, it understates the importance of voluntariness to many roles. To use the example of police officers, it seems to be an indispensable part of the role that it is voluntarily chosen – a conscripted police force is particularly unappealing, even if the role played by the conscripts is rationally defensible.

⁴² John Gardner, ‘Crime: In Person and In Perspective’, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007).

⁴³ For further discussion see John Kleinig, *The Ethics of Policing*, above n 19, chapter 2.

⁴⁴ *Police Powers and Responsibilities Act* 2000 (Qld), Chapter 2.

⁴⁵ *Ibid*, ch 12.

⁴⁶ *Ibid*, ch 14.

⁴⁷ *Ibid*, ss 615, 616.

⁴⁸ In addition to being role-based, they are also legally defined. But not all role-based duties, powers and permissions are legally defined.

meant to provide cover for unlawful activity. The very fact that these permissions and powers are so extraordinary indicates the importance of police restraint.

It is true that their duty to prevent wrongdoing and protect potential victims will sometimes lead police officers into areas of difficulty. Their duties to protect the public extend beyond their duty to obey and promote the law. For instance, the duties to keep the peace or protect the safety of the public may occasionally appear to conflict with their duties to obey and enforce the law without discrimination. Constitutional law and human rights jurisprudence occasionally remind us of these sorts of tensions. In the case of *Gäfgen v Germany*, the European Court of Human Rights considered evidentiary issues that arose out of a detective who had threatened a suspect with violent sexual assault in order to get him to disclose the whereabouts of a kidnapped child. (It emerged that he had already killed the child).⁴⁹

Gäfgen-type scenarios show that there may be genuine conflicts in the role-based duties that encumber police officers. On the one hand, police have a duty to act in the interests of public security. On the other, they have their more fundamental obligations to obey the law. Conflicts of this sort inevitably tempt police towards unlawfulness. (I do not mean to suggest that I think that the police in *Gäfgen* acted rightly. I do not think they did. I do, however, think that they took themselves to be acting rightly – in pursuit of their duty to protect the innocent child. The conflict of duties is a real one, even where the police choose to resolve the conflict in the wrong way.) The existence of these conflicts does not excuse wrongdoing. The duties of police to secure and protect the public do not extend to law-breaking. Moreover, the fact that one duty was breached in compliance with another at best affords the wrongdoer with a justification for their wrongdoing – they still have reason to provide such a justification. After all, we expect ordinary criminal defendants to offer justifications for their own wrongdoing – to show that they were acting in self-defense, for example, or that their actions were a proper response to an emergency. The existence of such justifications cannot be taken for granted. For every *Gäfgen*, one imagines that there are hundreds of more straightforward cases of wrongdoing without plausible justification. In a recent case in Queensland the police union protested at the standing down of police officers who had been engaged in an unauthorised pursuit and were alleged to have inappropriately used force on a suspect. A spokesman for the police union argued that standing down the officers was ‘an absolute disgrace’, citing the likelihood that the action of the officers in question was justified.⁵⁰ These protests ignore the fact that, even supposing that the actions of the officers were justified, there is value in ensuring that the officers in question are required to provide such justification in a legally appropriate way.

Finally, it is worth noting that the value of role-based obligations is also at least partially derived from the value in allowing the rest of us to shape our lives around the expectation that they will fulfil their duties. The presence of police officers gives, or ought to give us, reassurance. Part of that reassurance lies in the expectation that police officers will perform the ordinary tasks of peace-keeping and public protection, and in doing so save us from the problem of having to worry about these issues ourselves. The role of police officer forms part of a broader social division of labour – we shape

⁴⁹ *Gäfgen v Germany* [2010] ECHR 759.

⁵⁰ Sharnie Kim, ‘Queensland Police Union says standing down officers Chris Hurley, Barry Wellington over Gold Coast pursuit “an absolute disgrace”’ *ABC News* (22 May 2015). <<http://www.abc.net.au/news/2015-05-22/standing-down-officers-over-gold-coast-pursuit-a-disgrace-union/6488902>> (accessed 3 November 2015).

our own lives around the expectations that others fulfil their roles. When police officers break the law, it erodes our legitimate expectations, and thus undermines the very security and certainty that they are supposed to guarantee. This may be the case even if the law that police have been tasked with enforcing is a bad one. Even if the law is vindictive or stupid, we are still entitled to expect police officers themselves to uphold and obey it, other things being equal.

III POLICE MISCONDUCT AS A PUBLIC WRONG

Throughout this article I have been gradually developing the argument that police misconduct is a particular kind of public wrong. At the beginning of this article, I stated my position in another way – all members of our community have an interest in holding wrongdoers to account. But my arguments thus far do not yet support the conclusion that we have such an interest. At best, they support the conclusion that police misconduct is a breach of a special duty, on behalf of police officers, to uphold the rule of law. What interest do we have in ensuring that police officers live up to this ideal? Perhaps, it might even be claimed, many of us have an opposing interest – it would suit us just fine if the police were ruthless in their pursuit of criminality, if they paid little respect to the artificial confines of the law. Occasional glimpses at political rhetoric suggest that this view is widely held.⁵¹

I think that this way of seeing things is badly mistaken. The security that the police guarantee us in observing the rule of law is part and parcel of the general peace and security that police must act to promote. The rule of law possesses what Joseph Raz describes as ‘negative value’.⁵² Its value lies in allowing us certainty in determining when and how the law will intrude on our lives. Even laws that have no other redeeming features may nonetheless be partly redeemed by the fact that those of us coerced into following them are able to do so easily, and without any uncertainty as to their application. As I argued above, the value of roles and undertakings lies partly in allowing the rest of us to shape our lives around the fulfilment of those role-based responsibilities. In the case of officers of the law, their role-based duties towards the rule of law allow us to shape our lives around the additional expectation that the law will be followed and upheld.⁵³

It follows that we all share an interest in calling to account those police officers who breach their duty to uphold the law. Our interest in doing so exceeds the normal interest we have in supporting civil and criminal trials. It is an interest in publicly

⁵¹ See, for one local example, comments by the former Premier of Queensland suggesting that lawyers working for gang members were part of the ‘criminal gang machine’; ‘Campbell Newman says lawyers for bikies are part of the “criminal gang machine”’ *Courier-Mail* (February 6, 2014) <<http://www.couriermail.com.au/news/queensland/campbell-newman-says-lawyers-for-bikies-are-part-of-criminal-gang-machine/story-fnihsrf2-1226819588317>> (accessed 27 October 2015).

⁵² Raz, above n 19, 224.

⁵³ John Gardner supplements this claim with an additional one – as citizens or members of the polity, we lack any duties concerning the rule of law. The rule of law, as he conceives of it, entails ‘an unequal struggle between officialdom and the rest of us’; Gardner, ‘The Supposed Formality of the Rule of Law’, above n 19, 213. But this additional claim is controversial; see e.g. Gerald Postema, ‘Fidelity in Law’s Commonwealth’ in Dennis Klimchuk (ed), *Private Law and the Rule of Law* (Oxford University Press, 2014). For my purposes here it will suffice to argue that police officers acquire additional responsibilities concerning the rule of law in virtue of their role.

investigating wrongdoing that is grounded in our collective interest in securing the rule of law. Ensuring that police officers follow the law, and that they use their extraordinary permissions and powers responsibly, helps to ensure that we can plan our lives around the law's intrusions. Regardless of whether or not the law is good law, if police officers follow the law, and if they enforce it without prejudice or undue discrimination, then we are at the very least able to know what is expected of us.

There is a further reason that we all have an interest in ensuring that police promote the rule of law – their failure to do so often amounts to an injustice. It is well known that Hart thought that adherence to the rule of law promoted justice directly, at least in a weak sense. He said that 'we have, in the bare notion of applying a general rule of law, the germ at least of justice'.⁵⁴ But we need not go this far in order to conclude that breaches of the rule of law may amount to an injustice. It is enough to observe that, in many circumstances, the costs of these departures from the rule of law fall unevenly on those who are already in a poor position to meet them. If one is homeless, for instance, or indigenous, one is more likely to come into contact with the police, and therefore more likely to be exposed to their misconduct.⁵⁵ The ordeals faced by Bruce Rowe (whom I mentioned at the beginning of this note) highlight the special susceptibility of those who are already vulnerable to ordinary kinds of misconduct.⁵⁶ In Rowe's case, the fact that he existed in the public space made him more vulnerable to these kinds of police scrutiny and interaction, than those of us who are able to avoid the impacts of this kind of intrusive meddling in their day-to-day lives.⁵⁷

Many laws confer unduly broad powers of discretion on the police officers who are tasked with enforcing them. These laws threaten the rule of law in a different way –

⁵⁴ HLA Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 206. For further discussion see Matthew H Kramer, 'Justice as Constancy' (1997) 16 *Law and Philosophy* 561; John Gardner, 'The Virtue of Justice and the Character of Law' (2000) 53 *Current Legal Problems* 1; Leslie Green, 'The Germ of Justice' [2010] Oxford Legal Studies Research Paper No. 60 <<http://ssrn.com/abstract=1703008>>.

⁵⁵ The frequency of interaction between indigenous people and the police has been well documented, particularly following the Royal Commission into Aboriginal Deaths in Custody. For a summary see Mark Findlay *et al*, *Australian Criminal Justice* (Oxford University Press, 5th ed, 2014) 309-315. See further Elliot Johnston, 'Chapter 5: The Disproportionate Numbers in Custody' in *Royal Commission into Aboriginal Deaths in Custody* (Canberra: AGPS 1991); Christine Feerick, 'Policing Indigenous Australians: Arrest as a Method of Oppression' (2004) 29 (4) *Alternative Law Journal* 53. These issues are also discussed in Jennifer Corrin and Heather Douglas, 'Another Aboriginal Death In Custody: Uneasy Alliances and Tensions in the *Mulrunji* Case' (2008) 28(4) *Legal Studies* 531. On the frequency of interaction between homeless people and the police in Queensland see Monica Taylor and Tamara Walsh, 'Chapter 6: The impact of move-on powers on Indigenous Australians' in *Nowhere to Go: The Impact of Police Move-on Powers on Homeless People in Queensland* (Queensland Public Interest Law Clearing House Homeless Person's Clinic and the University of Queensland, 2006).

⁵⁶ See *Rowe v Kemper* [2009] 1 Qd R 247. The facts of the case are outlined in Crime and Misconduct Commission, 'Police move-on Powers: A CMC review of their use' (December 2010) Appendix 8.

⁵⁷ The issue of homelessness and the effect of laws regulating the use of public space was discussed insightfully by Jeremy Waldron many years ago in his 'Homelessness and Community' (2000) 50 *University of Toronto Law Journal* 371.

in virtue of their vagueness.⁵⁸ It is up to the police officer (and perhaps the magistrate who hears the plea) to determine whether or not certain conduct was sufficiently offensive, whether someone intoxicated in public is sufficiently intoxicated, and when someone should be asked to move-on.⁵⁹ The powers that these laws confer, and the resultant wide discretion they give, are not the fault of the police, though the use of them might be faulty or improper.⁶⁰ So the rule of law problems raised by selective enforcement stem from a different source than the more straightforward kind of police misconduct that I have considered here. But they are, to my mind, just as serious and probably more widespread from the point of view of someone who is concerned with promoting justice. The burdens of this kind of police discretion fall particularly unevenly on those who already lack the means to preserve for themselves a life free from this kind of intrusion. Several scholars in Queensland have done a great deal of work to draw attention to the injustice that is enlivened when such broad interpretive powers are given to police officers in the service of their duties.⁶¹ Because of the way these laws are, in fact, enforced, they are especially undesirable from the point of view of someone who wishes to promote justice.

IV CONCLUSION

In this article I have defended three related claims about the public significance of police misconduct. The first claim was that the rule of law, as an ideal, holds members of the police force to a particular standard – police officers are expected to follow the law, and to enforce it uniformly and non-discriminately. The second claim was that police employees have role-based responsibilities to uphold the rule of law – it is a constitutive requirement of their role that they follow the law themselves, and that they justify any legal wrongdoing. The third claim was that we have a collective interest in bringing this wrongdoing to account. This interest is grounded in our interest in ensuring that police conform with the rule of law – conformity with the rule of law, at the very least, offers us some sort of ability to predict the burdens that the law will place on us.

⁵⁸ Cf. John Kleinig, 'Selective Enforcement and the Rule of Law' (1998) 29 *Journal of Social Philosophy* 117.

⁵⁹ Offensive behaviour and public intoxication are prohibited by the *Summary Offences Act* 2005 (Qld), ss 6, 10; 'Move-On' powers are conferred by *Police Powers and Responsibilities Act* 2000 (Qld), Part V.

⁶⁰ There is some (now dated) evidence to suggest that police officers in Queensland have been interpreting public order offences in a manner inconsistent with the High Court's requirements in *Coleman v Power* (2004) 220 CLR 1. See Tamara Walsh, 'The Impact of *Coleman v Power* on the Policing, Defence and Sentencing of Public Nuisance Cases in Queensland' (2006) 30 *Melbourne University Law Review* 191. This shows that, in addition to being otherwise undesirable from a rule of law perspective, powers of selective enforcement are also highly likely to be abused.

⁶¹ Monica Taylor and Tamara Walsh, *Nowhere to Go: The Impact of Police Move-on Powers on Homeless People in Queensland* (Queensland Public Interest Law Clearing House Homeless Person's Clinic and the University of Queensland, 2006); Tamara Walsh, 'Poverty, Police and the Offence of Public Nuisance' (2008) 20 *Bond Law Review* 7; "'You're Not Welcome Here": Police Move-On Powers and Discrimination Law' (2007) 30 *University of New South Wales Law Journal* 151; Walsh, 'The Impact of *Coleman v Power* on the Policing, Defence and Sentencing of Public Nuisance Cases in Queensland' (n 52). Cf. Crime and Misconduct Commission, 'Police move-on Powers: A CMC review of their use' (December 2010).

As I made clear at the outset, my own reason for making this argument is not simply intellectual. I think they are particularly relevant in Queensland in the current political environment. The recent events that I have discussed already give us special reason for concern. Given Queensland's particularly worrisome history, and given the degree of public importance that should attach to police misconduct, we have sufficient reason to pay attention. Moreover, we have an interest in holding wrongdoers to account that extends beyond any interest we have in holding ordinary wrongdoing to account. This interest is grounded in our shared interest in a just and secure society – one in which we are all able to shape our lives without the undue intrusion of those who are meant to be acting on our behalf.

