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RESEARCH ARTICLE

Policing, citizenship and the civil courts: how increased settlement of civil claims has impacted police accountability

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Abstract

It is recognised that civil litigation has a place within the police accountability infrastructure. However, the role of actions against the police for wrongful arrest, false imprisonment, assault, and malicious prosecution (hereafter police actions) is underexplored. Taking citizenship as its analytical frame, this paper probes the relationship between police actions and the police complaints and discipline system over the last 60 years. Its primary focus is the Court of Appeal decision *Thompson v Commissioner of Police of the Metropolis, Hsu v Same* [1998] QB 498 (*Thompson*). Here the potential for police actions to expose questionable police responses to officer misconduct, and failings in external oversight mechanisms, came into conflict with the drive towards proportionate civil justice. In prioritising the latter, *Thompson* increased police autonomy over settlement of police actions, thereby deprioritising the role of the courts in demarcating the limits of state interference with citizens' rights. It is not suggested that *Thompson* should be overruled. Instead, it is contended that recognising the impact of the decision on subsequent reforms to police accountability processes and contemporary conceptions of the police-citizen relationship is crucial to understanding the roots of current disquiet concerning police accountability (and therefore to the development of meaningful reforms).

Keywords: criminal justice; police accountability; citizenship; civil litigation; proportionate justice; *Thompson v Commissioner of Police of the Metropolis*; *Hsu v Same* [1998] QB 498

Introduction

It is acknowledged that civil litigation plays an important, if sometimes subtle, role within the police accountability infrastructure.[1] Conaghan's analysis of the Article 3 ECHR action brought against the Metropolitan police by victims of the serial rapist John Worboys demonstrates how litigation can provide 'a crucial space for public discourse with the power to shape and inform public attitudes and beliefs'.[2] However, there is a lack of research and analysis concerning the role of civil actions against the police for the intentional torts of wrongful arrest, false imprisonment, assault, and malicious prosecution (hereafter police actions). This paper addresses that deficit by probing the interface between police actions and other police accountability mechanisms over the last 60 years. In doing so it argues that the move towards proportionate civil justice following the Wolfe Reforms of the 1990s has had

[1]M Rowe *Policing the Police* (Bristol: Policy Press, 2020) p 53; J Conahan 'Investigating rape: human rights and police accountability' (2017) 37 Legal Studies 54.

[2]Conaghan, ibid, at 76.

greater impact on both conceptions of police accountability and the boundaries of acceptable officer conduct in England and Wales than has hitherto been acknowledged.[3]

This analysis is of pressing contemporary significance. The interface between police actions and police discipline is complex. In many cases the line at which damages may be awarded in a police action will quite properly be drawn in a different place to the line at which police officers' conduct justifies a disciplinary (or other) response. However, while police actions theoretically perform a normative constitutional function in delineating the limits of legitimate state interference with citizens' rights, it seems intuitively likely that the prospect of disciplinary action will have more practical bearing on officers' conduct.[4] Lack of attention within the police complaints and discipline system to the lines drawn by the civil law can therefore add to other (operational, organisational and political)[5] disincentives for officers to fully respect citizens' rights.

Crucially, a civil law framing of incidents invites a more a citizen-focused interpretation of how officers treat citizens and how citizens' responses to officers are interpreted. Subject to some specified exceptions, officers cannot lawfully use force against a citizen unless the grounds for arrest are met.[6] Similarly, a citizen can use reasonable force to defend themselves in the face of unlawful force used or attempted by an officer. Clarity concerning these aspects of the legal position is fundamental to accurate determination of whether an officer or citizen has been assaulted, but the more general point extends to the interpretation of other police-citizen encounters. The concern is that a reduced focus on the constitutional boundaries drawn by the civil law invites unduly police-centred approaches to the assessment of incidents which downgrades the duty on officers to de-escalate where possible. In this context, it is disturbing to note that in 2018/19 one in ten arrests arising from stop and search were for public order offences after nothing was found.[7]

It is contended, therefore, that if the rights of the citizen are to remain meaningful, a more cohesive approach to the potential of police actions to inform officer conduct is required. The argument here provides the foundations of such an approach. The primary focus of analysis is the underexplored case of *Thompson v Commissioner of Police of the Metropolis, Hsu v Same*[8] (*Thompson*) which facilitated increased settlement in police actions. It is not suggested that *Thompson* be overturned. More subtly, it is argued that greater understanding of the impact of *Thompson* on public discourse concerning officer conduct and conceptions of the police-citizen relationship will provide crucial insights into ways in

[3]The focus of this paper is England and Wales because of the nature of the argument, but it is contended that elements of the analysis will be of relevance of other common law jurisdictions. In addition, it is acknowledged that policing is a complex 'plural' process, and that it can be reductive to focus only on the public police: see A Crawford 'The police, policing and the future of the "extended policing family"' in J Brown (ed) *The Future of Policing* (London: Routledge, 2014) p 173. However, a key element of the analysis here involves formal police accountability mechanisms and, as outlined below, police actions have specific procedural rules which only apply to servants of government. This inevitably leads to the public police being the focus of discussion.

[4]It is not suggested that the potential for misconduct processes or the outcome of civil claims are the only or most significant influences on street-level officers' conduct. See for example R Grimshaw and T Jefferson *Interpreting Police Work: Policy and Practice in Forms of Beat Policing* (London: Allen and Unwin, 1987), G Pearson and M Rowe *Police Street Powers and Criminal Justice: Regulations and Discretion in a Time Change* (Oxford: Hart Publishing, 2020)).

[5]Pearson and Rowe, ibid, found that 'systemic and technological changes, intended to ensure consistency and to reduce discrimination and complaints, have, in effect, only increased the accountability of frontline officers to their superiors rather than to the public' (p 185). However, see also C Chapman 'An independent review of the police disciplinary system in England', which found a tendency among senior officers to fail to hold junior officers to account or regulate their conduct (available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/385911/An_Independent_Review_of_the_Police_Disciplinary_System_-_Report_-_Final….pdf).

[6]*Collins v Wilcock* [1984] 1 WLR 1172. However also see s 110 of the Serious Organised Crime and Police Act 2005 and Code G of the Police and Criminal Evidence Act 1984. Officers may also use force in lawful self-defence. See the Criminal Justice and Immigration Act 2008, s 76.

[7]Her Majesty's Inspectorate of Constabulary Fire and Rescue Services *Disproportionate Use of Police Powers: A Spotlight on Stop and Search and the Use of Force* (2021) p 32, https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/disproportionate-use-of-police-powers-spotlight-on-stop-search-and-use-of-force.pdf.

[8][1998] QB 498.

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which the existing police accountability infrastructure may be improved. The distinction between the citizen focus of civil claims and the police focus of the disciplinary process invites the lens of citizenship as an appropriate analytical frame. The methodology adopted is therefore a detailed analysis of the social, legal and policing context of the decision in *Thompson* by reference to Marshall's delineation of citizenship rights. This permits the practical and conceptual impact of *Thompson* on police accountability to be exposed and thereby provides the foundations upon which future reforms can be based.

While, as noted above, *Thompson* is the primary focus of analysis, in order to make that meaningful, it is first necessary to explore the substantial connection between policing practices, our citizenship status, and the normative and regulatory role of police actions prior to that ruling. Section 1 provides this context, which allows Section 2 to probe the background to *Thompson,* the reasoning in the decision and its practical and conceptual impact on police accountability. Section 3 traces that impact into subsequent reforms. The concluding section makes recommendations for reform based on the insights in previous sections.[9]

1. Citizenship, policing and the normative role of police actions

(a) Citizenship, policing, and police actions

The idea of 'citizenship' is widely acknowledged to have contingent and imprecise definitional boundaries.[10] While some texts are concerned to explore the benefits and implications of global citizenship, a dominant theme in delineations of citizenship is its simultaneously inclusive and exclusive character within a given jurisdiction.[11] It can thus be seen as entailing 'a sense of loyalty, the discharge of duties and the enjoyment of rights not primarily in relation to other human beings but in relation to the abstract concept of state'.[12] Further, drawing on ancient Greek conceptions of citizenship, this state-centred notion is premised on the belief that individuals achieve their full potential only as participating members of society in relation to which citizens were 'all who share in the civic life of ruling and being ruled in turn'.[13] Thus a rudimentary depiction of modern citizenship can be taken as a legal status which incorporates the interlocking rights and duties that characterise both relations between individuals and between citizens and the state.[14]

Political models of citizenship might emphasise Rousseau's notion of the social contract.[15] In contrast, sociological perspectives may focus on those institutions in society which 'embody or give expression to the formal rights and obligations of individuals as members of a political community'.[16] Whichever lens is preferred, citizenship and policing are intimately connected.

In relation to the former, Weber understands the defining feature of the state as the ability to use coercive force within its territory.[17] This combines with the police role as the privileged bearers of the mandate to exercise such force to create inextricable links between policing and citizenship.[18]

[9]While the ECHR impacts the domestic legislation that informs police practices, and the formal elements of the police complaints infrastructure include reference to, for example, Arts 2 and 3 (see Police Reform Act 2002, Sch 3), the impact of the Human Rights Act 1998 is not addressed. Article 2 ECHR only applies in the context of a fatality and the threshold for bringing claims under Art 3 is high. So, while these are important safeguards the discussion here envisages a police that is held to higher standards than the minimum the ECHR seeks to secure.

[10]D Prahbat *Britishness, Belonging and Citizenship: Experiencing Nationality Law* (Bristol: Policy Press, 2018); BS Turner 'Citizenship studies: a general theory' (1997) 1(1) Citizenship Studies 5.

[11]D Heater *Citizenship: The Civic Ideal in World History, Politics and Education* (Manchester: Manchester University Press, 1990); Turner, ibid, at 6.

[12]Heater, ibid, p 22.

[13]Ibid, p 3.

[14]Ibid.

[15]JJ Rousseau *Discourse on Political Economy and the Social Contract* (Oxford: Oxford University Press, 2008).

[16]Turner, above n 10, at 6.

[17]M Weber *Essays in Sociology* (2013) p 48.

[18]RE Bittner *The Function of the Police in Modern Society* (MD: National Institute of Mental Health, 1970). As noted at n 3 above, it is acknowledged that 'policing' in a broad sense is also undertaken by other bodies.

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Moreover, the model of 'policing by consent' envisages a conception of the police institution as both a fundamental conduit for and qualitative signifier of the relationship between citizen and state. It is important, therefore, to distinguish two interconnected but conceptually distinct forms of police accountability because they engage citizenship in different ways. Police accountability regarding the efficient use and direction of resources towards stated aims of reducing crime and keeping the peace etc[19] can be contrasted with police accountability in relation to *how* officers' operational activities are performed. The former engages citizenship at a predominantly political level, whereas the latter (with which this argument is primarily concerned) engages citizenship at the more fundamental level of the *limits* of legitimate state interference with citizens' personal autonomy.[20]

Policing practices can also shape conceptions of social authority, of individual subjects and of social relations.[21] The police are thus similarly fundamental to conceptions of citizenship as an identity 'based on a sense of tradition, ethnicity, lifestyle and heightened by systems of belief, ceremonies and symbols'.[22] Walker outlines how, in the course of its routine operations, policing 'spells out its assumptions about persons and gives these assumptions an institutional reality'.[23] Thus, the dynamic role of citizenship in both reflecting and reproducing deep cultural and political associations is mirrored in how policing is conceived (and practised) within a given territory. The corollary to this, which is important to the argument here, is that subtle changes in how policing and police accountability is viewed or articulated can have a qualitative impact on what citizenship entails.

Marshall's seminal work on citizenship and social class conceives citizenship as an aspect of societies' development towards individual equality and freedom.[24] His now rather dated analysis inevitably fails to reflect the enormous social, technological and political changes since it was written.[25] Nevertheless, his delineation of citizenship as comprising three elements – civil rights, political rights and social rights – which (he argues) developed sequentially, remains relevant and provides a useful schema for the argument that follows.

The period up to the end of the eighteenth century saw the expansion of civil rights, for example, liberty of the person, freedom of thought and speech, and the right to own property and enter contracts.[26] The development of civil rights is strongly associated with the status of freedom, in contrast to serfdom. The foundation for civil rights therefore lies in facilitating habeas corpus and actions against the government and the police.[27] Among civil rights is the right to be tried by a jury, and the civil duty to perform jury service when called is an archetypal example of an obligation of citizenship anticipated within the ancient Greek conception.[28] Significantly, as outlined below, some police actions can be heard before civil juries. This ancient right links police accountability via police actions to those elements of citizenship which accord with civil rights and duties, both ideologically and practically.

Political rights developed during the nineteenth and early twentieth centuries with the extension of the franchise being linked to shifts in social and economic conditions and to ideas of citizenship.[29] For Marshall, the Representation of the People Act 1918 signifies one of the most decisive changes to conceptions of citizenship because 'by adopting manhood suffrage it shifted the basis of political rights from economic substance to personal status'.[30] The Police Reform and Social Responsibility Act 2012 extended political rights to include direct engagement with the 'use of resources' element of

[19]https://www.college.police.uk/app/operations/operational-planning/core-planning-principles.

[20]L Turner 'PCCs, neo-liberal hegemony and democratic policing' (2014) 13(1) Safer Communities 13.

[21]N Walker 'Defining core police tasks: the neglect of the symbolic dimension?' (1996) 6(1) Policing and Society 53.

[22]EF Isin and PK Wood *Citizenship and Identity* (London: Sage, 1999).

[23]Ibid, p 53.

[24]TH Marshall *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950) p 14.

[25]H Sommerlad 'Some reflections on the relationship between citizenship, access to justice, and the reform of legal aid' (2004) 31(3) Journal of Law and Society 345.

[26]Marshall, above n 24, p 10.

[27]*Entick v Carington* (1765) 2 Wils KB 275.

[28]Heater, above n 11, p 251.

[29]Marshall, above n 24, pp 25–26.

[30]Ibid, p 20.

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police accountability via the election of local Police and Crime Commissioners (PCCs). Further, PCCs' remit has recently been extended to include an express duty to hold chief constables to account for how police complaints are handled within forces.[31] This again raises the contemporary importance of the analysis in this paper because the dual role for PCCs has the potential to blur the distinction between the two types of police accountability noted above in ways which, as elucidated below, are consistent with the broader impact of *Thompson*.

Notwithstanding the advancement towards universal suffrage in the twentieth century, neither political nor civil rights are meaningful without the means of enforcing them. The third stage in Marshall's analysis is therefore the incorporation in the twentieth century of social rights into conceptions of citizenship.[32] The Beveridge Report, which laid the foundations for the establishment of the welfare state, is peppered with references to citizenship and it envisages social rights not solely in terms of financial assistance but as a means of empowerment.[33] Legal aid is a principal example of social rights empowering citizens to claim the equality purportedly inherent in their citizenship status. Importantly for the argument here, it also implicitly extends civic responsibility to include practical engagement with the legal process.[34] Legal aid to bring a civil action (when subject to unlawful force by police officers for example) typifies the expansion of social rights to include meaningful assertion of civil rights, *not only for the claimant but on behalf of all citizens*. Further, as discussed below, the civil procedures that invite jury trials for some police actions exemplify the engagement of both the civil rights and duties of citizenship. Hence the political, civil and social rights inherent in our citizenship status are inextricably linked both with how policing is practised and how the police are held to account (which are of course themselves recursively linked).

(b) The normative and regulatory role of police actions prior to Thompson

The relationship between police actions and police complaints and discipline processes is structurally and historically complex. The classic case of *Entick v Carrington*[35] is testament to the ancient and constitutional significance of recourse to the civil courts in demarcating and enforcing the boundaries of lawful state interference with citizens' rights. Further, the crucial vindicatory function of police actions in this regard was confirmed by the Court of Appeal as recently as 2009.[36]

However, the nature of civil litigation makes the historical significance of police actions difficult to trace. The Police Act 1964 established the basic modern structure of policing in England and Wales[37] and permitted police actions to be brought against chief constables.[38] Prior to this, actions were brought in the name of the claimant and the officer(s) in question, and cases are therefore difficult to locate. The centrality of police actions to police accountability prior to 1964 is nevertheless evidenced and underscored by that fact that Royal Commission on Policing which preceded that Police Act 1964 was established in response to consternation regarding the handling of a police action.

In 1957 an officer (PC Eastmond) allegedly assaulted and unlawfully arrested the claimant (Mr Garrett). Garrett was initially happy with an apology from the police. However, one of the parties to the incident was a famous actor and when the story became public, Garrett, who worked at the British Museum, sued Eastmond in order to clear his name. A settlement figure was agreed but when the settlement was read out in court the police statement indicated that despite the sums being paid liability was not admitted (thus frustrating the Garrett's primary motivation for bringing the claim). It also emerged that there was to be no disciplinary hearing in relation to the incident.

[31]Policing and Crime Act 2017, s 22.
[32]Marshall, above n 24, pp 25–26.
[33]Social Insurance and Allied Services, Cmd 6405 (1942).
[34]Sommerlad, above n 25.
[35](1765) 2 Wils KB 275.
[36]*Ashley v Chief Constable of Sussex* [2008] 1 AC 962.
[37]Subject to the establishment of PCCs by the Police Reform and Social Responsibility Act 2012.
[38]Police Act 1964, s 48, now the Police Act 1996, s 88.

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The affair led to a vote of no confidence in the then Home Secretary and one of the statements in the no confidence debate eloquently demonstrates the significance attached to the role of the police actions at that time:[39]

> … if there is no court hearing and no disciplinary hearing no one ever finds out and neither the officer nor the plaintiff *nor the public* ever receives any benefit. So, what does the £300 do?[40] (emphasis added)

Importantly, rather than police actions being seen in individualistic (fiscal) terms, this statement demonstrates a conception of them as integral to police accountability and a crucial means of providing the transparency upon which policing by consent is founded. Notably, the statement also betrays an implicit assumption of a collective interest in officer conduct (in the individual case), which mirrors the rich conception of citizenship incorporating civil, political, and social rights outlined above. Following the 1964 Act (until the decision in *Thompson*), police actions continued as markers of that form of engaged citizenship. In doing so, they also played a crucial role in the establishment and development police complaints oversight bodies.

Despite the events leading to the Royal Commission, the Police Act 1964 centred all control over officer discipline with chief constables.[41] The structural weakness of this was highlighted by several high-profile incidents of police brutality and purported corruption in the first decade directly following the 1964 Act, many of which were brought to public attention by their associated police actions.[42] The ensuing crisis in public confidence in the police to discipline officers appropriately resulted in a Private Member's Bill in 1973, the withdrawal of which was rewarded with the Police Act 1976 and the establishment in 1976 of the first independent police oversight body, the Police Complaints Board (PCB).[43]

Incidents of officers engaging in misconduct with apparent impunity continued after 1976 and again these were highlighted by the disparities between the outcomes of police actions and of police disciplinary process (in circumstances which cast doubt on police commitment to upholding the rule of law).[44] Against this backdrop of increased distrust, it was the disturbances in the summer of 1981 and the subsequent Scarman Report, which resulted in the Police and Criminal Evidence Act 1984 (PACE) and the substitution of the PCB with the Police Complaints Authority (PCA). However, despite the PCA having greater powers than the PCB, police actions once again continued to demonstrate police institutional inability or refusal to hold officers properly to account for gross breaches of citizens' rights.[45] This led the Home Affairs Committee on the Police Disciplinary and Complaints Procedures 1997[46] to specifically address the issue and ultimately to the establishment of the Independent Police Complaints Commission by the Police Reform Act 2002.[47]

Thompson was a central element of this period and is the focus of the analysis below. However, to understand the practical significance of *Thompson* it is first vital to appreciate how civil law and civil procedure in relation to police actions had developed over centuries to govern and demarcate the

[39]Facts taken from *The Spectator* 6 November 1959, which was confirmed as an accurate account during the HC debate.

[40]*Hansard* HC Deb, vol 18, col 1266, November 1959.

[41]In ss 48–50.

[42]K Russell *Complaints against the Police: A Sociological View* (Leicester: Milltak, 1976).

[43]See in particular the Police Act 1976, ss 1 and 2. The Police Act (Amendment) Bill was laid by the MP for Derby North, Mr Philip Whitehead. For a discussion see P Paling 'The Police Act (Amendment) Bill' (1973) Criminal Law Review 28.

[44]G Smith 'A most enduring problem: police complaints reform in England and Wales' (2005) 35(1) Journal of Social Policy 121.

[45]Ibid. As noted at nn 4 and 5 above, it is accepted that the influences/determinants of both street-level and senior officers' conduct extend far beyond the legal mechanisms for accountability. In this context the ability of police actions to provide transparency regarding deep-seated cultural failings to adhere to the rule of law and the principles of policing by consent is particularly important.

[46]1997 Cmnd 258 (discussed below).

[47]Smith, above n 44, at 130.

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boundaries of state interference with citizens' rights. Unlike negligence actions which are essentially private actions for which harm and compensation for harm are crucial, police actions are in most instances founded on trespass to the person. They are intentional torts, and their core function is, thus, not compensation for harm but vindication of the right to personal physical autonomy.[48]

Priel distinguishes private and public roles for intentional torts.[49] Within the former, vindication is understood as 'a "private" power an individual has to assert the existence of her rights against other individuals (including the state)'. Meanwhile, the latter sees vindication as vesting in 'an individual's power to *make public* the fact that her rights (whose content is determined elsewhere) have been infringed'.[50]

It is contended that even within the private role noted above, the uniquely public function of the police lends police actions a quintessentially public character. The starting point is citizens' rights not to be trespassed upon by state officials without lawful authority. The corollary is that it is for the police to justify their conduct by reference to the lawfulness of their actions. Therefore, the courts' formal determination of whether (for example) an arrest was lawful *in the specific circumstances* necessarily has public resonance and normative reach far beyond the particular case.

Further, as noted above, Priel convincingly argues that the intentional torts also serve an overtly public role which recognises the performative significance of the litigation process.[51] Thus, for Priel, 'the provision of a public and impartial forum for declaring that a claimant's rights have been infringed' can be seen as a 'particular aim' of tort *litigation*.[52] In police actions the performative element of litigation is inextricably linked to vindication of the rights in question and it is here that police actions can be seen to engage and sustain the features of citizenship that connect with identity and civic duties.

The importance of the *litigation process* in this regard is exemplified by the procedural rule that actions against the police for false imprisonment and malicious prosecution may be heard before a civil jury which makes specific findings of fact.[53] Police actions thus provide one of the primary forums whereby evidence (for example veracity of police officer testimony) can be tested within a mechanism that *is not focused on the potential outcome for the officer but on what was done to the citizen*.

The public and constitutional importance of police actions is additionally underscored by the availability of both aggravated and exemplary damages which juries are also empowered to determine.[54] Aggravated damages provide *additional compensation* for harm to the claimant's 'proper feelings of pride and dignity' concerning the manner in which the tort was committed. More significantly, for the argument here, exemplary damages are not compensatory but punitive.

Rookes v Barnard[55] (*Rookes*) sets out two categories of case for which exemplary damages are available, each with distinct functions and rationales. What is referred to as the second category of exemplary damages in *Rookes* (and hereafter the 'non-profit category') applies where the 'defendant's conduct has been calculated by him to make a profit for himself which exceeds the compensation payable to the plaintiff'.[56] The classic modern example of this non-profit category is defamation actions against newspapers that publish salacious mistruths about celebrities.

In contrast, the first category (here the 'constitutional category') operates as an ancient constitutional protection against 'oppressive, arbitrary or unconstitutional action by servants of the government'. [57]

[48]*Ashley v Chief Constable of Sussex* [2008] 1 AC 962.
[49]D Priel 'A public role for the intentional torts' (2011) 22(2) Kings Law Journal 183.
[50]Ibid, at 194.
[51]L Mulcahy 'The collective interest in private dispute resolution' (2013) 33(1) Oxford Journal of Legal Studies 59.
[52]Priel, above n 49, at 199. See also *Ashley v Chief Constable of Sussex* [2008] 1 AC 962.
[53]Senior Courts Act 1981, s 69(1).
[54]A Beever 'The structure of aggravated and exemplary damages' (2003) 23(1) Oxford Journal of Legal Studies 87.
[55][1964] AC 1129.
[56]Ibid, at 1226
[57]Ibid, at 1222. The availability of this category extends beyond actions against the police, but police actions provide an archetypal example.

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Awards in this category aim to serve three functions: to punish, to express outrage at, and to deter the arbitrary and outrageous use of executive power.[58] In police actions this outrageous behaviour extends to failure to discipline officers appropriately.[59]

The combined availability of civil juries and exemplary damages evolved to demarcate and signify a particular conception of the citizen state relationship '… for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'.[60] Importantly, therefore, the performative element here is not the claimant receiving a large exemplary award, but *the jury awarding it*. The jury represent the citizenry (writ large) and the ability for the juries to award exemplary damages against a state suggests a rich understanding of citizenship in which all citizens are united in vindicating rights on behalf of the citizenry as a whole. It is noteworthy that this accords with the quality of police-citizen relationship assumed in the quote above from the *Eastmond v Garret*.

In addition, a key non-legal driver of police institutional decision-making is the need to secure and maintain public support.[61] The civil legal processes associated with police actions prior to *Thompson* aligned with this because the threat of public support being undermined by court cases that expose police failures to discipline officers appropriately, could (in theory at least) act as a deterrent at this non-legal level.

2. Thompson: background, reasoning and practical and conceptual implications

(a) The policing background to Thompson

The previous sections outlined the interconnected relationship between police actions and citizenship prior to *Thompson*. This section focuses on the facts and reasoning in *Thompson* to demonstrate its immediate practical impact on this relationship.

In line with Marshall's understanding of the development of citizenship to include social rights, the expansion of legal aid from the early 1960s to the mid-1980s gave rise to a wide-reaching increase in recourse to law.[62] Accordingly the period from the 1970s to the 1990s saw a steady increase in numbers of police actions.[63] The argument could therefore be made that increased access to the courts was disproportionately highlighting a small number of police failings and thereby inappropriately undermining public confidence in an otherwise well-disciplined public institution. However, Epp details multiple occasions in the 1980s and early 1990s in which the Metropolitan Police, in particular, were criticised for failing to discipline officers in the face of repeated incidents of 'gratuitous violence, fabricated evidence, perjury and racism'.[64] These ongoing and broadly recognised concerns were implicitly acknowledged by the Royal Commission on Criminal Justice sitting in 1993. Despite its terms of reference not specifically including police complaints and discipline, the Royal Commission openly recognised that police accountability was problematic and expressed:

> … concern not only at the lack of prompt and visible disciplinary actions in cases where it has been publicly reported that police malpractice has contributed to a miscarriage of justice but also a lack of action against [] officers where [the allegations extend to] more than a technical breach of PACE or its codes and the actions of the police have been publicly criticised by the judge.[65]

[58]Ibid.

[59]*Thompson*, above n 8, at 518.

[60]*Rookes*, above n 55, at 1126.

[61]C Torrible 'Reconceptualising the police complaints process as a site of contested legitimacy claims' (2018) 28(4) Policing and Society 469.

[62]Sommerlad, above n 25, at 365–366.

[63]There were 52 claims for assault false imprisonment and/or malicious prosecution against the Metropolitan Police in 1976. This increased to 175 in 1985 and again to 451 in 1997: R Clayton and H Tomlinson *Civil Action against the Police* (London: Sweet and Maxwell, 2004) p 18.

[64]CR Epp *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago: Chicago Press, 2009) ch 7.

[65]Cmnd 2263: 102.

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During this period the standard of proof for police disciplinary charges was the higher criminal rather than the civil standard. This permitted the Home Affairs Committee on the Police Disciplinary and Complaints Procedures 1997 (noted above) to satisfy itself in the face of starkly conflicting evidence that it was 'probably the case that the differing standard of proof' accounted for the discrepancies between the findings of civil juries in police actions and the outcomes of internal discipline processes'.[66] However, even this potential justification for the discrepancies was made difficult to sustain by the consequences of the decision in *Chief Constable of West Midlands Police, ex p Wiley*[67] (*Wiley*). *Wiley* granted claimants in police actions access to the official evidence in internal police investigations and one of the lawyers acting for victims of police malpractice commented:

> We could show juries [in civil actions] that the investigations were, in fact, efforts at mitigation, not investigations. There were instances where investigators effectively told officers how they should answer the question in order not to substantiate the complaint.[68]

In short, police actions had, since the modern police structure was established in 1964, repeatedly demonstrated the police institution as incapable of or unwilling to prevent its officers from engaging in 'outrageous arbitrary and unconstitutional'[69] conduct against citizens. Increased access to legal services and legal aid merely allowed these failings to be brought into public view more readily.

The important point for the argument here is that the result of the twin appeal of Miss Thompson and Mr Hsu was to remove (or seriously undermine) the civil law route by which this defective or corrupt police culture could be exposed and thereby also reduce the non-legal route to regulating police institutional conduct based on threats to public confidence and public support. The facts and outcome of the case underscore the gravity of this loss to our status as citizens.

Mr Hsu was unlawfully arrested and racially abused by officers who twisted his arms behind his back, placed him in a head lock, struck him across the face with a set of keys and kicked him in the back so hard that he later passed blood in his urine. Miss Thompson was initially lawfully arrested for a drink driving offence but during her detention was subject to excessive and unnecessary force by several officers who bundled her into a cell during which a clump of her hair was pulled out. She also suffered bruises and pain in her back and hands. Officers had sought to justify their use of force against Mr Hsu by giving false evidence that he had pushed an officer in the chest. In Miss Thompson's case the officers falsely claimed that she had refused to be searched and that she had bitten one of the officers' fingers, causing it to bleed. She was subsequently maliciously prosecuted (to the point of a criminal trial) for assault occasioning actual bodily harm. In her civil action the court found that the criminal prosecution against her had involved the fabrication of a deliberately false account of events and that two officers of the rank of inspector, together with the other officers, had given false evidence.[70] Significantly, none of the officers involved with either Miss Thompson or Mr Hsu was disciplined. The civil trials thus engaged police accountability both in terms of officers' egregious conduct and in relation to the institutional response.

It must be remembered that *Thompso*n occurred amid a backdrop of multiple similar actions where juries had found that officers had behaved egregiously and the police had refused to refer them to disciplinary processes.[71] Accordingly, in addressing the jury, counsel for the claimants (instructed by a young Sadiq Khan) drew on the role of exemplary damages as a deterrent, a punishment and an expression of outrage at unconstitutional actions of the police institution (as well as the officers) and urged the jury to:

[66]1997 Cmnd 258 (discussed below).
[67][1995] HL 274.
[68]Excerpted in Epp, above n 64, p 152.
[69]*Rookes*, above n 55, at 1222. Also see the comment at n 45 above.
[70]*Thompson*, above n 8, at 505–506.
[71]Epp, above n 64.

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> Send a clear message to the Commissioner that the public will no longer tolerate bullying, perjury and racism by officers. In this case a small award of damages would be greeted as a victory by the officers involved. [] It is only if you award damages on an unprecedented scale that you can be sure the commissioner will be told of your award, will take note of it and will act on it.[72]

The juries gave exemplary awards of £200,000 to Mr Hsu and £50,000 to Miss Thompson. However, the action the Commissioner took was to confirm the Metropolitan Police's refusal to discipline any of the officers concerned and to launch an appeal against the level of the awards, asking that the Court also introduce a tariff system for aggravated and exemplary awards.[73]

(b) Thompson: reasoning and practical impact

Making general, aggravated and exemplary awards predictable facilitates settlement of claims. This favours larger organisations who, because of their role, are repeat players in the litigation game with greater experience, deeper pockets and relatively less at stake than 'one shotter' individual claimants.[74] Repeat player advantages also include the ability to effectively force settlement of cases which might entail uncomfortable publicity and media attention by making appropriately pitched payments into court.[75]

Consequently, in bringing the appeal the Commissioner was requesting the police institution be given the power to limit the performative practical role of police actions in protecting citizenship rights, suppress judicial scrutiny of unlawful treatment of citizens and reduce public scrutiny of the internal complaints and discipline function. *Thompson* was thus a crucial moment for the notions of the police-citizen relationship embodied in the constitutional role of police actions in both the private and public sense noted by Priel. What has largely been missed and what has been demonstrated here is that it was also a decisive moment for the ability of citizens to use the civil courts to challenge (albeit tangentially) the veracity of internal police complaints mechanisms and the efficacy of associated oversight bodies. Further, Lord Wolfe acceded to this request without any reasoning that meaningfully addressed the importance of police actions to our citizenship status or the function of exemplary damages in these constitutional cases.

The appeal in *Thompson* centred on the application of section 8 of the Courts and Legal Services Act 1990, which allows the court to substitute its own award for a jury award that is 'excessive or inadequate'. The position in relation to the 'non-profit' category of exemplary damages had already been considered in (among others) *John v Mirror Group Newspapers Ltd* (*John*).[76] In *Thompson* the court was faced with a wholly different application of section 8, engaging the distinct constitutional category of exemplary damages with the unique purpose of protecting the citizen against oppressive state practices. It is thus remarkable that, pre-empting the very point the court was tasked with deciding, Lord Woolf's starting point in *Thompson* was that once section 8 had been interpreted for one class of case, that interpretation had to apply to both.[77]

Moreover, the decision in *Thompson* is arguably more restrictive of juries' role in police actions than the decisions concerning the 'non-profit' category of cases. As regards *general damages* in libel/defamation actions, the Court in *John* expressed concern that it is offensive for awards for reputation to vastly exceed awards for catastrophic personal injury.[78] The court therefore determined that juries in libel actions could be given guidance relating to awards in personal injury cases and directions

[72]Ibid, p 154.
[73]*Thompson*, above n 8, at 506.
[74]M Galanter 'Why the "haves" come out ahead: speculations on the limits of legal change' (1974) 9(1) Law and Society Review 95.
[75]Civil Procedure Rules 1998, Part 36.
[76][1997] QB 586.
[77]*Thompson*, above n 8, at 511.
[78]*John*, above n 76, at 614.

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including suggested appropriate sums in general damages[79] However, in doing so it stressed the importance of not equiparating libel and personal injury cases and was careful to distinguish reputational damage and personal injury by quoting with approval the passage in *Broome v Caselle*[80] that refers to the need for a plaintiff in libel actions to be able 'point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge'.[81]

In contrast, Lord Woolf in *Thompson* insists that police actions can be compared with personal injury cases in relation to awards of general damages. This is in part on the basis that, for example in an assault case, the claim may include a personal injury element. However, this comparison substantially downgrades the deep and lasting sense of insecurity that may be imparted by, for example, in Ms Thompson's case, being subject to prolonged malicious prosecution by the state institution whose role it is to protect and serve.[82]

In terms of exemplary awards in defamation/libel actions, an important consideration (which does not apply to police actions) is that excessive libel awards may breach Article 10 of the European Convention on Human Rights. Accordingly, in *John* the court confirmed the importance that exemplary awards in such cases are no more than is necessary to perform the 'public purpose underlying such damages'.[83] However, it was content that a direction to the jury in such terms would be sufficient to ensure Article 10 compliance.[84]

In *Thompson* his Lordship sidesteps the constitutional elements of exemplary awards in police actions by suggesting that the Article 10 point gives the non-profit category of awards a distinctive nature. His reasoning is that in police actions there is no *element of profit from the tort* and therefore exemplary awards have a lesser role.[85] This fails to acknowledge the triptych of functions the constitutional category serves, ie to punish, deter and permit expressions of 'jury detestation' at arbitrary outrageous and unconstitutional conduct on the part of state actors. Furthermore, at a practical level, the suggestion that there was no profit from officers' and the police institutions' conduct in *Thompson* is untenable. If the malicious prosecution against Ms Thompson had been successful, the force would not only have perverted the course of justice but would also have saved itself the time and expense of the civil action and subsequent payment of damages.

Lord Wolfe augmented his position with the erroneous argument that exemplary awards in police actions should be limited because they are formally brought against chief officers who, while vicariously liable, are unlikely to have themselves been personally involved in the tort.[86] This is inconsistent with the judgment's later concession that the conduct of the litigation in defending police actions can increase both aggravated and exemplary awards.[87] Moreover, it also misunderstands the public nature of the police and section 88 of the Police Act 1996 which permits actions against individual officers to be brought against chief constables.

It is on this unsteady footing that his Lordship went on establish what have become known as the '*Thompson* Guidelines'. These are detailed directions to be given to juries in police actions with categories within which basic, aggravated and exemplary awards should fall in various situations and stipulating maximum sums for each.[88] However, it is contended that the *Thompson* Guidelines also signalled, and in turn reinforced, conceptual changes in the police-citizen relationship that (as discussed in the final section) have ongoing resonance.

[79]Ibid, at 616.
[80][1972] AC 1027.
[81]*John*, above n 76, at 616.
[82]See G Smith 'Actions for damages against the police and the attitudes of claimants' (2003) 13(4) Policing and Society 413.
[83]*John*, above n 76, at 619.
[84]Ibid.
[85]*Thompson*, above n 8, at 512.
[86]Ibid, at 513.
[87]Ibid, at 518.
[88]Ibid, at 514–517.

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(c) The Thompson Guidelines

There is a circular self-fulfilling element to *Thompson*. In treating police actions as largely fiscal, the decision denudes the litigation process of its performative constitutional importance and in doing so effectively downgrades the actions to money-only claims. In addition, the guidelines include implicit assumptions which undermine the police-citizen relationship.

The Commissioner argued, and the *Thompson* Guidelines stipulate, that it must be pointed out to juries that:

> an award of exemplary damages is in effect a windfall for the plaintiff and, where damages will be payable out of police funds, the sum awarded may not be available to be expended by the police in a way which would benefit the public.[89]

This is deeply problematic. To frame the awards as a draw on police funds presents them as an unavoidable and burdensome toll on the police institution. In contrast, it is important to underscore that exemplary damages in police actions are *only available* once the court has found *outrageous arbitrary and unconstitutional* conduct.[90] The threat of large (uncapped) exemplary awards (along with the damage to public confidence by a trial which provides otherwise unavailable transparency regarding details of the misconduct) is intended to act as a deterrent restraining further unconstitutional conduct. Further, it is the police who are responsible to the public at large for what is a wholly avoidable diversion of funds; not the law, not the claimant's lawyers, and not the claimant themselves. In contrast, the way the direction is framed subtly invites criticism of the claimant for bringing the action and thereby establishes a polarity between 'good citizen' (equating to 'the public') and 'police claimant' who is branded as 'other'. This in turn subtly reduces those universalising elements of citizenship identity that envisage united responses to abuse of state power.

The *Thompson* Guidelines also stipulate (again at the Commissioner's request) that juries must:

> be told that even though the plaintiff succeeds on liability, any improper conduct of which they find him guilty can reduce or even eliminate any award of aggravated or exemplary damages if the jury consider that this conduct *caused or contributed to the behaviour* complained of.[91]

It is important to highlight once again that exemplary awards are *only available* in those extreme circumstances where *outrageous arbitrary and unconstitutional* behaviour is found. The suggestion that citizens can be treated as having provoked *that* level of unlawful conduct by officers not only undermines the rule of law but may inadvertently invite dishonesty and abuse on the part of officers. It must be recalled that the facts of both *Thompson* and of *Hsu* involved officers fabricating evidence that the claimants had used force against them. Moreover, the police practice of seeking to discredit those whom they have themselves subjected to excessive force is well documented.[92]

Furthermore, the idea of a citizen bearing some responsibility for being subjected to outrageously unlawful police conduct introduces notions of contributory negligence to police actions which are anathema to their vindicatory role. More subtly, alongside Lord Woolf's alignment of police actions with personal injury claims, this also tends to elide police actions and negligence actions. As discussed below, to conflate the two types of action in this way has other far-reaching consequences for *conceptions* of the role of the police and the limits of acceptable officer conduct.

As noted above, proof of damage is of fundamental (definitional) importance to negligence actions and the aim of damages is to put the victim in the position they would have been in had the negligence not occurred. Critical legal theorists have argued that a focus on corrective justice preserves the status

[89]Ibid, at 517.
[90]*Rookes*, above n 55.
[91]*Thompson*, above n 8, at 516.
[92]B Bowling et al *The Politics of the Police* (Oxford: Oxford University Press, 2019) pp 174–175.

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quo, and the notion of compensatory damages therefore has the practical outcome that it is less costly to injure the poorly paid and those with a lower life expectancy than it is to injure those on higher incomes who expect longevity.[93] Corrective justice's intuitive appeal thus masks the incentives it gives to commercial enterprises to site high-risk activities in areas of depravation.

> Whether or not the Bhopal disaster was an 'accident,' it was no accident that its victims were among the poorest in the Third World. Nor is it chance that toxic waste dumps are concentrated in black ghettoes in the United States.[94]

Aligning awards in police actions with negligence actions risks inviting a conception of police practices which mirrors that corrective justice reasoning. For example, the siting of dangerous activities near those whom it is cheaper to compensate translates, in a police context, to additional institutional incentivisation regarding the police tendency to focus their law enforcement endeavours (and excesses) on the activities of citizens with less social capital and who are easier to discredit.[95]

Similarly, the economic theory of negligence focuses on deterrence, with the understanding (and for some the normative stance) that tort encourages (and should limit itself to encouraging) economic efficiency in establishing the conditions for the most cost-effective balance between costs of injury and costs of risk prevention.[96] However, an officer's decision to hit someone across the face with keys (as was the case with Mr Hsu) and to commit perjury in order to maliciously prosecute a would-be complainant (as was the case with Ms Thompson) are matters of individual choice to breach the rule of law. An institutional decision that officers should not be disciplined for such behaviours reflects a similar choice. The consequences of inviting the reasoning of 'risk and efficiency' to be imputed into such choices are succinctly summarised by Skolnik and Fyfe:

> For those [] who believe that a degree of police brutality aids overall police efficacy, payments in settlement of police claims may be viewed as a reasonable price for the perceived benefits of officers' unlawful and violent conduct.[97]

(d) Police actions compensation culture and citizenship

Taking a step back from the reasoning in *Thompson* and moving on from comparisons with defamation actions, it is important to recognise a further element of the milieu in which *Thompson* occurred. The increase in legal aid in the 1970s and 80s fuelled the development of the Law Centre movement and the emergence of cause and activist lawyers.[98] In addition, reforms to the mechanisms for the delivery of legal services in 1987 and 1990 stimulated a substantial increase in general recourse to the civil courts.[99] The result was growing disquiet regarding the development of a what was termed a 'compensation culture'. This phrase embodied two key concerns: that there was too much litigation

[93]RL Abel 'A critique of torts' (1989) 37 UCLA Law Review 785.

[94]Ibid, at 809–810.

[95]B Bradford and I Loader 'Police, crime and order: the case of stop and search' in B Bradford et al (eds) *The Sage Handbook of Global Policing* (London: Sage, 2016) ch 15.

[96]WM Landes and RA Posner 'The positive economic theory of tort law' (1980) 15 Georgia Law Review 851.

[97]J Skolnick and J Fyfe *Above the Law: Police and the Law: Police Excessive Use of Force* (1993) p 205. The Human Rights Act is relevant here. As noted in n 9 above, Sch 3 to the Police Reform Act 2002 requires any complaint that might engage Art 2 or 3 ECHR to be investigated. However, the investigation will in many cases be undertaken internally by officers in the force professional standards department and (subject to IOPC review of the *outcome*) has to be proportionate (as determined by the investigating officer). See Police Reform Act 2002, Sch 3, para 6(2A). For a discussion see C Torrible 'Police complaints and discipline: integrity, lesson learning, independence, and accountability: some implications of the reforms under the Policing and Crime Act' (2017) 31(9) Policing and Society 1117.

[98]Sommerlad, above n 25.

[99]A Morris 'Spiralling or stabilising? The compensation culture and our propensity to claim damages for personal injury' (2007) 70(3) Modern Law Review 349 at 357.

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and that was it too costly.[100] Accordingly, any debate concerning the potential *causes of harm* was eclipsed by references to the overconsumption of excessively costly litigation exacerbated by 'fat cat' lawyers and greedy claimants.[101] In turn, this problematisation resulted in solutions which emphasised the importance of achieving balance between the costs of litigation and the speed and accuracy of litigation outcomes.

In 1996, the then Master of the Rolls, Lord Woolf, who was later to preside over *Thompson,* published his report, Access to Justice.[102] This paved the way for the subsequent Woolf Reforms which resulted in the Civil Procedure Rules, which marked a radical change in perceptions of civil justice by introducing (and subsequently making central) the idea of proportionality.[103] This re-characterised the key tenet of civil justice not as substantive justice on the merits of the case (with the clearest and most accurate determination of the facts) but instead in the delivery of the level of accuracy that was proportionate to the value of the claim.[104]

On this view, the decision in *Thompson* to facilitate the settlement of police actions by standardising general, aggravated and exemplary damages can be seen as a fair and appropriate way of balancing the use of limited resources in line with the aims of proportionate justice. However, as noted above, this perspective elides police actions with negligence actions and divests them of their constitutional importance by treating them as primarily private and pecuniary in nature. It assumes that efforts to introduce proportionate justice were applicable pari passu to both negligence and police actions; this, it is maintained, is a category error.

Concerns surrounding the 'compensation culture' rested on underlying assumptions that are applicable to negligence actions but not to police actions. One such concern was that the trend towards cause lawyers promoting the *individualised* process of litigation as a means of raising standards was undermining the political sphere.[105] However, in police actions, increased claiming serves to underscore and protect the liberties of *all citizens*, not in a manner ancillary to the political sphere, but as a matter of constitutional right. A second was that the depiction of an 'active citizen standing up for his or her rights' failed to give appropriate weight to the 'damaging impact of the culture of compensation' on human relations by its promotion of 'suspicion and conflict' and the way in which it undermined relations of trust and the 'sense of personal responsibility'.[106] Again, while this might be relevant to negligence actions, there is security for all in knowing that the police are properly held to account and this would tend to reduce suspicion and conflict, thereby creating greater social cohesion.[107]

It is here that the lens of citizenship is valuable in highlighting the central difficulty with *Thompson*. The decision to encourage settlement or ration court resources in relation to negligence actions centres on essentially political questions concerning the correct distribution of the costs of injury in an increasingly complex society.[108] The central problem in relation to perceived compensation culture was therefore political, and the impact and outcomes of political questions of this nature tend to operate at the level of social rights.

It is not disputed that elements of those political decisions could also apply to police actions. However, the nature of the harm that gives rise to claims in police actions is fundamentally different.

[100]F Füredi *Courting Mistrust: The Hidden Growth of a Culture of Litigation in Britain* (Centre for Policy Studies, 1999).

[101]F Furedi and TC Brown 'Complaining Britain' (1999) 36(4) Society 72 at 77–78.

[102]Access to Justice Final Report, by The Right Honourable the Lord Woolf, Master of the Rolls, July 1996.

[103]Speech by the Master of the Rolls: Judicial College lecture 2013, https://www.judiciary.uk/wp-content/uploads/2014/10/mr-speech-judicial-college-lecture-2013-1.pdf; J Sorabji *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, 2014) p 22.

[104]Provisions were made for the hearing of cases with a public interest element, but these have been progressively undermined: see Mulcahy, above n 51.

[105]Furedi, and Brown, above n 101, at 77–78.

[106]Furedi, above n 100, p 28.

[107]C Torrible 'Trust in the police and policing by consent in turbulent times' (2022) 21(3) Safer Communities 171.

[108]A Morris 'The "compensation culture" and the politics of tort' in TT Arvind and J Steele (eds) *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford: Hart Publishing, 2014) ch 4.

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It concerns the powers and accountability of the body that has the monopoly over the use of coercive force against *all citizens*. There is thus an inexorable collectivity about the rights themselves. The overarching issues in *Thompson* were consequently significantly more complex than those relating to other types of claims. They engaged both political *and constitutional* questions which impacted citizenship at the level of both social *and civil rights*.

The discussion thus far has centred on the immediate practical and conceptual consequences of *Thompson*. Application of the lens of citizenship has allowed the decision in *Thompson* to be properly distinguished from other elements of the move towards proportionate civil justice. This paves the way for the examination below of *Thompson's* legacy in terms of both the police-citizen relationship and subsequent reforms to police accountability mechanisms.

3. The changing contours of police accountability

It has been argued that, prior to *Thompson*, police actions simultaneously both symbolised and bolstered a rich notion of citizenship that can be traced back to before the modern era of policing. The consultation document that preceded PACE in 1984, and the subsequent creation of the PCA, confirms that that rich conception of the police-citizen relationship continued at least into the mid 1980s.[109] Comparison with post-*Thompson* reforms to police oversight bodies demonstrates that, although direct causative links cannot be proved, *Thompson* (at the very least) coincided with distinct changes in implicit understandings of the role of police accountability mechanisms and consequently in the police-citizen relationship.

Within the pre-PACE consultation document on police complaints, individual officers were described as 'accountable both to the *public at large*, through the courts, and to their chief officers' (emphasis added), who were themselves described as 'locally and nationally accountable'.[110] The formulation (and ordering) of this articulation implicitly gives primacy to 'public accountability' perceived in a broad sense that includes all citizens having a stake in the outcome of all complaints. Importantly, this embodies an understanding of a police-citizen relationship in which the former is the servant of the latter, and the listing of accountability 'via the courts' second underscores the then commitment to officers complying with the rule of law.

Accountability was also central to the PCA's anticipated role. The PCA was to 'hold forces to account for how they handled complaints and discipline matters' and it was envisaged that its review and supervision powers would 'enable it *to require* investigating officers to account for their actions; to explain the strategy and tactics of their investigation; and to justify particular lines and depth of questioning and any apparent delay in the investigation'.[111] It is clear that an explanatory and cooperative form of accountability was envisaged[112] but this was matched (in the articulation at least) with an expectation that the PCA's supervision powers and its duties to publish reports would act as sufficient deterrent to secure compliance.

It is submitted that public reports of (for example) superficial, tardy, or purposefully misleading internal investigations can only act as a deterrent to a force that is publicly conceived as broadly subservient to the 'public at large' and bound by the rule of law. Further, this point is underscored by the description of the PCA as 'guardian of the *public interest*' in police complaints and discipline matters being handled correctly (emphasis added), which, as discussed below, is significantly different to a body seeking to secure 'public confidence' in how police complaints are handled. The emphasis was on substantive outcomes and clarity of explanation or justification regarding officers' conduct, and public confidence in the police was implicitly seen as stemming from and ancillary to accountability so understood.

[109]Home Office 'Police complaints and discipline procedures' 1983 Cmnd 9072.

[110]Ibid, p 13.

[111]Ibid, p 6.

[112]G Marshall 'Police accountability revisited' in D Butler and AH Halsey (eds) *Policy and Politics* (Palgrave Macmillan, 1978) p 51.

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It is not suggested that these depictions matched the practical realities at the time. The discussion above demonstrates that they did not. Nonetheless they are indicative of the then accepted understandings of the relationship between the police and the public; the police and the courts; and the police and the PCA. At the very least the articulation of police accountability implicit in the consultation document demonstrates what were considered the acceptable (discursive) boundaries of officers' treatment of citizens at that time. In contrast, subsequent (post *Thompson*) reforms reveal a different conception of the police-citizen relationship.

As noted above, the 1997 Home Affairs Committee on the Police Disciplinary and Complaints Procedures responded to the crisis in confidence in the police stemming from discrepancies in police actions and police disciplinary outcomes, by suggesting that the standard of proof for discipline processes be reduced to the civil standard.[113] However, The Committee did also recommend that the then Home Secretary conduct a feasibility study into the creation of a new police oversight body with power to independently investigate police complaints.

Reforms to the police complaints and discipline process tend to be in response to growing distrust in the police, which is then catalysed into a crisis in public confidence by a specific set of events.[114] Within each set of reforms the catalysts for reform and the political ideologies of the incumbent government each play a role. However, the details that determine how reforms will operate in practice tend to be negotiated at the later phases of the reform process. By this stage public outrage has tended to abate, the issues that caused the crisis are less overtly in the public gaze, and the parties that were central to the scandals that precipitated the perceived need for reform are less empowered.[115] Consequently, the police are able to exert considerable influence at the later stages of the reform process.[116]

The murder of Stephen Lawrence and the subsequent Macpherson Inquiry arguably made the establishment of a new independent police oversight body in line with the 1997 HAC recommendation inevitable. It is not, therefore, suggested that *Thompson* was the only influence on subsequent reforms. It is, however, noteworthy, that *Thompson* delivered the police greater control over which cases proceed to trial, and therefore any resultant media interest.[117] Further, the three years after *Thompson* saw a 50% reduction in the percentage of police actions against the Metropolitan Police going to trial.[118] Thus, by the time the feasibility study was completed and the latter stages of the reforms were being decided, the public comparison of police actions and police disciplinary outcomes had been substantially curtailed. Equally noteworthy is the fact that in contrast to the position in the consultation document leading to the PCA, the reforms that established the IPCC conceive police accountability in a manner that is more consistent with the conception implicit in *Thompson* (and subsequent reforms continue this trend).

The IPCC was the first police complaints oversight body in England and Wales to be given the power to conduct its own investigations into the most serious incidents (or allegations of police misconduct). The IPCC also acted as an appeal body for complaints that continued to be handled internally by forces. The primary statutory function of the IPCC was not, however, to hold individual officers to account in the cases it investigated, or to hold the police institution to account for how it handled complaints internally. Instead, its principal purpose was to secure 'public confidence'[119] in the mechanisms for handling police complaints and to ensure that those mechanisms were 'efficient and effective' and 'contained and manifest an appropriate degree of independence'.[120] Thus the conception of direct police officer and police institutional accountability evident in 1984 was no longer the

[113]1997 Cmnd 258.
[114]Smith, above n 44.
[115]Ibid, p 63.
[116]Ibid.
[117]Epp, above n 64.
[118]Clayton and Tomlinson, above n 63.
[119]Police Reform Act 2002, s 10(b).
[120]Ibid, s 10(c).

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organising concept for police complaints and discipline, or the discursive fulcrum by which 'what good looks like' was to be measured. With the establishment of the IPCC, that mantle passed to ideas of 'independence' and 'public "confidence"', both of which are a step removed from the question of what officers have done and how the police institution has responded.

Arguably, direct police accountability (as conceived at the establishment of the PCA) was implicit in the 'independence' of the IPCC understood as descriptive of an oversight body's objective stance to interpretation of the evidence when assessing allegations of officer misconduct. However, in the absence of a direct statement to that effect, debate shifted to whether 'manifest and appropriate independence' is better secured via functional or organisational independence[121] and indeed the degree to which either is achievable.[122] Similarly, once public confidence in *the police complaints system* becomes the measure of success, that is what becomes problematised. However, the majority of those surveyed for public confidence measures have little or no personal interaction with the police and therefore have no reason to access the complaints system. The disenfranchised, the vulnerable and those who do not have easy access to online monitoring systems easily slip through the 'measured' cracks, leaving the possibility of relatively high levels of public confidence being enjoyed by the oversight body while users of the system remain consistently dissatisfied.[123] Importantly for the argument here, it is considerably easier to maintain public confidence in a complaints and discipline system the outcomes of which are not readily comparable with juries' contrary findings of fact and judicial assessments of whether officers' conduct was lawful.

The Policing and Crime Act 2017 (PACA 2017) introduced further reforms to the police complaints and discipline system, three aspects of which make the direct accountability that was central in 1984 additionally diffuse. First, the consultation document which preceded PACA 2017 stresses that the proposed reforms will make the complaints system more accountable and more independent of the police. Significantly, however, much of the purported increased independence and accountability introduced by the PACA 2017 is via the role of PCCs, whose hitherto implicit role in holding chief officers to account for how complaints are handled within the force the PACA 2017 makes express.[124] Consequently, the idea of direct accountability of officers for their actions (to the public and the courts) or of forces' accountability for how they respond to complaints, is transmuted into the democratic accountability of PCCs to local communities and blended with political decisions concerning efficient and effective use of resources.[125] Such accountability via four-yearly local elections of PCCs is inevitably diluted by the multiple functions PCCs serve. More importantly, this blended accountability mirrors the concerning consequences of aligning police actions with negligence, inviting the risk-based assessment of officers' conduct pointed to in section 2(c) above. The focus is on PCCs' relationship with their electorate rather than on what officers do or how forces respond. The individual citizen is less visible and the 'public' is less directly engaged in what happened to her.[126]

Secondly, the PACA 2017 reforms emphasise lesson learning within the police complaints and disciplinary process, and this also has the potential to downgrade police accountability.[127] Lesson learning is valuable within all organisations and misplaced or overly harsh discipline can be detrimental to honest responses when things go wrong. However, the emphasis on lesson learning from mistakes within the PACA 2017 is implicitly police-focused, thereby subtly reversing the ordering of the

[121]G Smith 'Citizen oversight of independent police services: bifurcated accountability, regulation creep and lesson learning' (2009) 3 Regulation and Governance 421.

[122]S Savage 'Thinking independence: calling the police to account through the independent investigation of police complaints' (2012) 53(4) British Journal of Criminology 94; S Savage 'Seeking "civilianness": police complaints and the civilian control model of oversight' (2012) 53(5) British Journal of Criminology 886.

[123]Torrible, above n 61, at 464–466.

[124]PACA 2017, s 13. Of the nine occasions the consultation document preceding PACA 2017 refers to 'accountability', eight are in relation to the role of PCCs: Cm 8976 December 2014.

[125]Torrible, above n 97.

[126]Ibid.

[127]Police Conduct Regulations 2020, Part 6.

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servitude in the police-citizen relations evident in 1984. Instead of a force that serves *and is accountable* to all the public, those members of the public that *would* complain serve *the force* in providing lesson learning opportunities which can be pointed to in order to secure 'public confidence'.

Importantly, and in line with Conahan's observations noted in the introduction above, a clearly articulated notion of direct accountability (stemming from public trials of police actions) could fuel public debate concerning exactly what lessons should be learned. In contrast the police-focused assessment of lesson-learning assumes the police and IOPC role in making that crucial assessment. It is contended that here the lawfulness of officers' conduct should be a central consideration and it is of concern that there is no mechanism to measure the extent to which it is taken into account.

Thirdly, PACA 2017 stipulates that complaints against the police are to be 'handled in such reasonable and proportionate manner as the appropriate authority determines'.[128] The appropriate authority will, in most instances, be the internal professional standards officers. Further, the IOPC Statutory Guidance confirms that a 'reasonable and proportionate' response requires balancing 'the matter's seriousness and potential for learning, against the efficient use of policing resources'.[129] This is substantially removed from accountability to the 'public at large' understood as vesting in appropriately resourced investigations which aim to uncover what happened when police wrongdoing is alleged. Instead, it aligns with the ideas of proportionate justice inherent in the CPR and the *Thompson* Guidelines in endorsing the interpretation of complaints as a draw on police resources.

Importantly, the idea of 'proportionality' is relative, and in framing police actions in pecuniary terms *Thompson* invited the seriousness with which unlawful conduct by officer is perceived to be downgraded. This is exemplified by the Commissioner of the Metropolitan Police in 2010, Sir Paul Stephenson, lobbying the Home Secretary with proposals aimed at making it harder to bring police actions. In line with the narratives of fat cat lawyers and arguments that police actions divert resources away from police services, Stephenson expressed the view that money was 'being wasted on speculative claims with lawyers gaining large fees that would be better spent fighting crime'.[130] In particular, he pointed to average settlements being 'well under £10,000 and most under £5,000' suggesting that these therefore represented 'not major areas of police misconduct with long-lasting consequences but often technical breaches'.

It should be noted that the *Thompson* Guidelines for general damages (ie without aggravated or exemplary awards) suggest £3,000 is an appropriate starting point for a wrongful arrest and 24 hours of false imprisonment and that £2,000 is the starting point for a malicious prosecution in the magistrates' court that continues for two years.[131] So the description of these as merely technical breaches (rather than indicating training needs or systemic issues that need rectifying) suggests an attitude towards citizens and the rule of law that is far removed from that implicit in the role of police actions prior to *Thompson*.

Furthermore, Stephenson's requests have been acceded to. As reforms to the civil justice system to re-enforce proportionate justice have continued into this century, police actions have been further aligned with purely money claims. Following the Jackson Review, the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) restructured and limited the availability of legal aid in England and Wales. Section 21(4) of LASPO 2012 provides that legal aid may be claimed for legal services relating to *abuse by a public authority of its position* (see Sch 1, Part 1; section 21). Consequently (unlike personal injury claims) legal aid is still technically available for police actions, which arguably represents a continued recognition of their constitutional importance. However, this is belied by the statutory limitations LASPO 2012 places on the availability of legal aid in police actions. In addition, it is contended that the courts' interpretation of these limitations is facilitated by *Thompson*'s failure to acknowledge the constitutional importance of police actions. Section 21(4)

[128]Ibid, Sch 5, para 6(3).
[129]IOPC Statutory Guidance 2020 pp 20–21.
[130]V Dodd 'Protect police from lawsuits, says Met chief' (*The Guardian*, 10 October 2010).
[131]*Thompson*, above n 8, at 515.

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of LASPO 2012 specifies that an act or omission by a public authority does not constitute an abuse of its position or powers unless the act or omission:

(a) is deliberate or dishonest, and
(b) results in harm to a person or property that was reasonably foreseeable.

In *R v Director of Legal Aid Casework, ex p Sisangia*, the Court of Appeal held that the words 'abuse of its position or powers' must be interpreted in the context of the Schedule as a whole and 'that something more than *mere unlawfulness*' (emphasis added) is required'.[132]

This judicial articulation of officers' unlawful interference with citizens of '*mere* unlawfulness' echoes Stephenson's position (noted above) and invites a permissiveness regarding, for example, excessive use of force. Further, the reasoning in *Sisangia* also exemplifies the reconceptualisation of police actions as purely money claims introduced by *Thompson*.

In most cases the availability of funding is determinative of whether a claim is brought. In S*isangia* it was argued that a narrow interpretation of section 21(4) would undermine the 'constitutional torts" protection of 'fundamental common law values such as inviolability of the person and of property'. The court was unpersuaded. While conceding 'a right of access to the court is itself a constitutional right', Lewisham LJ maintained that the case was not about access to a court but 'whether the citizen is entitled to bring her claim with the aid of lawyers paid for at public expense.[133] This exemplifies the distinction between social and civil rights noted above. Moreover, he later distinguishes police actions from judicial review claims on that basis that in the former 'the recovery of money is the whole point of the claim'.[134]

The idea of '*mere unlawfulness*' also requires greater attention. In *R (on the application of Chief Constable of West Yorkshire) v IPCC* (*West Yorkshire*)[135] the Court of Appeal determined that when completing an investigation report the IPCC had exceeded its powers by making (and stating) a finding that the complainant's arrest had been unlawful. It is not suggested that on the facts that finding was incorrect. However, as noted in the introduction, the lawfulness of an arrest is of crucial importance to whether officers can lawfully use force against citizens.[136] The concern is that the tenor of the judgment in *West Yorkshire,* which like *Sisangia* tends to align police actions with purely money claims, fails to give sufficient weight to the crucial impact that reduced recognition and practical enforcement of our citizenship rights may have on police practices. The figures on arrests for public order offences following stop and search (also noted in the introduction above) highlight the real and current importance of this concern.

Conclusion

As noted throughout, it is not suggested that police actions prior to *Thompson* were the most appropriate, effective, and efficient way of vindicating citizens' rights. Neither were they necessarily the most productive and positive way of promoting policing by consent.[137] However, the argument above has established that pre-*Thompson* police actions did perform those functions, and that *Thompson* diminished their ability so to do. Whether the connection between *Thompson* and subsequent reforms to the police complaints and discipline system is fully made out, it *has* been demonstrated that the practical impact and conceptual underpinnings of *Thompson* did coincide with subsequent reforms embodying

[132][2016] EWCA Civ 24 at para 20.
[133]Ibid, para 8. See also The Bar Council's Final Report on LASPO (2013).
[134]Sisangia, above n 132, para 29.
[135][2014] EWCA Civ 1367.
[136]*Collins v Wilcock* [1984] 1 WLR 1172.
[137]Litigation is a costly and stressful process for claimants. For systemic reasons claimants are also likely to be self-selecting in a way that does not ensure the worst features of officer conduct are addressed: see H Genn *Paths to Justice: What People Do and Think about Going to Law* (Oxford: Hart Publishing, 1999).

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a concomitant downgrading of conceptions of police accountability and the police-citizen relationship. Further, it is difficult to dispel the idea that the transparency afforded by more police actions going to trial would improve the public accountability of both the police and the IPCC/IOPC. In short, it is maintained that *Thompson* took something away which has not been replaced and that police accountability mechanisms operate differently as a consequence.

The past cannot be changed and, as noted, it is not suggested that *Thompson* should be overruled.[138] However, a fuller understanding of past events and their impact does provide fruitful means of gauging appropriate avenues for reform.

The police have repeatedly been found to harbour an institutional tendency to resort to defensive and obfuscating practices in response to allegations of officer misconduct. [139] This tendency was at the root of the increased recourse to civil courts that led to the decision in *Thompson*. Moreover, it has endured through various iterations of police complaints oversight bodies and was most recently reaffirmed by the Home Affairs Committee on Police Conduct and Complaints 2021.[140] In short, the police's motivation to uphold the fundamentals of policing by consent cannot be assumed.

Against this background it is concerning that the definition of when officer conduct warrants disciplinary action is currently circular. Broadly speaking, a disciplinary hearing is deemed appropriate if the officer's breach of the standards of professional behaviour is considered serious enough to warrant disciplinary proceedings. Similarly, conduct may be gross misconduct if (if proved) it is sufficiently serious for dismissal to be an appropriate response.[141] Further, this circularity grants professional standards departments large degrees of discretion.[142]

Arguably, therefore, a far-reaching review is required of the *institutional role of the police*[143] in handling complaints and discipline matters. Furthermore, this also needs to prioritise greater clarity regarding the standards that are to be upheld. The argument in this paper indicates that to ensure subsequent reforms are sufficiently citizen-focused, it is crucial that the boundaries set by the civil law are a central pillar of the review. In the shorter term, however, some more immediate reforms are suggested. An important opening is provided by the recent extension of PCCs' role to specifically include oversight of the function of police complaints within their forces.[144] This combines with their holding of the institutional purse strings, to put them in a central position regarding interim reforms. It is therefore suggested that PCCs' duties should be extended to include collation and publication of police actions data in a standardised form and the provision of detailed police actions data to the IOPC. In addition, PCCs should be required to review police actions within their forces that include claims for malicious prosecution and/or exemplary or aggravated damages and produce a public report confirming that they are content with the correlative disciplinary outcomes for officers. These reforms would go some way to clarifying the way in which citizens' rights are currently conceived within the complaints and discipline system. If implemented, they would also provide data that could inform more meaningful debate about how the lines drawn by the civil law might be incorporated into future reforms. Further, this interim measure would increase fiscal accountability in relation to public funds spent on settlement of police actions.

[138]In addition to the points made at n 137 above: litigation processes; the provision of legal services; the police regulation and complaints infrastructure and operational policing's use of technologies have all moved on in the intervening quarter of a century. Forward-looking reform is now required.

[139]See for example A Goldsmith 'External review and self-regulation: police accountability and the dialectic of complaints procedures' in A Goldsmith (ed) *Complaints Against the Police: The Trend Towards External Review* (Oxford: Clarendon, 1991) pp 13, 23; C Chapman 'An independent review of the police disciplinary system in England and Wales' (2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385911/An_Independent_Review_of_the_Police_Disciplinary_System_-_Report_-_Final….pdf.

[140]Home Affairs Committee on Police Conduct and Complaints Sixth Report of Session 2021–22. HAC 140. 49.

[141]The Police (Conduct) Regulations 2020, SI 2020/4, reg 2.

[142]Torrible, above n 97.

[143]See the suggestion made by G Smith 'Evidence to the Home Affairs Committee on Police Conduct and Complaints 2021 PCO0055', https://committees.parliament.uk/writtenevidence/23372/html/.

[144]PACA 2017, s 22.

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It is important to stress that it is not suggested that every technical breach of PACE or of the civil law should result in disciplinary action for the officer(s) involved. However, increased emphasis on the lawfulness of officer conduct would help rebalance the current police complaints and discipline system towards recognition of citizens' civil rights, and respect for the police-citizen relationship and the rule of law.

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