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Policing and public office

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University of Toronto Law Journal, Volume 70, Supplement 2, 2020,
pp. 248-266 (Article)

Published by University of Toronto Press



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In this paper, I argue that policing can be defended as consistent with the equality of all before the law – but not by denying that policing occupies a special place in our legal order that is dangerously close to certain ancien régime privileges. In order to defend the special privileges of policing, it is essential to show that they are something quite different from the ancien régime privileges that they in some respects resemble. The crucial conceptual tool for making that argument is the idea of public office. Policing, I argue, is a public office and like other public offices, it comes equipped with a number of special rights, privileges, powers, and immunities that are not generally possessed by all persons in their private capacity. But that situation is no challenge to the equality of all persons before the law. Those special rights do not belong to the office-holder as their private property, to do with them just as they would like. They belong, instead, to the office itself, and they may be exercised only by someone duly appointed to the office (who may also be duly removed from office) and only in pursuit of the purposes that define her office. The idea of public office is what makes possible a necessary and acceptable kind of inequality – that between individual private persons on the one hand and the collective person of the state on the other – while maintaining the kind of equality that matters, which is the equality of all persons vis-à-vis one another.

Keywords: authority, equality, jurisprudence, justification, policing rule of law

I Introduction

These days, the very existence of police power is under sustained attack. Many of these attacks are aimed at specific policies or at abuses of power by individuals who work in policing: racial profiling, police brutality, the co-opting of police for political purposes, and so on.¹ But underneath many of these critiques is an unspoken and much broader understanding of policing as a deeply problematic institution down to its very core. The thought is that even when police officers are acting according to otherwise acceptable policies, there is something about their legal status that undermines deeply held ideals about equality before the law and the accountability of public power.

It is certainly true that police officers in almost every jurisdiction are entitled to do things that the rest of us may not. Their powers of arrest are wider, as are their powers to use force to prevent the commission of an offence or to pursue a suspect in flight, and they have powers to search, to detain, and much else that the rest of us simply do not have. In all of these and many other cases, the conduct in question is permissible only because some special licence has been granted to the police to carry it out. These permissions grant one class of persons – namely, police officers – special rights and privileges that are denied

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1 Jill Lepore, 'The Long Blue Line,' *The New Yorker* (20 July 2020) 64 at 64ff: 'The crisis in policing is the culmination of a thousand other failures – failures of education, social services, public health, gun regulation, criminal justice, and economic development.'

to others, thereby violating our commitment to the equality of all persons before the law. According to this more fundamental critique, the very institution of the police is a holdover from the *ancien régime* when the law recognized a number of special class privileges. Although the special privileges once granted to the nobility and clergy have long since been abolished, those of the police still remain. Policing is patriarchy, one might say;² policing is antithetical to the rule of law; policing is irredeemable.³

Those who have come to the defence of the idea (if not the present reality) of policing have done so in at least two quite different ways. One defence is based on the denial of any special status for policing. This account often takes its inspiration from the principles of ‘community policing’ first enunciated in England in the first half of the nineteenth century (often referred to as ‘Peel’s principles’), which seem to deny quite explicitly any class distinction between the police and the rest of us. According to that view, ‘the police are the public and ... the public are the police; the police being only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen, in the interests of community welfare and existence.’⁴ The police are not a special class of persons who are above the ordinary law that applies to the rest of us. The reason that the law permits them to do things that the rest of us may not do is simply that they are under a duty to carry out those functions (and paid to carry out those duties) and that they have special expertise and training to carry them out. In this way, the police are not so different from, say, surgeons who are permitted to do things that the rest of us may not, simply in virtue of their employment and training.

My own view is that policing can be defended as consistent with the equality of all before the law – but not (as the first defence does) by denying that policing occupies a special place in our legal order. Policing does come with special privileges. To defend them as legitimate, it is essential to show that they are something quite different from the privileges of the *ancien régime*. The crucial conceptual tool for making that argument is the idea of public office. Policing, I argue, is a public office, and, like other public offices, it comes equipped with a number of special rights, privileges, powers, and immunities that are not generally possessed by all persons in their private capacity. But this situation is no challenge to the equality of all persons before the law because those special rights do not belong to the office-holder as her private property, to do with them just as she would like. Instead, they belong to the office itself, and they may be exercised only by someone duly appointed to the office (who may also be duly removed from office) and only in pursuit of the purposes that define her office. The idea of public office is what makes possible a necessary and acceptable kind of inequality – that between individual private persons, on the one hand, and the collective person of the state, on the other – while maintaining

2 Markus Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005).

3 William Kunstler, William Moses Kunstler & Karin Kunstler Goldman, *The Emerging Police State: Resisting Illegitimate Authority* (New York: Ocean Press, 2004).

4 Home Office, ‘Definition of Policing by Consent’ (10 December 2012), online: <www.gov.uk/government/publications/policing-by-consent/definition-of-policing-by-consent> [Home Office, ‘Definition of Policing’].

the kind of equality that really matters, which is the equality of all persons *vis-à-vis* one another.

This article is in three parts. In Part II, I set out the basic features of public office and sketch out the ways in which they are present in the modern law governing policing in many Western countries. In Part III, I set out the puzzle of policing: how the special powers afforded to those enforcing law and order seem to undermine the equality of all persons before the law. I then put the idea of public office to work to show how it opens up a more promising way of thinking about police powers. In Part IV, I sketch an argument for why the offices view not only fits well with a good deal of existing doctrine but is also consistent with a more plausible understanding of public authority more generally.

II *The public office of policing*

A THE NATURE OF PUBLIC OFFICE

Policing is a public office and that office, like all legal offices, has a certain structure. The office of policing⁵ consists of a set of normative powers, rights, privileges, and immunities that may be exercised by its occupant in service of its defining purpose (which, roughly, is concerned with keeping the peace, preventing violations of the law, and ensuring the due process of law).⁶ That is, the office exists quite apart from any particular occupant. Because offices are free-standing in this way, entering an office is a bit like acquiring private property: in both cases, new rights, powers, privileges, and so on are at our disposal to exercise. Further, like private property (or money),⁷ an office can pass from one occupant to another, and when an office (or property) passes from one occupant/owner to another, it is not created anew for the new occupant; it persists in whatever state it was in pre-transfer. Thus, when a property owner validly creates an easement over her property, that easement will bind future owners of that same property. Similarly, when an office-holder makes a valid decision about some matter in the jurisdiction of the office (say, the grounds

5 In the English legal tradition, the office is usually referred to as that of police constable. See HB Simpson, 'The Office of Constable' (1895) 10 English Historical Rev 625. Since the use of the term 'constable' is varied from jurisdiction to jurisdiction, I use the more generic expression 'office of policing' to refer to a range of roles that may have different formal titles attached to them, such as police constable, police sergeant, sheriff, and so on.

6 Michael Oakeshott's description of the office of policing (which he calls 'power') neatly summarizes its main features: '[O]ffices equipped with procedures composed of rules and authorized to compel the performance of the substantive actions commanded by a court of law, and custodians of "the peace," similarly equipped, concerned to detect and to prosecute alleged illegalities and to forestall imminent breaches of the law.' Michael Oakeshott, 'The Rule of Law' in *On History and Other Essays* (Indianapolis: Liberty Fund, 1999) 129 at 160–1 [Oakeshott, 'Rule of Law'].

7 As Shakespeare's Iago said of money, 'twas mine, 'tis his, and has been slave to thousands.' *Othello*, Act 3, scene 3, 155–61.

for releasing a suspect from detention), that decision will generally bind future occupants of the office.

In crucial respects, however, offices are very different from ownership of private property. The most important difference lies in the fact that private property *belongs* to its owner – it is hers to do with as she sees fit. Indeed, the freedom of owners to use their property as they see fit is essential to the underlying rationale of private property in a system of law that takes the independence of persons seriously: private property expands the sphere of a person’s independence from others’ authority over them beyond the limits of her body.⁸ By contrast, office-holders are never free to exercise the rights and powers of office just as they would like: to do so would be the very essence of corruption in office. The Supreme Court of Canada put this point as follows:

In public regulation ... there is no such thing as absolute and untrammelled ‘discretion’, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose however capricious or irrelevant, regardless of the nature or purpose of the statute. ... Discretion necessarily implies good faith in discharging public duty.⁹

It is this fact about offices that explains some of their crucial doctrinal features.

1 *Reasons*

First, the actions of office-holders are governed by a different – and much narrower – set of reasons from the actions of private property owners. No one is legally entitled to do just as she would like, of course: even when acting within our private jurisdiction over our bodies and our private property, we need to respect the equal rights of others in their bodies and property and the demands of valid public laws. When we exercise the powers of an office, however, it is not only our actions that are subject to scrutiny but also our reasons for carrying them out. Police officers, as office-holders, are sometimes entitled to make decisions about whether someone may be arrested or whether a particular location may be searched. But what is notable about these decisions is that they may only be undertaken for the right reasons.¹⁰ By contrast, as far as the internal norm of ownership is concerned,¹¹ my decisions about my property can be as outrageous – perverse, discriminatory, or just plain arbitrary – as I might like.

It is because we are acting with respect to matters that are not our own that our reasoning is subject to such tight scrutiny when we are acting within an office.

8 As Arthur Ripstein puts the point, ‘the owner is entitled to determine the purposes for which the property is used, rather than having its use constrained by the purposes of others.’ Arthur Ripstein, ‘Property and Sovereignty: How to Tell the Difference’ (2017) 18 *Theor Inq L* 243 at 252.

9 *Roncarelli v Duplessis*, [1959] SCR 121 at 140, per Rand J.

10 In criminal law, this is sometimes referred to as the *Dadson* principle. *R v Dadson*, [1850] 4 Cox CC 358.

11 Public law, obviously, imposes many restrictions on owners. But these are external to the norm of ownership.

Public offices concern the interests (or some subset of the interests) of the public as a whole. They concern one or more of the legitimate functions of government: keeping the peace, enforcing the law, securing the external borders of the country, administering justice, preserving the natural environment, and so on. Private offices, by contrast, concern the interests of some narrower class of persons. In some cases, such as the office of the legal guardian of a child or next-of-kin of an unconscious person, they involve the interests only of a single person; in other cases, they will concern the interests of a class of persons (as the office of director of a corporation looks to the interests of the corporation's shareholders). Because the subject matters that are of public concern are often quite vast, there is an important respect in which the authority of public office-holders is much greater than that of any private member of the general public: there are many questions with which only public officials may deal. Nevertheless, public office-holders must exercise that authority for reasons that have to do with the public interest rather than their own interests.

In the case of all public offices – and often in the case of private offices as well – there is yet another sort of constraint on our reasoning. This is the constraint imposed by the fact that each office is only one among many different public offices. Although the office of sovereign has the public welfare as a whole as its defining purpose,¹² specific public offices such as the office of policing, deal with some much more specific aspect of the public welfare. When a police officer – or any other public office-holder – uses coercive force, she does so as the holder of a specific public office with a specific defining purpose. Accordingly, the law will also prohibit her from taking on aspects of the public interest that are not part of the defining purpose of her office. Police officers are assigned certain narrow questions to determine (whether it is permissible to arrest, search, detain, and so on), and they are required to answer these questions only on the basis of a narrow set of reasons concerned with the need to keep the peace, to enforce the law, and to ensure the effective administration of justice. That is, even though police officers are public office-holders, they are not entitled to consider just any public reasons to answer the questions that their office authorizes them to decide.

This concern with the office-holder's reasoning – that her own personal view of the matter might push her one way, but her office requires her to cleave to a different set of reasons – has a pervasive influence on the structure of many public offices. It is for this reason that office-holders are often subject to specific training to qualify for the office.¹³ That training is designed not merely to pass along information to allow them to carry out the position more effectively; it is also designed to indoctrinate them into a certain way of thinking so that they will inhabit their role

12 Or what Hobbes called 'the procuration of the safety of the people.' Thomas Hobbes, *Leviathan*, ed by Richard Tuck (Cambridge, UK: Cambridge University Press, 1996) at 231 [Hobbes, *Leviathan*].

13 Like judges and several other public office-holders, police officers are often required to continue training throughout their careers. In Ontario, this training is organized by the Ontario Police College, a division of the Ministry of the Solicitor General of Ontario.

more neatly. In many cases, office-holders must also swear an oath of loyalty,¹⁴ insisting that they will prefer the reasoning of the office over their own private reasons for action.¹⁵ Office-holders are also commonly denied liberties that are common to others in order to ensure that their reasoning remains pure. In order to eliminate certain conflicts between private interest and public reasoning, they are sometimes denied the right to strike,¹⁶ the right to seek certain forms of employment,¹⁷ and the right to bargain collectively altogether, but they are (also for the purpose of keeping their reasoning pure) also guaranteed job security that is unheard of elsewhere. The full package of special rights, duties, powers, and privileges attendant upon German ‘*Beamter*’ or French ‘*fonctionnaires*’ gives a flavour of the logic of public office, especially its focus on securing the separation of private reasoning from the reasoning appropriate to the office, when this is taken to its utmost limit.

2 *Standing*

The office of policing not only has severe legal constraints on the misuse of the powers of office for private purposes, but it also shares another feature of many¹⁸ offices (both public and private): it constrains the officer’s set of reasons even further, insisting that he should defer to his superiors within a larger bureaucratic hierarchy. Even though a police officer might have better on-the-ground knowledge of the reasons for arresting a suspect or searching a residence, he usually has to defer to the judgment of a justice of the peace. The office-holder has no normative power to decide matters where the law has given a superior decision maker the authority to grant or withhold a warrant for his decision. Police officers, like many office-holders,¹⁹ share a single office with many others. In order

14 For example, *Civil Service Law*, section 62, requires every person employed by New York State or any of its civil divisions, except an employee in the labour class, prior to the discharge of his or her duties, to take the oath required by the New York State Constitution. In lieu of the oath, a state employee may execute and file the statement prescribed by *Civil Service Law*, section 62. All employees of the state of California must swear an oath of loyalty, which is required by the *Government Code*, chapter 8, division 4, title 1.

15 Oaths of office for police officers: in England and Wales: *Police Reform Act 2002* (UK), c 30; in Ontario: *Police Services Act*, RSO 1990, s 2; in France: Décret no 2009-481, 28 April 2009.

16 In Canada, police officers were denied the right to strike. The Supreme Court of Canada found this to be unconstitutional in *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1.

17 William Blackstone, *Commentaries on the Laws of England* (Chicago: Gallagher and Company, 1884), book I at 333–4 [Blackstone, *Commentaries*]: ‘[N]o under-sheriff or sheriff’s officer shall practice as an attorney during the time he continues in such office: for this would be a great inlet to partiality and oppression.’

18 But not all. Whereas other features of offices addressed above are general features of all offices, this one is a feature only of those offices that are carried out by a collective agent, such as a government department (such as a police department) or a business corporation.

19 The office of guardian of a particular child does not come within a bureaucratic hierarchy as such. Nevertheless, there is always the possibility of reviewing a guardian’s decisions through the courts – as may happen in high-stakes cases such as those involving the separation of conjoined twins or the refusal of medical treatment. See *In Re A*, [2001] 2 WLR 480 (conjoined twins); *Hamilton Health Sciences Corp v DH*, 2014 ONCJ 603 (on First Nations child whose parents refused chemotherapy for her cancer).

to ensure the coherence among the many occupants of the office, there is a strict hierarchy in place, including a duty of deference to superior authority.²⁰

We should note one more feature of offices, for it plays an especially important part in our understanding of policing. It is the constraint imposed by a formal procedure for entry into office. With a formal procedure in place to determine who shall occupy any given office, we preclude individuals from imposing their views on others even on this question. When the subject matter is our own private property, the law leaves it up to us to decide as we wish who will receive our property through contract, a gift, or a will. But because a public office is not ours to do with as we see fit – it is a position of power over matters that are not entirely our own – we are not entitled to pass it on to whomever we might like. Through the institution of a public procedure for entry into office, the question of who shall fill a given office is transmuted from a matter of one person’s unilateral will (‘I’ll help myself to that office’ or ‘I’ll just pass along this office to my son-in-law, Jared’) to a question settled by public law.²¹ As William Blackstone puts the point in the policing context, ‘it is of the utmost importance to have the sheriff appointed according to law, when we consider his power and duty.’²²

In short, the office of policing has most of the usual features of offices in law: formal procedures for entry into office, formal constraints on reasons for the exercise of its normative powers, and external constraints on disloyalty. Also, because the office of policing is shared among a number of occupants, it comes with a duty of deference to superiors in the bureaucratic hierarchy. What is more, the office of policing, rather more than most offices, is not merely a position from which to exercise normative powers; it is also a mandate to undertake actions that would normally be prohibited: it is what is usually referred to as a ‘ministerial office.’²³ This can easily be obscured by an undue focus on the decision-making aspect of the office.²⁴ Police officers are not simply low-level justices of the peace, exercising normative powers; they are also (indeed, perhaps even primarily) the default actors to carry out arrests, searches, detentions, and so on.

20 We should be careful, however, to distinguish between deference to superiors in a hierarchy (as the beat cop must defer to his commanding officer) and the deference he owes to judicial warrants for action. In the latter case, we are not concerned merely with coherence within the office; we are concerned instead with judicial oversight of administrative action.

21 One can become a biological parent through a unilateral act, but one becomes a legal guardian by operation of law. This is clear from the fact that the law can separate biological parenthood from legal guardianship where appropriate.

22 Blackstone, *Commentaries*, supra note 17 at 331.

23 William Blackstone points out that a sheriff exercises several different types of office. He exercises a judicial office (adjudicating minor matters); he is keeper of the peace, which empowers him to summon citizens to assist in those efforts; and he is a ministerial officer, bound to execute all process from the king’s courts. A ‘ministerial office’ gives the officer the power to enforce authoritative decisions with authorised coercive force. See Blackstone, *Commentaries*, supra note 17 at 331–3.

24 I myself have been guilty of this. See Malcolm Thorburn, ‘Justifications, Powers, and Authority’ (2008) 117 Yale LJ 1070.

B PUBLIC OFFICES, PRIVATE CITIZENS

So far, we have focused on the public office of policing only as it is exercised by police officers. I have insisted that insofar as police officers are entitled to do things that the rest of us may not – using force to keep the peace, to arrest, to search, to detain, to prevent the commission of an offence, and so on – they do so from within the public office of policing. All of this discussion might easily lead the reader to conclude that my point here is that policing is (or ought to be) the preserve of members of the police force and is not something that members of the general public ever have the right to do.²⁵ That is, a focus on the office of policing might quickly lead the reader to think that policing is always the preserve of duly selected employees of the police department. But that would be a serious mistake, which I hope to dispel in what follows.

Although it is much more common to see police officers using force in all of these circumstances – arrest, search, detention, and so on – than it is to see members of the general public doing so, the divide between police officers and the rest of us is not quite as stark as that distinction might suggest. The criminal law in almost every English-speaking jurisdiction recognizes that members of the general public may be justified in doing a number of things under certain circumstances that are generally prohibited. What is important to see, however, is that when the law grants justification defences to members of the general public, it still does so insofar as they have stepped into the public office of policing (temporarily, *in extremis*) at the relevant time.

1 *Reasons*

When a private citizen claims a justification defence of self-defence, lawful arrest, and so on, the courts will examine her reasons for action to ensure that she was not just pursuing her own private ends through the use of coercion. In its general prohibitions, by contrast, the criminal law usually regulates only our conduct and not our reasons for action: intentional killing of a human being is murder, for example, whether it is done out of hatred, indifference, or compassion for human suffering. This is consistent with the law's regulation of private conduct: so long as we are dealing with matters within our private jurisdiction, the law is largely indifferent to our reasons for action.²⁶ It is only when we stray outside our jurisdiction – by taking charge of, or injuring, another's body or property or by substituting our own views for the state's public laws – that it takes an interest.²⁷ When we claim a justification, the law considers our reasons for action quite carefully. First, as with police officers, private citizens are only entitled to use force

25 This seems to be the tenor of John Gardner's critique of my position. He takes it as a point against me that 'morality binds police officers on duty just as it binds anyone else. Nobody can evade it by saying "I work for the government now."' John Gardner, 'Criminals in Uniform' in RA Duff et al, eds, *The Constitution of Criminal Law* (Oxford: Oxford University Press, 2013) 97 at 117 [Gardner, 'Criminals in Uniform'].

26 Of course, there is an overlay of public law regulation that makes things more complicated. Many crimes are violations of public regulations – which may focus on, for example, racist intentions – but this is an exceptional feature of criminal prohibitions.

27 On the connection between usurping the public authority to make law and the nature of crime, see Malcolm Thorburn, 'Criminal Punishment and the Right to Rule' (2019) 70 UTLJ 44.

for a very narrow set of public purposes. We might think that it is morally justified to use force for all sorts of different moral reasons – to enforce generosity, to prevent lying, to demand that people keep their promises, and so on – but the criminal law does not recognize any of these reasons.²⁸ Instead, just as with police officers, the criminal law grants justification defences only on the basis of a very narrow set of reasons connected with the point of policing: to apprehend suspects and bring them before the courts; to prevent the commission of serious offences; and to maintain the peace.

2 *Review*

Whether we are employees of the police department or members of the general public, the law regulates our reasoning in a distinctive way when we claim a justification defence. It will consider not only whether we appealed to the right sort of reasons in defence of our decision but also whether our decision was a reasonable one, such that it can be attributable to the office rather than to the arbitrary will of the person claiming to occupy it. In Canada, for example, when one claims a defence of self-defence, the courts do not apply a ‘correctness’ standard to self-defence claims. They do not ask whether the situation one faced in fact required the use of deadly force in self-defence. If they did apply a correctness standard, this would suggest that they took it to be their job to substitute their view on whether the actor’s conduct was justified for the actor’s own decision. But the courts use a reasonable belief standard, asking whether it was reasonable for the actor in the circumstances to believe that it was necessary for her to use force to defend herself. That is, the courts ask themselves whether the actor made a decision that was a reasonable exercise of her powers of public office. If so, then her decision deserves deference from the court, and the actor’s decision that the conduct was permissible should stand. It is only if the actor’s decision was unreasonable that the court will dislodge the actor’s decision and remove the justification defence.

3 *Standing*

The point on which justifications aimed at the general public seem most different from those aimed at police officers, however, is on the question of standing. These justifications are available in principle to anyone who might find herself in the situation to which they apply. So how can we still insist that these justifications still belong to a special public office (for which a formal procedure for entry is the normal course of things) rather than just being among the general powers of all private persons? Part of the answer lies in the highly restrictive grounds upon which an individual can claim these justification defences. We are not generally permitted to act in self-defence where it is open to us to seek assistance from a police officer. Similarly, any private citizen who undertakes an arrest is under a strict

28 As John Locke puts the point, ‘[t]he Commonwealth [is] a Society of Men constituted only for the procuring, preserving, and advancing of their own Civil Interests. ... [A]ll Civill Power, Right and Dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended the Salvation of Souls.’ John Locke, *A Letter Concerning Toleration*, ed by James Tully (Indianapolis: Hackett, 1983) at 26 [Locke, *Letter Concerning Toleration*].

duty to deliver up the arrested person to the authorities as soon as possible.²⁹ If the concern were simply with the moral justification of the act – in a case of self-defence, using force to repel deadly and unjustified force – the obligation to retreat and find officials to take over the situation would not play any obvious role. Where we conceive of the defence as concerned with the occupation of a public office *pro tempore*, however, it is obvious why this requirement should play a crucial role. As we saw earlier, offices are often nested within a larger institutional framework organized in a strict hierarchy. Beat cops must obey the decisions of their superiors; police officers generally must abide by the decisions of justices of the peace; and so on. The reason why hierarchy is valuable and even necessary in these situations is that these office-holders are not entitled to act in their own names; they are all acting in the name of the state. It is the state, after all, rather than any particular individual, that is entitled to act on behalf of the people as a whole. In order for any given office-holder to be able to show that he is acting on the state's behalf, he must be able to show that his acts fit into the larger allocation of power within the collective agent that is the state. Hierarchy is the principal mechanism through which the actions of a multiplicity of natural persons can achieve the coherence and unity of agency necessary for them to count as the state's acts.

Still, we must recognize that notwithstanding the law's concern for bureaucratic hierarchy in justification defences, the fact is that the justification defences that are available to the general public do not fully conform with the demand of a public procedure for entry into public office. When private citizens are entitled to claim a justification defence, it is usually an emergency situation of a certain kind. (Where it is not an emergency, the law usually maintains a formal procedure for entry into the office of policing even by private sector workers, through a process of deputization.)³⁰ It is not just that there is a situation that could be made morally better if someone were to take charge of the situation. Rather, it is that a core state function – ensuring that criminal suspects are brought to justice, protecting persons from physical assault, and so on – will go undone unless someone takes it upon himself to carry it out. So it is true that the demand for a public procedure into office is not fully met in cases such as these. But it is important to see why it is appropriate to accept a second-best solution in these limited cases. The point is that if action were not taken by someone in the moment, the state's function would be left undone.

III *The puzzle of policing*

There is something special about police power. To put this point squarely in focus, consider the figure of the vigilante: the individual who 'takes the law into his own

29 In Canada, this is regulated by *Criminal Code*, RSC 1985, c C-46, s 494(3): 'Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.'

30 Clifford Rosky points out that in the United States, '[p]rivate police are often 'deputized,' or given general public police authority, by federal, state, and local governments.' Clifford J Rosky, 'Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States' (2004) 36 Conn L Rev 879 at 898 (citing, as examples, Georgia and South Carolina statutes).

hands' and violates the criminal law's explicit prohibitions on the grounds that his conduct is morally justified, all things considered. Time and again, the law is totally unwilling even to hear the vigilante's argument that he is doing the right thing or that he is only doing what police officers could do in the same situation. It might be that a criminal wrongdoer deserves to be condemned and punished, but the individual who takes that task upon himself will be convicted for unlawful confinement, assault, and, likely, many other crimes besides. The criminal law is often willing to entertain the idea that someone should arrest, judge, convict, and punish criminal wrongdoers, and it will recognize that those whom the law has tasked with doing so are legally justified in doing so. In short, the criminal law is not (or at least, not always) deaf to the call to right society's wrongs; it is just that it is deeply concerned with the legal standing of those who undertake these actions. It is the law's concern for standing – and not its general disregard for morality's demands – that explains why it is deaf to the vigilante's plea.

Without an idea of public office, however, the idea of police power seems puzzling. If we do without the idea, it seems that we are left with two alternative accounts, which are both deeply unappealing. The first account is one that I call the '*ancien régime*' account because it equates the special powers afforded to those enforcing law and order to the special (and quite unjustifiable) privileges afforded to the nobility and the clergy under the *ancien régime* in France and elsewhere.³¹ The second account – what I call the 'radical equality view' – attempts to redeem policing by eliminating any special status afforded to those who carry it out. In redeeming policing in this way, it does away with the distinction between authorized law enforcer and vigilante. Only with the idea of public office is it possible to maintain the importance of that distinction while simultaneously insisting on the equality of all persons before the law.

A THE ANCIEN RÉGIME READING

One way to make sense of the law's apparently special treatment of police officers and its unwillingness to grant the same privileges to the rest of us is to insist that the law systematically favours public employees over private citizens. One might try to read Max Weber's famous dictum that the state is 'that human community which (successfully) lays claim to the *monopoly of legitimate physical violence* within a certain territory' to mean that only state employees should be legally permitted to use the sort of coercive force that is rendered permissible by justification defences.³² But that focus on the employment status of police officers as conveying a host of special privileges would seem to turn the status of the police into that of the nobility under the *ancien régime*. It would make them bearers of a host of special status-based privileges that cannot be justified in any society that claims to take seriously the equality of all persons before the law. This is the

31 The classic challenge to the privileges of the nobility and clergy under the *ancien régime* is Abbé Emmanuel-Joseph Sieyès, 'What Is the Third Estate?' in Mochael Sonenscher, ed, *Sieyès: Political Writings* (Indianapolis: Hackett, 2003) 92.

32 Max Weber, 'The Profession and Vocation of Politics' in Peter Lassman and Ronald Speirs, eds, *Political Writings* (Cambridge, UK: Cambridge University Press, 1994) 309 at 310–11 [emphasis added].

conception of policing that has sometimes been attributed to me. John Gardner writes: '[Thorburn] thinks [that] there is one morality for the rest of us, and there is another for the authorities (even if we sometimes cross the line and stand in for them *pro tempore*).'³³

I share Gardner's distaste for this *ancien régime* conception of policing and for many of the same reasons. All systems of law must draw distinctions among people, of course: it is appropriate for the law to allow us to do more where circumstances warrant it, either because of our superior skills and abilities or because of the greater need for us to take action. But that is simply the application of a single, morally justifiable set of laws to a variety of different circumstances. The *ancien régime* conception is something quite different. It is a system of privilege – etymologically, 'private laws' – for a certain class of persons that are different from the laws, procedures, and institutions that apply to the rest of us. Most importantly, the distinctions drawn under an *ancien régime* conception are ones that do not reflect any underlying morally significant distinction. They are the legal embodiment of arbitrariness and inequality.

It would be troubling indeed if there were one morality for officials and another for the rest of us in this way. But that is an inaccurate description both of the situation as we find it and of the normative account I have put forward to explain it. First, there is not, and never has been, a monopoly on legitimate coercion by government employees – there continue to be a great many justification defences available to private actors. It is just not the case that there is one clear set of rules for officials and another for 'the rest of us.' Second, there is another, deeper distinction animating the law's concern for standing in justification defences. The line between those who are and those who are not entitled to justifications is not drawn on the basis of employment status. We draw it, instead, in terms of who occupies the relevant public office of which the justifications are a part. When we look more closely, we find that whether the justified actor is a police officer, a private security guard, or a member of the general public caught in a difficult situation, the law of justifications is always concerned with establishing that this person occupied the relevant public office and that she acted according to the terms of that office. If so, she is justified; if not, she is not.

C THE RADICAL EQUALITY READING

Once we recognize that certain justification defences are available to members of the general public and not merely to members of the public police force, it is tempting to think that this talk of public office as the general structure of all justification defences is overblown.³⁴ If we define the public office of policing in such a way that it can be occupied (at least sometimes) by just anyone, then perhaps we can do away with talk of public office altogether. Perhaps, one might think, it would be better to ask only if the conduct in question was morally justified, all

³³ Gardner, 'Criminals in Uniform,' *supra* note 25 at 117.

³⁴ In part, this is related to the insistence among some English lawyers that categorical distinctions (such as the public/private distinction) are foreign to English law generally. See John Allison, *A Continental Distinction in English Law: A Historical and Comparative Perspective on English Public Law* (Cambridge, UK: Cambridge University Press, 1996).

things considered. This would allow us to set different norms for different people in different circumstances, but it would do so without separating us into different classes of persons and threatening to undermine our equality before the law. We might be tempted to do away with the public office of policing in this way. But that would be a mistake.

In 1829, when Prime Minister Robert Peel created England's first public police force (the London Metropolitan Police), he also set down nine principles of policing that were to guide them. Often referred to as the principles of 'community policing' or simply as 'Peel's principles',³⁵ they have been enormously influential long after the early nineteenth century and far beyond the borders of Great Britain.³⁶ It is possible to read them as a clear statement that policing is everyone's business, which we can all carry out as part of our private jurisdiction. The seventh of the nine principles reads (in part) as follows: '[T]he police are the public and ... the public are the police; *the police being only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen, in the interests of community welfare and existence.*'³⁷

If we take Peel's principle at face value, it seems to suggest that police officers are not really public office-holders at all. Their legal position is simply to carry out tasks (for pay) that are incumbent on all members of the public: there are no special police tasks and no special police powers available to carry out those tasks. When this principle is applied to certain policing duties, this might seem to make sense. Advocates of 'community policing' often emphasize how important it is for police officers to do ordinary-sounding things like picking up garbage from sidewalks or helping a lost child to find her way home or talking with neighbours on the sidewalk as ways of building trust and connection with the community they are charged with patrolling. This is in many ways an appealing way to characterize police work – it makes them seem more like concerned community members and less like an occupying army, and it is likely to encourage members of the general public to support them in their work³⁸ – but it fails to capture essential parts of their job description. Although it is undoubtedly good police practice to try to engage with the community, this cannot be all there is to the policing role. Sometimes, push comes quite literally to shove, and police officers need to do more than just demonstrate their *bona fides* to the community. They need to engage in some highly coercive conduct: arresting, detaining, searching, and sometimes even killing, which are the sorts of things that are generally prohibited by the criminal law and that call for some sort of criminal justification defence.

35 These are often referred to as Robert Peel's nine principles, since Peel both introduced the Metropolitan Police Force in London and advocated for these nine principles. But he is likely not their author. Home Office, 'Definition of Policing,' *supra* note 4.

36 For example, they are the 'bible' for police commissioner William J Bratton of New York City. See 'Sir Robert Peel's Nine Principles of Policing,' *New York Times* (15 April 2014), online: <www.nytimes.com/2014/04/16/nyregion/sir-robert-peels-nine-principles-of-policing.html>.

37 See Home Office, 'Definition of Policing,' *supra* note 4 [emphasis added].

38 The importance of legitimacy, built up through small interactions that build up trust, is a theme in much recent policing literature, especially since Tom Tyler's influential *Why People Obey the Law* (Princeton, NJ: Princeton University Press, 2006).

And when it comes to these sorts of tasks, we cannot say that it is incumbent on every citizen – at least, not simply *qua citizen* – to do all of these things. The central point of what we have seen so far is that the police are entitled to do a whole lot more of all this than are ordinary citizens – no matter how clever, well trained, or otherwise qualified to carry out the task. This is precisely the law’s distinction between the authorized police official and the (clever, well trained, and so on) vigilante.

D THE OFFICES READING

Without a conception of public office, we are left to choose between two quite unattractive understandings of policing. Either we recognize that police officers are subject to different norms from the rest of us (but we do so by undermining equality before the law) or else we insist on the equality of all persons before the law (but we do away with any way of making sense of the law’s sharp disavowal of vigilantism). The idea of public office allows us to avoid both of these traps in a way that is consistent with existing legal doctrine, with our commitment to the equality of all persons before the law, and with an important distinction between public power and private power that has animated Western law for centuries.

Once we introduce the idea of public office into our conceptual universe, a different reading of Peel’s principles of policing opens up to us. On that reading, we can agree that ‘the police [are] only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen’ because we recognize that, throughout English legal history, private citizens have always been called upon to take up a variety of public offices, as required.³⁹ In medieval or early modern England – a densely populated country with a vanishingly small public service – it was necessary to call on members of the public to carry out those public functions quite frequently.⁴⁰ Nevertheless, English law was alive even then to the difference between the (very limited) powers of an individual acting in his own name and the (much broader) powers of an individual acting with a warrant to act in the name of the king. So members of the police department are not different from the rest of us just in virtue of being employees of the police department. They are different only insofar as they more regularly and more enduringly occupy the public office of policing.

Insofar as members of the general public act with justification, then, we may think of them as ‘officials in plain clothes.’ It is one’s status as the valid occupant of a public office, and not one’s status as a public employee, that is doing all of the work in rendering one’s conduct legally justified. Putting matters in terms of one’s occupying a public office (rather than filling a government job) also puts this account on the right side of a core commitment to the equality of all before

39 On the prevalence of popularized offices throughout the history of most legal systems, see Larissa Katz, ‘Governing through Owners: How and Why Formal Private Property Rights Enhance State Power’ (2012) 160 U Pa L Rev 2029.

40 As Lucia Zedner has pointed out, policing took place long before the advent of modern public police forces at the beginning of the nineteenth century, and it will continue to be carried out by ordinary members of the public long into the future. See Lucia Zedner, ‘Policing Before and After the Police’ (2006) 46 Brit J Crim 78.

the law – or what is often referred to as the ‘citizens in uniform’ doctrine. This doctrine was given its best-known formulation by the English constitutional lawyer AV Dicey: ‘[E]very official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.’⁴¹ In the twentieth and twenty-first centuries, this ‘citizens in uniform’ doctrine has gained general acceptance in a wide variety of jurisdictions beyond the borders of the United Kingdom and with good reason.⁴² Dicey’s doctrine is just a reminder that, although they are police officers with all sorts of special powers and mandates peculiar to their office, they are also persons who are always answerable to the law for their actions. To be a police officer, in short, is not to be above the law. It would be a deep violation of the rule of law to allow anyone to escape legal responsibility for his conduct simply by virtue of his job title. This is not the case in Canada, in England, or in the United States,⁴³ and that is as it should be. Police officers are always answerable for their conduct – it is just that there are answers available to them in virtue of their office (in the form of justifications) that are not available to the rest of us.

IV *Public office and public authority*

So far, the focus of most of my argument has been to make the best sense of the structure of existing criminal law doctrine in the English-speaking world. I have argued that we will do best on that score if we think of justification defences as reflecting the fact that the party claiming this justification was properly acting within the public office of policing. In this part, I take the argument a step further. It is not just that the doctrine we have inherited happens to fit well with this understanding of public office. It is, rather, that the idea of public office – and, in particular, the public office of policing – plays a crucial role in an account of legal order under the rule of law that we have good reason to endorse.

A JUSTIFYING AUTHORITY ON THE MERITS

The idea of legal offices and their central role in legal order is at the heart of a deeper disagreement about the very point of legal order and how to establish its authority over free people. The idea of public office plays a crucial part in a well-known solution to the problem of legitimate political authority, which is

41 AV Dicey, *An Introduction to the Study of the Law of the Constitution*, ed by Roger Michener (Indianapolis: Liberty Fund, 1982) at 149.

42 Peter Rowe, ‘The Soldier as a Citizen in Uniform: A Reappraisal’ (2007) 7 *New Zealand Armed Forces L Rev* 1, citing numerous sources on the spread of this doctrine to the understanding of soldiers as well as police officers. For example, it was also used by the European Organization of Military Associations (EUROMIL), which indicates that ‘all the member associations of EUROMIL consider themselves committed to the principle of the Citizen in Uniform.’ EUROMIL, ‘About Us,’ online: <www.euromil.org/aboutus.asp>.

43 In the United States, this doctrine has faced some real challenges over the years. Richard Nixon famously said that ‘when the president does it, that means that it is not illegal.’ Quoted in ‘Excerpts from Interview with Nixon about Domestic Effects of Indochina War,’ *New York Times* (20 May 1977) A16.

sometimes referred to as ‘the anarchist’s challenge’: how it is possible for one person to have legitimate authority to tell another person what to do such that the other person thereby has a duty to do it and (if necessary) may be coerced to do it. If we think of them simply as two free persons, one telling the other what to do, the problem seems to have no solution: no person has the right to command and to coerce another free person to do as he is told. This means that the anarchist is right: it is never the case that one person actually has genuine authority over another – for that situation is at odds with the status of all persons as their own masters rather than deferring to the judgment of others.

One solution to this challenge proposes that we simply treat one person’s directives as though they were authoritative where they guide us reliably toward what morality requires of us anyway. That is, we can try to bypass the anarchist’s challenge and simply answer a different question. It is not that someone else’s directives ever actually bind me as directives; it is just that when that other person usually gets things right, her directives will serve as good heuristics to what morality already demands of me. Since morality (unlike any person’s directives) genuinely is always binding, then I can act in a way that might look like I am treating the other person’s directives as binding, even though I am really just using them to discover the demands of morality. This approach – which in fact embraces anarchism but can sometimes have the look and feel of law as a genuine authority – is given its best-known articulation by Joseph Raz in his well-known ‘normal justification thesis.’ In its canonical formulation, it states that ‘the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him ... if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.’⁴⁴

This sort of approach to the public authority of states over their subjects has been enormously influential, not only in criminal law theory but also across legal theory more generally. As such, it has been developed in myriad ways by a number of different writers, starting with Jeremy Bentham.⁴⁵ The details of all of these various accounts need not delay us here, however. Instead, what is important to keep in mind is the general structure of the argument.⁴⁶ The thought here is that the only morally relevant relationships are between natural persons. Starting from that point, we cannot come up with a convincing argument that the law has any independent claim of authority over us. The best we can do is to show that

44 Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) at 53 [Raz, *Morality of Freedom*].

45 Jeremy Bentham, *A Fragment of Government* (Oxford: Clarendon Press, 1891) at 54–5 [emphasis in original]: ‘This then, and no other, being the *reason* why men should be made to keep their promises, viz., that it is for the advantage of society that they should, is a reason that may as well be given at once ... why *subjects* ... should obey ... so long as the probably mischiefs of obedience are less than the probable mischiefs of resistance.’

46 Raz borrows general structure of the argument from Jeremy Bentham. See Joseph Raz, ‘The Functions of Law’ in *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1983) at 166–7.

it might sometimes be a good guide to conforming with the only code that is genuinely authoritative over natural persons: that is, morality. Accordingly, as Raz insists, ‘it is the function of governments to promote morality.’⁴⁷

B PUBLIC AUTHORITY AND PUBLIC OFFICE

In place of this rather depressing vision of the authority of law, there is a different starting point for thinking about public authority – one that has dominated thinking about public authority from around the time of Thomas Hobbes at least until the time of Jeremy Bentham – that involves the idea of public office as a basic structural feature. On this account, the problem of public authority is the same: how can we ever say that one person has the authority to tell another person what to do – that is, genuinely to change his normative situation just by his say-so? In order to find a solution to the problem of public authority, this second account reframes the question not in terms of the substance of the directive (as Raz and Bentham do); it focuses instead on the possibility of persons relating to one another through law in a different way. For as we saw above, we may construct a public office as a free-standing position of authority that is not attached to any particular natural person. It is, instead, a collection of powers, rights, and liberties to be exercised for the purpose of achieving its defining purposes. What is crucial about a public office, of course, is that it concerns the exercise of decision-making authority by a natural person over concerns that are not properly his own. But by constructing that decision-making authority as an office, we may render the decisions made by the occupant of the office consistent with the status of both office-holder and subject as free and equal.

Within a public office, one person may give directives to another person not in his own name but simply as the occupant of the office. This is Hobbes’s insight about the justification of public authority: in order to be in a position to impose genuine obligations on his subjects, the sovereign must not do so just as one person over another. Instead, it must be merely as the occupant of an office exercising the powers of that office. John Locke put the point in terms of the office of magistrate: ‘Every man is entitled to admonish, exhort, and convince another of error, and lead him by reasoning to accept his own opinions. But it is the magistrate’s province to give orders by decree.’⁴⁸ When seen in this way, the puzzle of authority takes on a different cast. For some (like Jean-Jacques Rousseau),⁴⁹ the legitimacy of public authority turns on the connection of the office of sovereign to the will of all those who are subject to its power; for others, the legitimacy of the office of sovereign turns only on the requirement that it be an office, directed at ‘the safety of the people’ rather than just being the personal power of an individual.⁵⁰ But the basic move that

47 Raz, *Morality of Freedom*, supra note 44 at 415.

48 Locke, *Letter Concerning Toleration*, supra note 28 at 19.

49 Rousseau defines the fundamental problem to which the social contract is the solution in the following terms: ‘Trouver une forme d’association ... par laquelle chacun s’unissant à tous n’obéisse pourtant qu’à lui-même et reste aussi libre qu’auparavant.’ Jean-Jacques Rousseau, ‘Du contrat social’ in *Oeuvres complètes*, vol 3 (Paris: Gallimard, 1964) 347 at 360.

50 Hobbes, *Leviathan*, supra note 12 at 231.

is common to all of these accounts is that, in a legitimate legal order, we never surrender our judgment to another person; instead, we construct legal offices to take care of purposes that need doing but that no person is entitled to claim as his own.

The idea of office allows us to imagine one person making decisions with respect to another person without putting one person above another. When one person assumes the office, he exercises the power to decide certain matters and may also use coercive force to enforce those decisions, all without imposing himself upon the other. Instead, he is simply carrying out the demands of the office: although it is he, the natural person, who made the particular decision and who used the coercive force, the decision and the use of force did not belong to him but only to the office.

C PUBLIC OFFICES AND JUSTIFICATIONS

If we think of the public authority of states as arising simply from the substantive merits of their laws (in the style of Raz or Bentham), there is no reason why we should assume that such laws should include the office of policing as a fundamental structural feature. We might find, on this account, that offices are a legal technology that helps us to organize legal thinking in useful ways. But it is probably more likely that the structure of criminal law will focus on questions that are more appropriate to the relationship of each individual to the law, looking to it for guidance as to how best to conform his conduct to the demands of morality.

If we think of public authority as fundamentally structured around the concept of public office – like many of the traditional social contract accounts of the seventeenth and eighteenth centuries – then the idea of the public office of policing seems to play an irreducible role in the very idea of legal order. On this account, public offices are required wherever genuine public authority is called for: in the making of laws, in adjudication, and in the enforcement of the law and of court judgments.⁵¹

V Conclusion

The idea of policing is facing closer scrutiny now than ever before – and rightly so. We should pay careful attention to the wrongdoing of individual officers, of the policies of the specific police departments, and of the ways in which corrupt politicians have tried to use police power to their own partisan ends. But we should also pay closer attention to the very idea of policing to make sense of

51 These are the three offices necessary to the rule of law, according to Oakeshott, ‘Rule of Law,’ supra note 6: ‘an office with the authority to make law’ (at 151); ‘a judicial office, a court of law concerned with considering actual performances solely in respect of their legality’ (at 157); and ‘power: offices equipped with procedures and duties composed of rules and authorized to compel the performance of the substantive actions commanded by a court of law, and custodians of “the peace,” similarly equipped, concerned to detect and to prosecute alleged illegalities and to forestall imminent breaches of the law’ (at 160–1).

the idea that some people are entitled to use force that is prohibited to the rest of us in order to secure the peace and security of the community. It is this apparently paradoxical idea – of protecting ourselves from the domination of others by empowering a leviathan to make and enforce laws over us all – that is at heart of modern conceptions of legitimate state power under the rule of law. The concept of office generally, and of public office in particular, has a long history in legal thinking. It is this idea of public office – a legal artefact that combines special powers and special duties together with directing purposes – that allows us to make sense of the paradoxical idea of policing and, indeed, of self-government under the rule of law.