

Conceptualising surveillance harms in the  
context of political protest: privacy,  
autonomy and freedom of assembly

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## Abstract

This thesis considers the human rights issues arising from the use of police surveillance of political activists on demonstrations. Such protests are routinely subject to intensive forms of visible, or 'overt', surveillance, including the use of dedicated 'intelligence gathering' teams to monitor, photograph and film participants. The courts – both domestic and in Strasbourg - have generally taken the view that such measures will not, in themselves, amount to an interference with a person's right to privacy or their right to freedom of assembly. This thesis takes issue with this approach and offers a new, and more developed conceptualisation of the harms to privacy and to assembly rights arising from police surveillance activities.

The thesis draws on interviews with around 30 individuals, each of whom have been subjected to police surveillance in the context of political protest. Testimony from interviewees demonstrates a complex matrix of harms arising from overt surveillance practices which have not been adequately recognised within the human rights framework, nor have been adequately regulated by statute or common law.

The thesis suggests a new conceptualisation of surveillance harms, which acknowledges the capacity of surveillance to result in a loss of autonomy, identity and integrity; and also to disrupt and obstruct the mobilisation processes which make protest possible. Harms must be recognised, it is argued, as arising both within the framework of privacy, and the right to freedom of assembly. Further, it is necessary for the courts to recognise that protest is an on-going process rather than a stand-alone 'event', and as such is vulnerable to disruption by surveillance activities. Surveillance must also be understood as being distinct from general observation by its position within a surveillance assemblage and a police 'repertoire of control' mechanisms in use during all stages of assembly mobilisations.

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## Chapter 1: Introduction

### The research question

This thesis aims to critically examine the legal framework governing the overt state surveillance of public protest and political assemblies. The overarching research questions may be framed as follows: does the orthodox judicial approach taken by the courts to the regulation of overt police surveillance give proper weight to the human rights of protesters subjected to it, and adequate recognition of the harms experienced by them?

This investigation has required an examination of various further sub-headings, explored in Chapters 2 – 4:

- What harms (to privacy or freedom of assembly) do participants in protest perceive as arising from the overt surveillance of political protest and assemblies?
- How might we conceptualise these perceived harms within a normative legal framework?
- At a doctrinal level, do the courts, both in the UK and Strasbourg, recognise perceived harms from surveillance as being constitutive of interferences with the right to privacy and the right to freedom of peaceful assembly, within Articles 8 and 11?
- If they do not, what might explain the difference between doctrine and experience?
- What is the legal basis for the use of overt surveillance, and is it 'fit for purpose' in the 21<sup>st</sup> Century?

### The background canvas: the extent of the problem

Campaigners and protesters may be forgiven for believing that, in modern-day Britain, they are under siege from a plethora of state surveillance systems. The surveillance of political dissent has, however, a long pedigree. In 1832 William Popay, a Metropolitan Police officer, set about investigating the radical National Political Union by disguising 'himself as an impoverished revolutionary' and participating 'vociferously in political meetings<sup>1</sup>'. The use of such covert methods created great political disquiet, and William Popay was dismissed from his position. It is perhaps doubtful that Popay was the only police officer engaged in covert policing at that time, or that it came completely to an end once he left the Metropolitan police. Nevertheless, the public outcry that followed appeared to have

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<sup>1</sup> Clive Emsley *The English Police* (2nd ed Longman 1996) 104

shifted policy towards the use of more overt means which, as they did not make use of active deception, were considered more politically tolerable. Emsley describes the use of overt police tactics against the Chartists from 1840 onwards:

“In April 1840, for example, two officers attended a Chartist committee meeting in plain clothes; rather than give false names and addresses, they left the meeting and returned later in uniform, requesting formal permission to be present...the uniformed constable, openly taking notes for all to see, was a feature of political meetings during the 1850’s and 1860’s.”<sup>2</sup>

Some elements of modern surveillance methods are reminiscent of that Chartist experience. Police have, for example, continued to keep records of political meetings, with police ‘forward intelligence’ and camera teams being frequently posted outside political meetings. In 2009 David Lepper MP made a formal complaint to Sussex police when officers wielding cameras with a telephoto lens, photographed attendees at a meeting of the environmental group Earth First! taking place at a Brighton social centre.<sup>3</sup>

Video surveillance has now become a routine feature of political protest of all forms. Protesters may be filmed, both as part of a crowd, and individually in ‘close-up’. Protesters’ identities may also be obtained and recorded: during the 2009 ‘Climate Camp’ protests in Kingsnorth, for example, the police reported adding the details of 1,745 protesters, obtained during stop and search operations, to a Kent police database.<sup>4</sup> Campaigners complained that personal information had been obtained from objects found during the search, such as bank cards, and that this data had been subsequently recorded and retained in circumstances in which no prohibited items were discovered.<sup>5</sup>

Having been identified, protesters may also find that their details are entered onto a national ‘domestic extremism’ database: in 2013 *The Guardian* revealed that almost 9,000

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<sup>2</sup> Ibid p104

<sup>3</sup> [http://www.theargus.co.uk/news/4119466.Police\\_\\_\\_\\_scare\\_tactics\\_/](http://www.theargus.co.uk/news/4119466.Police____scare_tactics_/)

<sup>4</sup> Andy Holt, *Strategic Review: Operation Oasis (Camp for Climate Change)* (South Yorkshire Police 2008) (Final Report). See also: E, T and Dave Morris v Chief Constable of Kent (2008) Unreported. A proportion of searches were found to have unlawfully relied on ‘blanket’ grounds for a suspicion-based search under section 1 of the Police and Criminal Evidence Act 1984. No challenge was brought, however, to the retention of data from these searches, or others conducted lawfully under section 60 of the Criminal Justice and Public Order Act 1994.

<sup>5</sup> Phil McLeish and Frances Wright, ‘Policing of the Kingsnorth Climate Camp: Preventing Disorder or Preventing Protest’ (2009). Available at <http://climatechangeaction.blogspot.com/2009/04/policing-of-kingsnorth-climate-camp.html>. Accessed 24 August 2018

individuals had a 'nominal file' on Metropolitan Police databases.<sup>6</sup> The *Guardian* reported that many of these would have no criminal record: activists 'seen on a regular basis' as well as those on the 'periphery' of demonstrations would have been included on the police databases, 'regardless of whether they have been convicted or arrested'.<sup>7</sup> The domestic extremism database has been found to include details of journalists covering protest events;<sup>8</sup> also politicians, including the Green Party peer, Jenny Jones.<sup>9</sup>

Overt surveillance also extends to the virtual domain. 'Open source research' of social media and other publicly available on-line sources provides a rich source of information that is only just beginning to be fully exploited by UK forces, although some forces have reported that such is the power of open source research in uncovering personal information it has, in some cases, replaced the need for covert practices. Jones obtained evidence of social media intelligence (often referred to by yet another acronym, SOCMINT) when she submitted a Subject Access Request to the Metropolitan Police under the Data Protection Act 1998. The response she received showed that a number of her personal tweets expressing support for or engagement with political events or protests, had been retained in an intelligence file.<sup>10</sup>

Surveillance of protest is not confined to overt visual surveillance and data-gathering. In 2010 Mark Stone, an activist that was known to many in the environmental, anti-capitalist and anti-fascist movements was revealed to be, in fact, an undercover police officer named Mark Kennedy.<sup>11</sup> Kennedy had spent seven years posing as an activist, while working for the Metropolitan Police National Public Order Intelligence Unit (NPOIU): the same unit that operated the 'domestic extremism' database.<sup>12</sup> The revelations about Kennedy led to a successful appeal against the conviction of 20 climate change protesters for aggravated trespass at Ratcliffe-on-Soar power station,<sup>13</sup> and were followed by a series of further

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<sup>6</sup> Paul Lewis and Marc Vallée, 'Revealed: police databank on thousands of protesters' *The Guardian* 6 Mar 2009

<sup>7</sup> *ibid*

<sup>8</sup> Rob Evans, 'Police face legal action for snooping on journalists' *The Guardian* 20 Nov 2014.

<sup>9</sup> Matthew Norman, 'Jenny Jones an extremist? Nice work, Met Police' *The Telegraph* 17 June 2014

<sup>10</sup> BBC 'Green Party politician Jenny Jones on 'domestic extremist' database' 16 June 2014 available at <https://www.bbc.co.uk/news/uk-england-london-27872451> accessed 24 May 2017

<sup>11</sup> Tim Rayment and Jonathan Leake, "Flash' the activist is a secret cop' *The Sunday Times* 19 December 2010.

<sup>12</sup> Following a restructuring in 2011, the NPOIU was disbanded, and the work of managing 'domestic extremism' passed to the Counter Terror unit of the Metropolitan Police.

<sup>13</sup> *R v Barkshire* [2011] EWCA Crim 1885. See also, 7 year snitch: 'Flash' the activist is a secret cop', *The Sunday Times*, 19 December 2010.

disclosures. Over a period stretching from 1968, close to 150 front-line undercover officers are now known to have been deployed.<sup>14</sup>

Undercover police officers infiltrated a range of campaigning and protest groups and organisations, as well as trade unions and family justice campaigns, including the family of Stephen Lawrence, a teenager murdered in a racist attack in 1993.<sup>15</sup> Such was the level of concern about the use of this tactic of police surveillance, the government announced in 2015 that it would be the subject of a Public Inquiry which, at the time of writing, is still ongoing. Public unease about the use of undercover policing has often centred on instigation of sexual and long-term intimate relationships by officers deployed. Deceived women, some of whom had children with police officers while undercover, launched civil actions and received an apology from the Metropolitan police which recognised that they had been deceived and manipulated, and that the actions of undercover police constituted a 'grave violation'.<sup>16</sup> Other concerns raised have related to the practice of undercover officers assuming the identity of dead children, without the knowledge or consent of the families involved; and that the failure of the police to disclose the use of undercover officers to the courts may have resulted in miscarriage of justice.<sup>17</sup>

Activists have also drawn attention to the use of police informants in political protest. In 2009 Matilda Gifford, an environmental campaigner, recorded conversations with officers from Strathclyde Police, who offered her money to provide them with information about climate change activists.<sup>18</sup> 2014 *The Guardian* further reported that Cambridgeshire police had attempted to recruit four environmental campaigners by making unannounced visits to their homes, creating excuses to invite them to police stations, and even accosting one in a supermarket. Although the force denied accusations that their officers had behaved inappropriately, Cambridgeshire constabulary admitted they had attempted to recruit the four activists as informants.<sup>19</sup>

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<sup>14</sup> Raphael Schlembach, 'Undercover policing and the spectre of 'domestic extremism': the covert surveillance of environmental activism in Britain' (2018) 17(5) Social Movement Studies 1

<sup>15</sup> Undercover Policing Inquiry, List of Core Participants, <https://www.ucpi.org.uk/core-participants/list-of-core-participants/> Accessed 9 September 2018

<sup>16</sup> Metropolitan Police, Claimants in civil cases receive MPS apology, 20 November 2015.

<http://news.met.police.uk/news/claimants-in-civil-cases-receive-mps-apology-138574> accessed 9 September 2018

<sup>17</sup> Rob Evans, 'Convictions of 83 political campaigners in doubt over undercover police failings' *The Guardian* 16 Jul 2015

<sup>18</sup> Richard Osley, 'Protester 'offered cash by police' *The Independent* 26 April 2009

<sup>19</sup> Rob Evans and Matthew Taylor, 'Cambridgeshire police tried to turn political activists into informers: Force defends use of covert tactics against campaigners' *The Guardian* 17 Mar 2014

Added into this maelstrom of surveillance of course, there is the issue of increased technological capacity on the part of the police undertake surveillance. The extent to which protesters may be subject to surveillance by hidden devices or through the interception of communications remains a matter of speculation. Not all technological surveillance devices, however, are used in secret. Privacy International, for example, has drawn attention to the routine use by some police forces of mobile phone extraction technology, which enables the police to download all content and data from the phones of people held in custody.<sup>20</sup> The data may then be retained, even if the person concerned is not charged or is subsequently acquitted.

This raises a particular surveillance threat in the context of protest policing, as protesters are significantly more likely to face arrest for an offence for which they are not ultimately convicted.<sup>21</sup> The police have also been prepared to make mass arrests of protesters, in circumstances in which few if any of those arrested would face prosecution. In 2010, for example, 153 student protesters were arrested during the course of a demonstration, mostly to prevent a breach of the peace;<sup>22</sup> in 2012 the Metropolitan police arrested 182 cyclists in 2012 for breaching conditions, imposed on the 'Critical Mass' bike ride, to stay away from the site of the Olympic games,<sup>23</sup> and in 2013 286 anti-fascist protesters were arrested *en masse* in East London for public order offences.<sup>24</sup> In many cases no further action was taken,<sup>25</sup> yet all were held in custody and will therefore have been required to provide personal details as well as fingerprints and DNA. It is not known whether data was downloaded from mobile phones, although it is possible that this also took place.

Other campaign groups have also drawn attention to the emerging use of facial recognition technology (FRT).<sup>26</sup> FRT systems are currently being rolled out by police forces across the UK, following an extended trial by South Wales Police and the Metropolitan Police forces.

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<sup>20</sup> Catrin Nye and Leo Sands, 'Police 'should need warrant' to download phone data' *BBC Victoria Derbyshire programme* 27 Mar 2018 Available at <https://www.bbc.co.uk/news/uk-43507661> Accessed 24 September 2018

<sup>21</sup> William Jackson, Joanna Gilmore and Helen Monk, 'Policing unacceptable protest in England and Wales: A case study of the policing of anti-fracking protests' [2008] Critical Social Policy 1

<sup>22</sup> Graeme Paton, Rosa Prince and Heidi Blake, 'Student protest: 153 arrested in London demonstration against tuition fees' *The Telegraph* 01 December 2010

<sup>23</sup> Shiv Malik, 'Critical Mass arrests: police charge three' *The Guardian* 29 July 2012

<sup>24</sup> Letter to *The Guardian*, 'The criminalisation of anti-fascist protest' 13 April 2014

<sup>25</sup> *ibid*

<sup>26</sup> Owen Bowcott, 'Police face legal action over use of facial recognition cameras' *The Guardian* 14 Jun 2018

The system connects to existing police datasets (which may comprise people not convicted of an offence). It then scans a target population (a protest, a football crowd, or simply shoppers on a Saturday afternoon) by means of FRT enabled cameras. It produces an alert if a 'match' is found, i.e. an image on the relevant dataset matches a person in the target population. The rolling out of this system has prompted considerable criticism by human rights campaigners, and the issue is likely to fall before the courts.<sup>27</sup>

Police surveillance of political protest thus spans the use of coercive public order measures (such as stop and search); the visual monitoring of protest activity; the identification of protesters; the gathering, processing and use of personal data (from various sources) and the infiltration of protest groups and movements by informants and undercover police. Although it falls outside the scope of this thesis it is important to remember that this framework of surveillance will often co-exist with surveillance carried out by private bodies who may become the target of protest, and may seek to minimalise the impact it may have on corporate interests: BAE Systems and McDonalds, for example, both employed people to spy on protest group.<sup>28</sup> Surveillance measures are thus not deployed in isolation: rather they form part of a surveillance assemblage which creates actual and potential links and integrates disparate surveillance systems into an aggregate whole.<sup>29</sup> In the context of policing, different mechanisms may be in play to link together surveillance systems, and integrate these into wider policing practice.

While the legal framework for surveillance places emphasis on the distinction between overt and covert forms of surveillance, surveillance systems are not, in practice, arranged along these lines. Rather hidden and visible forms of surveillance are likely to be interlinked and inter-dependent. Opportunities to deploy covert surveillance (such as the recruitment of an informer) may arise as a result of information gathered through overt forms of surveillance; equally decisions to deploy overt surveillance (such as the monitoring of a particular individual in the course of a demonstration) may be influenced by covertly obtained information. It is also important to be aware that, in the context of the policing of political assemblies, both forms will be deployed within a coercive 'public order' policing

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<sup>27</sup> Owen Bowcott, 'Police face legal action over use of facial recognition cameras' *The Guardian* 14 June 2018

<sup>28</sup> Evelyn Lubbers, *Secret Manoeuvres in the Dark: Corporate and Police Spying on Activists* (Plutopress 2012)

<sup>29</sup> Kevin Haggerty and Richard Ericson, 'The surveillant assemblage' (2000) 51(4) *British Journal of Sociology* 605

environment.<sup>30</sup> Public order policing may be influenced by the information or intelligence arising from both overt and covert sources; it may also determine the manner in which surveillance is deployed and/or aid the collection of personal data (the use of stop and search measures, for example, to facilitate identification).

The interrelation between public order policing and surveillance, and between covert and overt surveillance, may be structural as well as relational. Efforts have been made in policing bodies in recent years to centralise protest policing functions, creating a dedicated structure for police forces to assimilate intelligence and develop 'joined-up' and strategic policing practices. The National Public Order Intelligence Unit (NPOIU), for example, was concerned not only with the deployment of undercover police officers, but with the broader task of collecting intelligence from various sources on 'the threat to communities from public disorder connected to domestic extremism and single issue campaigning',<sup>31</sup> and with supporting police forces in managing 'strategic public order issues'.<sup>32</sup> The unit gathered intelligence directly from both covert and overt means, making use of both undercover police officers, and overtly-deployed officers to monitor and photograph demonstrators.<sup>33</sup> It also gathered intelligence from regional police forces, which was collated and analysed to provide a resource for public order policing and for the policing of 'domestic extremism'.<sup>34</sup> Such material would no doubt have been influential in determining the policing style adopted for any particular protest; and may also have contributed to decisions relating to the deployment of undercover officers in protest groups.

Any examination of the impact of any particular form of surveillance must therefore take into consideration the overall policing environment in which it is situated.<sup>35</sup> While this study is specifically concerned with overt surveillance, it recognises that the interplay between different forms of surveillance, and between surveillance and public order

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<sup>30</sup> See, for example, Patrick Gillham, Bob Edwards & John Noakes, 'Strategic incapacitation and the policing of Occupy Wall Street protests in New York City, 2011' (2013) 23(1) *Policing and Society* 81; Oscar Rantatalo, 'The Miscellany of Militaristic Policing: A Literature Review' (2018) 7 *Journal of Policing, Intelligence and Counter Terrorism* 51

<sup>31</sup> Association of Chief Police Officers Terrorism and Allied Matters (ACPO (TAM)) (undated), 'The National Coordinator Domestic Extremism (NCDE)' [pamphlet]

<sup>32</sup> Her Majesty's Inspectorate of Constabulary (2012) *A review of national police units which provide intelligence on criminality associated with protest*, 5

<sup>33</sup> Fitwatch website, cached at <https://4therecord.org/uk-police/useful-information/fit-forward-intelligence-team/> Accessed 9 September 2018

<sup>34</sup> Her Majesty's Inspectorate of Constabulary *Adapting to Protest* (2010) 150

<sup>35</sup> Raphael Schlembach, 'Undercover policing and the spectre of 'domestic extremism': the covert surveillance of environmental activism in Britain' (2018) 17(5) *Social Movement Studies* 1

policing, creates a degree of complexity that is not always acknowledged academically or judicially.

Judicial and legislative approaches to surveillance do not fit well with conceptions of surveillance as an assemblage. Instead the law seeks to categorise and differentiate forms of surveillance, which are then subject to differing frameworks of regulation. Thus the law distinguishes between 'covert' surveillance, which involves the use of secret, hidden or deceptive mechanism, and which is capable of intruding into a person's private space; and 'overt' surveillance which, on the other hand, is a term associated with visible, open forms of surveillance, used exclusively for the monitoring of the public domain. While the former is defined in law and subject to express statutory legislation, the latter has no clear definition, and is not regulated by primary legislation.

While protesters might perceive state surveillance as forming part of an overall strategy of control, and thus as inherently problematic, policy-framers and thus the legal framework often sees no 'harm' arising from the overt police surveillance of public protest.<sup>36</sup> It does not, as covert surveillance may do, intrude upon the inner sphere of a person's life. It is not, as covert surveillance may be, intentionally deceptive or hidden from view. In contrast, overt surveillance is considered to be a routine feature of modern life.

We are all likely to be 'caught on camera' whenever we walk through a town centre high street, catch a bus, or sit in a bar. Such surveillance is generally considered to be outside the scope of judicial concern: it is simply viewed as the monitoring of a public landscape which can be freely observed by anyone who happened to be at the scene. Legal issues have arisen only exceptionally, and have invariably been concerned with issues of data retention or dissemination, rather than surveillance *per se*.

The use of overt surveillance systems for the monitoring of political protest is usually considered to raise no additional concerns. Protest is considered to be, essentially and by definition, a creature of the 'public domain': not only does it generally occupy public space, it is public in a broader, situational sense, in that it occupies a Habermasian public sphere of public discourse and debate.<sup>37</sup> The value of such a sphere for political action, Arendt has

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<sup>36</sup> See, for example, *Catt v Commissioner of Police for the Metropolis*, where the court found that the long-term retention of data by the state may amount to an interference in privacy (albeit a 'modest' one), there was no recognition that the experience of being subject to overt surveillance may be harmful – indeed, it was presented as an 'expected' part of attending political protest.

<sup>37</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Polity 1992)

argued, lies in its commonality of experience: that it is open, and visible and accessible to all. It is the presence of others, Arendt has argued, that ‘assures us of the reality of the world and ourselves’. The public sphere must therefore be defined as a place where everything ‘can be seen and heard by everybody and has the widest possible publicity’.<sup>38</sup> In such an environment it might be assumed that the monitoring by police officers of these public activities, in a manner which is itself visible to all concerned, causes no harm.

This thesis fundamentally challenges this view. Police surveillance of public protest cannot be conceived as equivalent to mere public observation. It is argued here that overt surveillance cannot be properly understood as a homogenous practice, which is uniformly harmless. Rather, the ‘harmfulness’ of a surveillance practice should be conceptualised as relating to the manner in which it is carried out; the purpose for which it is carried out; and the effect it has on surveillance subjects.

### **The aim of the thesis**

This thesis seeks to challenge orthodox judicial approaches to overt surveillance by examining and investigating the harms arising from ‘overt’ forms of police surveillance in the context of protest. The domestic courts in cases such as *Catt*<sup>39</sup> and *Wood*,<sup>40</sup> and to a lesser extent the European Court of Human Rights at Strasbourg, have generally taken the view that measures of overt surveillance will not, in themselves, amount to an interference with a person’s right to privacy or their right to freedom of assembly. Participants in protest in public, on the streets, are considered to have no ‘reasonable expectation of privacy, in Article 8 terms, in relation to being watched, photographed or filmed by others. Further, as it does not amount to a physical restriction or constraint on an individual’s ability to protest with others, surveillance is also considered to have little impact on the right peacefully to assemble under Article 11.

The lack of harm perceived to arise from overt surveillance has resulted in the development of a regulatory framework which is broad and general in nature, and which provides extensive discretion to the police in deciding how, when, why and against whom, overt surveillance mechanisms are used. Unlike covert surveillance, overt surveillance has no basis in statute. It is neither positively prescribed nor positively regulated. Instead it relies upon historical common law powers – to prevent and detect crime – which are of

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<sup>38</sup> Hannah Arendt, *The Human Condition* (2<sup>nd</sup> edn University of Chicago Press 1998) 50

<sup>39</sup> *Catt v Commissioner of Police of the Metropolis* [2015] UKSC 9

<sup>40</sup> *Wood v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414

uncertain scope and extent; or (as we shall see) permitted because it is not proscribed. Neither source is a satisfactory or adequate basis, it will be argued, for regulating policing in the 21<sup>st</sup> century.

Two key objects of this thesis are, therefore: to investigate how overt surveillance is perceived by those who are subject to it; and to examine the extent to which judicial approaches align with the experiences of protesters and social movement actors. It does so by drawing on interviews with around 30 individuals, each of whom have been subjected to police surveillance during protest events, or while participating in protest-related activities. The interviews were designed so as to allow interviewees the opportunity to speak about those aspects of overt surveillance which they felt caused them 'harm' in some way: they were therefore invited to speak both about the actions of the police that they considered 'harmful' and about the ways in which that 'harm' was experienced. The data provided a picture of the different surveillance activities to which respondents were subject, as well as a glimpse of some of the ways they had been affected, individually and collectively, by those activities.

Drawing both on empirical data and academic literature, the thesis argues that there has been a significant misconception on the part of the courts about the nature of overt surveillance, and the impact it may have on those subject to it. The data demonstrate that overt surveillance cannot be conceptualised simply as being seen, watched or listened to by others. Respondents did not generally object to being seen by others: attracting public attention is often a key objective of political campaigning and protest action. Nor did they find that being observed by police officers was necessarily or inherently problematic. The harms they experienced instead related to particular types of overt surveillance activity.

It is argued therefore, that overt police surveillance activities should be conceived of as a heterogeneous group of activities; and that the harms arising from these activities must be assessed not merely in relation to the location in which they take place, but by considering their function, purpose and nature in the context of a coercive policing environment. Thus while protesters may not object to being filmed or photographed, the use of specialist police surveillance teams to take photographs repeatedly and from close proximity, with large cameras and sometimes with flashlights, may be problematic. Further, it will be relevant if the photographs are not taken merely to record the nature of the scene, but to enable future identification and recognition processes. This form of surveillance is clearly

distinct from general monitoring or observation: it is carried out within the context of coercive police environment, and is intended to communicate a particular message. It tells protesters, 'you are being watched', not merely in a general sense, as members of a crowd, but in a focused manner which is intended to remove from them their public anonymity.

They are rendered not merely visible, but to use Brighenti's term, 'hyper-visible'.<sup>41</sup>

Protesters find that not only is their identity known to police, they have been assigned an external identity which they have not sought. In being visibly, often conspicuously, subject to police surveillance, they are highlighted, 'picked out' and potentially stigmatised as 'troublemakers' and 'extremists'.

Having examined the nature of surveillance harms, a further key objective of this thesis is to critically examine the extent to which courts have recognised these types of harm in judicial proceedings. The thesis argues that there has been a failure on the part of both legislature and judiciary to recognise the often complex matrix of harms to individual and collective autonomy arising from overt surveillance measures, and thus to acknowledge the threat posed to individual privacy and freedom of assembly. In short, the doctrinal position fails to take account of the lived experiences of protesters and activists.

The failure to recognise the pluralistic nature of overt surveillance, and of the harms that may arise, has also resulted in an inadequate legislative framework. In the absence of an appropriate framework for assessing surveillance harms, it is argued that the courts have too readily accepted that common law police powers provide a sufficient legal basis for the use of overt surveillance measures. The courts have failed to expand, either on the scope and delineation of such powers, or their historical development: rather they have simply asserted or assumed that the common law provides a satisfactory legal basis for all types of overt surveillance measures, regardless of their intended purpose, or the circumstances in which they are used. It is argued that the common law provides a precarious and uncertain legal basis which, in combination with the limited judicial application of human rights protections, has resulted in a largely unfettered discretion on the part of the police.

Although this thesis concentrates on the use of overt surveillance in the context of political protest, the conclusions it reaches have implications beyond the policing of public assemblies. Overt surveillance has, in recent years, undergone significant technological change, encompassing measures to monitor, track, and identify people in a much wider range of circumstances than ever before. The police now make routine use, for example,

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<sup>41</sup> Andrea Brighenti, 'Visibility: A Category for the Social Sciences' (2007) 55(3) Current Sociology 323

of Automatic Number Plate Readers (ANPR) in a range of circumstances (including the monitoring of protest). These enable the police not only to undertake checks of legislative compliance, but to issue 'alerts' when a vehicle of interest passes through or approaches a particular point. Facial Recognition Technology, as we have already noted, uses a similar technological approach, although applied to the scanning of a person's face, rather than a vehicle registration number.

The effective regulation of the use of these technologies requires an appropriate legal framework, capable of recognising the often complex matrix of harms that may arise. This thesis makes some suggestions for the construction of a pluralistic framework that better enables both the judiciary and legislature to balance the competing interests at play.

### [Structure of the thesis](#)

The thesis will proceed in three parts. In the first part, it considers the legal basis for the operation of overt police surveillance, and conducts a critique of judicial reliance on common law powers of uncertain scope and unexplained heritage. The thesis then turns to examine the human rights framework, considering the applicability of Article 8 to potential harms arising from overt surveillance measures. Finally it considers the framework of assembly rights as an alternative, or crucial supplementary means of understanding the impact of overt surveillance.

### **Chapter 2 : The common law as a basis for overt surveillance and intelligence-gathering.**

This chapter explores the judicial reliance on the common law as a legal basis for overt surveillance. Unlike covert forms of surveillance, which have a legal basis in statute law, overt surveillance is not explicitly regulated by primary legislation. It thus depends for its legal basis on the common law powers of the police. The nature and scope of these powers are, however, uncertain. The courts have variously asserted or assumed the existence of a sufficient and appropriate common law power, without elucidating or explaining its historical basis or judicial development. Nor have they attempted to delineate or define the extent of its application. In the case of *Wood*, for example, Laws LJ declared that the common law 'sufficed' as a legal basis for the use of overt police photography and data-gathering; he did not explain the basis on which he had reached such a decision, nor the limits of police powers to undertake such surveillance.

The degree of discretion available to the police in determining when, how, why and against whom the technologies of overt surveillance are used, arguably creates a risk of arbitrary

state action, counter to the principles of the rule of law. There are no clear criteria, for example, relating to the requirement of suspicion or the imminence of any emerging threat. Unlike the common law power to prevent a breach of the peace, for example, common law police powers to undertake overt surveillance appear to be applicable across any time frame, and are not constrained in the categories of person on which they may be focused. Given the recent decisions of the ECtHR in relation to issues of data retention, the scope of discretion available to the police in this area must raise questions as to whether the law is sufficiently certain as to meet ECHR requirements.<sup>42</sup>

This chapter approaches these issues by attempting to ‘unpack’ the common law power of the police to conduct overt surveillance, and to situate it historically, tracking the development of the powers and duties of the police constable over time. It contrasts modern preventive surveillance strategies with the ‘traditional’ monitoring functions of the early constable in ‘setting the watch’ and the preventive, patrolling constables of the early nineteenth century. Further it provides a critical analysis of judicial claims made, at various times, that the police either require no legal basis for overt surveillance (on the basis that it is not unlawful) or more recently that the general power of the police to ‘prevent crime’ suffices.

### **Chapter 3. Overt police surveillance and the problem of public privacy**

Drawing on empirical data obtained in interviews with thirty social movement actors, all of whom had direct experience of overt police surveillance in the context of political protest, the thesis is concerned here to examine the harm to individual privacy that may arise through the deployment of overt police surveillance. It seeks to challenge the conception, which remains prominent in judicial debate, that police surveillance of public assemblies is broadly equivalent to ‘public observation’, in that it causes no greater privacy harm than simply being observed or seen by others in public places. Instead it argues that there are at least three circumstances, in which distinct privacy harms arise. These relate to the physical intrusiveness of surveillance; the loss of public anonymity; and the persistent or sustained focus of surveillance on the individual.

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<sup>42</sup> See for example, Marper and S v United Kingdom (2009) 48 EHRR

There have been very few empirical studies on the impact of surveillance on individuals in the context of political protest,<sup>43</sup> and even fewer in the UK context.<sup>44</sup> This thesis therefore augments to academic understanding of how people experience and react to police surveillance activities. What emerges from the data, it is argued, is a complex matrix of intrusive practices and privacy harms that are seldom recognised or acknowledged as arising from overt surveillance practices. Overt surveillance mechanisms do not operate in isolation, but are integrated within coercive policing strategies; such surveillance therefore possesses features that are materially distinct from simply 'being watched'. A common theme arising from the data, for example, was that protesters reported being addressed by name by police officers they had never met; others reported that their movements were directly monitored by uniformed police officers, sometimes for sustained periods or time; and others complained that surveillance was physically intrusive, involving, for example, the 'close-up' and 'in-your-face' taking of photographs.

Judicial considerations of privacy, and the applicability of privacy rights, do not easily accommodate such privacy harms. This thesis explores and critically evaluates the extent to which the framework of privacy rights, as it is interpreted by both UK and Strasbourg courts, is able to recognise these impacts of surveillance as privacy harms. The courts, it is suggested, have adopted an approach to privacy which is essentially locational and/or informational in nature, both of which are inadequate to recognise privacy harms that arise in a public place, or which do not directly involve the collection and retention of personal data. The aim of this chapter is therefore to construct a notion of privacy that emphasises its role, not merely in protecting private space or personal information, but in defending individual autonomy, physical integrity, and personal identity.

#### **Chapter 4 : Overt surveillance and assembly freedoms**

This chapter seeks to explore the use of Article 11 as an alternative or supplementary human rights framework for the conceptualisation of surveillance harms: that provided by

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<sup>43</sup> Those that have been undertaken include those situated in the US anti-globalisation and 'occupy' movements: Lius A Fernandez, *Policing Dissent: Social Control and the Anti-Globalization Movement* (Rutgers University Press 2009); Amory Starr, Luis A. Fernandez, Randall Amster, Lesley J. Wood, Manuel J Caro, 'The Impacts of State Surveillance on Political Assembly and Association: A Socio-Legal Analysis' (2008) 31 Qual Sociol 251; and in relation to the use of police video surveillance in Germany: Ullrich, P., & Wollinger, G. R. (2011), 'A surveillance studies perspective on protest policing: The case of video surveillance of demonstrations in Germany' (2011) 3(1) Interface: a Journal for and about Social Movements 12

<sup>44</sup> Michael McCahill and Rachel Finn, *Surveillance, Capital and Resistance: Theorizing the surveillance subject* (Routledge 2004).

the Article 11 right to freedom of assembly and association. The aim of this chapter is therefore to examine what has frequently, in judicial considerations and socio-legal literature, been referred to as the ‘chilling effect’ of police actions. Such an effect has not been expanded or explored in any detailed manner in socio-legal literature, but is normally associated with the impact of privacy intrusions upon assemblies or gatherings of people. It may be assumed therefore, that the ‘chilling effect’ of surveillance consists simply of a loss of individual privacy rights, collectively experienced. That is, that the chilling effect of surveillance on collective assemblies arises in the same circumstances (and is thus subject to the same limitations) as the effect of surveillance on individual privacy rights.

This chapter attempts to conceptualise the ways that surveillance ‘chills’ political protest, suggesting that this cannot be understood only in the framework of privacy. Drawing from social movement literature, it examines interview data to investigate the ways in which surveillance was perceived to curtail or disrupt protest and protest-related activities. The data suggests that the impact of surveillance may not be immediate or cataclysmic, but may be cumulative and diffuse, aggregating over time and affecting a larger, or differently constituted class of person than those who may be directly the focus of surveillance measures.

Interviewees, for example, clearly viewed surveillance as having a de-legitimising or stigmatising impact, which affected their ability to communicate with potential allies and gain public support. It was also perceived as having a disruptive impact on organisation processes, and as inhibiting access to key resources. It also took an emotional toll on protesters, as dealing with surveillance was emotionally taxing, and was capable of having a de-motivational effect. Surveillance, in short, made organising harder, limiting capacity and capability.

In evaluating surveillance harms it is therefore critical that protest is conceptualised not merely as an event, but as a process which is dependent upon effective mobilisation strategies. Further, it is, to at least some extent, an iterative process, by which protest events are not only a culmination of mobilisation activity, but a means of engaging and enthusing those who may become both participants in, and organisers of, future protest. The restriction of that process is thus capable of having a cumulative ‘chilling effect’.

As we have already noted, however, the courts have been reluctant to recognise the surveillance of protest as a harmful activity. The courts have, to date, shown little willingness to make use of Article 11 as an alternative framework to evaluate surveillance

harms, given the preferred judicial approach is to conceptualise an assembly as a temporally-singular event, not a developmental process. Nevertheless, it is argued that Article 11 provides a means by which the courts may recognise the particular vulnerabilities to state surveillance that arise in the context of political mobilisations.

## Methodology

This thesis adopts a socio-legal approach, drawing on qualitative research to provide an evidential basis from which critically to examine legal doctrine. A key aim of this research is to examine the extent to which the current legal framework has failed fully to recognise or acknowledge the harms flowing from the overt surveillance of political protest; in short it asks whether or not the doctrinal position adopted by the courts may be misaligned with the lived experiences of protesters and activists.

To this end, this thesis makes use of grounded theory. Grounded theory was originally developed by Glaser and Strauss as a structured approach to discover theory from data.<sup>45</sup> It is recognised in this research that grounded theory concerns a general approach to the research process, and is not confined to the analysis stage alone.<sup>46</sup> Grounded theory thus begins with a broad research question rather than a specific hypothesis. Theoretical sampling is used to identify individuals or events from which data is obtained, which is then analysed by means of open coding. In this case, the research involved the collection of interview data from a sample of thirty individuals who were subject to surveillance in during political protest and/or prior mobilisation processes.

In deciding upon the use of in-depth individual interviews as the most appropriate form of research method, the interviewer considered the following: the need for empirical research; thematization; validation; and sampling and interview design.<sup>47</sup> These are considered in turn below.

### I The need for empirical research.

The decision to undertake empirical research was driven by the lack of research undertaken to date on the impact of overt surveillance on protesters and social movement actors. The

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<sup>45</sup> Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Transaction Publishers 2009)

<sup>46</sup> Matt Henn, Mark Weinstein, Nick Foard, *A Short Introduction to Social Research* (Sage 2006) 199

<sup>47</sup> See, in relation to this, Bourdieu's conception of the seven stages of an interview inquiry, Pierre Bourdieu, 'Understanding' in P Bourdieu (ed) *The Weight of the World* (Stanford University Press 1999) 610-625; See also Svend Brinkmann and Steinar Kvale, *Interviews: Learning the Craft of Qualitative Research Interviewing* (3rd edn Sage 2015), 130

courts have tended to adopt a general assumption that surveillance, when it is conducted openly and visibly, and when confined to public space, is not harmful; and that protesters in particular, by participating in a public activity, have no reasonable expectation of privacy.

Protesters themselves, however, have complained that surveillance is harmful.

Surveillance has been criticised for being oppressive and as constituting the 'harassment of peaceful protesters'.<sup>48</sup> Campaigners have stated that surveillance 'chills' protest participation, inhibits association and is 'intentionally divisive'. They have also complained that surveillance causes raises significant privacy concerns, by 'building profiles on the size, structures, leadership and alliances of campaign groups, by singling-out 'organisers' for particular attention, by visiting campaigners at home, filming attendance at meetings and protests and by routinely monitoring social media'.<sup>49</sup> Campaigners and protesters have also brought a number of legal challenges relating to the use of police photography,<sup>50</sup> the obtaining of identification data,<sup>51</sup> and the retention of personal information.<sup>52</sup>

Very little empirical research has been undertaken in this area. Two studies, however, warrant particular attention. One, undertaken in the UK, considered the use of overt surveillance in the context of the policing of anti-militarist protest connected to a 'peace camp'.<sup>53</sup> The other, which considered the effect of surveillance on social movements in the US, considered the combined impact of both overt and covert surveillance, within the context of a coercive (and often violent) policing environment.<sup>54</sup>

The UK study, undertaken by Cahill and Finn, presented an ambiguous picture of attitudes towards surveillance.<sup>55</sup> It primarily examined the impact of the police filming of peace activists, who were involved in acts of non-violent civil disobedience, outside a military base, but also considered the use of public CCTV to monitor a protest procession. It concluded that surveillance is not necessarily viewed as threatening, but was described by

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<sup>48</sup> Her Majesty's Inspectorate of Constabulary (HMIC), 'Adapting to Protest' (2010), 127

<sup>49</sup> Kevin Blowe, 'The State of Surveillance 2018' (Big Brother Watch 2018), 10

<sup>50</sup> Wood v Commissioner of Police for the Metropolis [2009] EWCA Civ 414; Mengesha V Commissioner of Police of the Metropolis [2013] EWHC 1695 (Admin)

<sup>51</sup> *ibid*

<sup>52</sup> Catt v Commissioner of Police of the Metropolis [2015] UKSC 9

<sup>53</sup> Michael McCahill and Rachel Finn, 'FIT squads, files and phone taps: the surveillance of protesters' in (eds) *Surveillance, Capital and Resistance: Theorizing the surveillance subject* (Routledge 2004)

<sup>54</sup> Amory Starr and others 'The Impacts of State Surveillance on Political Assembly and Association: A Socio-Legal Analysis' (2008) 31 *Qual Sociol* 251

<sup>55</sup> Michael McCahill and Rachel Finn, 'FIT squads, files and phone taps: the surveillance of protesters' in (eds) *Surveillance, Capital and Resistance: Theorizing the surveillance subject* (Routledge 2004) 80

some protesters in positive terms relating to 'play' and 'excitement' and as 'identity affirming' rather than as oppressive and coercive.

The study concluded that perceptions of harm from surveillance were 'dependent upon existing social relations and identities' and thus largely influenced by cultural variables: in particular attitudes towards the police and expectations of the way they would behave. It did not examine, whether differing attitudes to surveillance may be the result of the manner in which surveillance was carried out, or the form which that surveillance took: it did not, for example, consider whether the use of public CCTV may have a different impact from the close up filming of activists. It did suggest however, (albeit in passing), that protesters found surveillance less problematic if they believed the focus of surveillance was on someone else (such as watching out for 'troublemakers'), was carried out for a precise and confined purpose (such as traffic management) or if they had low expectations of surveillance capability and capacity (for example, that it involved the collection of information which was never processed or acted upon).

The Starr study related to the use of surveillance in the context of the policing of contentious assemblies in the US. In contrast to the Cahill study, this concluded that surveillance was capable of significantly restricting protest activities, and amounted to 'an alarming threat' to mobilisations and social movement organisations.<sup>56</sup> It was found to have a potentially destructive impact on various aspects of assemblies and associations, including, 'fundraising, relations with members, reputation and connections with allies, redirection of agendas, displacement of strategic framing, and foreclosure of space for civil disobedience'.<sup>57</sup>

The conflicting conclusions reached by these two studies demonstrates the need for further research in examining the impact of overt surveillance measures. The Starr study places particular emphasis on the existent policing environment in the US: it does not necessarily follow that overt surveillance in the context of UK policing will have similarly damaging consequences. Further, this study considered police surveillance in its entirety, and conflated issues arising from overt and covert surveillance. It is therefore of limited help in identifying harms that arise specifically from overt surveillance measures. The Cahill study, is also of limited assistance. While the study may well be correct in stating that

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<sup>56</sup> Amory Starr and others 'The Impacts of State Surveillance on Political Assembly and Association: A Socio-Legal Analysis' (2008) 31 Qual Sociol 251, 266

<sup>57</sup> Amory Starr and others 'The Impacts of State Surveillance on Political Assembly and Association: A Socio-Legal Analysis' (2008) 31 Qual Sociol 251, 267

some protesters and activists do not find surveillance disruptive or intrusive, this does not mean that, in other circumstances, harms do not arise.

## II Thematization

Bourdieu's conception of interview-based research places significant emphasis on the thematization of the research area as an essential pre-requisite to the effective formation of a research question.<sup>58</sup> The above studies illustrate the difficulties in developing a precise working definition of the type of surveillance we are interested in. Starr et al conflated overt and covert forms of surveillance, while Cahill's study made no clear distinction between 'generalised' surveillance of public places (such as the use of CCTV) and forms of overt surveillance that are specific to the policing of public assemblies and political protest. Further, while Starr conceptualised surveillance as an on-going process which was integrated within strategies of public order policing, Cahill considered surveillance in relation to single instances of political protest.

As the study was concerned with surveillance harms that arose in the particular context of protest, there was a need to differentiate this type of surveillance from the general surveillance of the public realm, such that we all encounter in public places. To this end, it was necessary to conceptualise overt surveillance as a particular type of surveillance, deployed in the context of public order policing. The initial stages of research design therefore focused on definitions of surveillance, and differentiation of overt and covert forms; and the conceptualisation of how the surveillance of protest differed from other forms of overt surveillance, such as public CCTV. The following sections cover briefly the conceptualisations of surveillance; covert surveillance; and preventive surveillance adopted for the purposes of this thesis.

### i) **Conceptualising surveillance.**

Surveillance has been defined in various ways. Some definitions place emphasis on surveillance as a means of obtaining information, usually through the use of some technological device. The New South Wales Law Commission, for example, defines surveillance as "the use of a surveillance device in circumstances where there is a deliberate intention to monitor a person, a group of people, a place or an object for the

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<sup>58</sup> Pierre Bourdieu, 'Understanding' in P Bourdieu (ed) *The Weight of the World* (Stanford University Press 1999) 610-625; See also Svend Brinkmann and Steinar Kvale, Interviews: Learning the Craft of Qualitative Research Interviewing (3<sup>rd</sup> edn Sage 2015) 130-131

purpose of obtaining information about a person who is the subject of the surveillance".<sup>59</sup> Such an approach is, however, overly narrow: while state surveillance is frequently associated with forms of remote monitoring, surveillance in the context of public protest may take more direct forms. Public order policing invariably involves the deployment of police officers, often in large numbers: in such a context there is necessarily considerable capacity for direct monitoring, without the need for mediating technology. Further, it is not necessarily the case that surveillance involves the collection of information: surveillance may have other purposes. Gill for example, has noted that surveillance may have a 'scarecrow' function, and be deployed primarily as a means of deflecting or deterring acts deemed to be undesirable.<sup>60</sup>

UK legislation adopts a definition which is broader than that proposed by the South Wales Law Commission. The Regulation of Investigatory Powers Act 2000 defines surveillance as 'the monitoring, observing or listening to persons, their movements, conversations or other activities and communications'; 'the recording of anything monitored or observed or listened to'; or 'surveillance by or with the assistance of a surveillance device'<sup>61</sup>. This, however, is so broad that it fails to make any distinction between 'observing and listening' and surveillance. We instinctively feel that there is a difference: we may be listened to or observed in a range of situations without feeling that we are 'under surveillance'; similarly we may observe and listen to others, in the street, or even on stage in a theatre or concert hall, without believing that we are carrying out surveillance activity. What is needed is a definition which provides us a means of distinguishing 'surveillance' from simply being seen by others.

The distinction, it is suggested, lies in the purpose or reason for which a person is listened to or observed. Surveillance is therefore not mere watching; it is watching for reason. Surveillance must therefore be conceptualised as purposeful, carried out for a pre-defined purpose such as 'control, entitlement, management, influence or protection'.<sup>62</sup>

Surveillance may therefore be defined broadly as 'assorted forms of monitoring, typically for the ultimate purpose of intervening in the world'.<sup>63</sup>

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<sup>59</sup> New South Wales Law Commission, *Surveillance: final report* (NSWLRC 108 2005) para 1.8

<sup>60</sup> Peter Gill and Mark Phythian, *Intelligence in an Insecure World* (2<sup>nd</sup> edn Polity Press 2012) 95

<sup>61</sup> Regulation of Investigatory Powers Act 2000 s48(2)

<sup>62</sup> The Surveillance Studies Network, 'A Report on the Surveillance Society For the Information Commissioner' (2006) <sup>63</sup> Kevin Haggerty and Minas Samatas, *Surveillance and Democracy* (Routledge 2010), 3

<sup>63</sup> Kevin Haggerty and Minas Samatas, *Surveillance and Democracy* (Routledge 2010), 3

This definition has utility in that it does not define surveillance solely in terms of the mechanism by which surveillance takes place (i.e. through the use of surveillance ‘devices’), and because it recognises that surveillance extends beyond the collection (and subsequent retention and processing) of information. Further, and importantly, it differentiates surveillance from mere ‘watching’ by emphasising the importance of the purpose for which it takes place.

This definition provides a useful launching point for this study. Its breadth, however, means that it is of limited utility as a means of conceptualising the particular forms of surveillance that we are here concerned with. There is a need to further conceptualise surveillance in terms of the manner in which it takes place and the purpose for which it is done.

### **ii) Conceptualising overt surveillance**

The overt/covert dichotomy is problematic in a number of ways. Firstly, the distinction in law is uncertain, and the concept of what is ‘overt’ surveillance is undefined, meaning that it tends to become a residual category consisting of that which is not ‘covert’. Secondly, it constitutes what often appears to be an arbitrary divide in surveillance strategies that may be better conceptualised in terms of the totality of their impact. Thirdly, the distinction applies only to a particular part of the surveillance process: the collection of information.

Although the regulation of covert surveillance is undoubtedly imperfect, and has been subject to considerable criticisms by privacy campaigners, regulation does at least exist. One of the most prominent features of overt surveillance measures, in contrast to its covert cousin, is the relative lack of explicit statutory regulation. Such regulation that does exist tends to be narrowly focused so that it is confined to specific mechanisms (such as regulation of the retention and use of DNA samples) and/or has general or broad application. The regulation of CCTV cameras, for example, by the Surveillance Camera Code of Practice issued by the Home Office, has application to all users of CCTV: thus while it was ostensibly developed to ‘address concerns over the potential for abuse or misuse of surveillance by the state in public places, with the activities of local authorities and the police the initial focus of regulation’, its provisions are general in nature so as to also encompass ‘the many surveillance camera systems within public places [which] are operated by the private sector, by the third sector or by other public authorities’.<sup>64</sup>

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<sup>64</sup> Home Office, *Surveillance Camera Code of Practice* June 2013 para 1.8

Alternatively, regulation has focused primarily on issues of data protection. The recently enacted Data Protection Act 2018 provides, for the first time, provisions aimed specifically at police practices in the collection and retention of data. The focus of the legislation remains, however, the management of data, and the Act has relatively little to say about the circumstances in which surveillance may be deployed, the manner in which this may be done, or the ways in which surveillance data may be used.

Overt surveillance is therefore a term which can be considered to encompass a cluster of different surveillance methods and tactics, carried out for a range of potential purposes. It may involve the use of a recording device (such as a camera or audio recorder) or the deployment of dedicated officers to maintain visual monitoring. It may be concerned with obtaining information, but may also be used to supervise behaviour in circumstances in which no data is obtained. These features are, however, also shared with covert forms of surveillance, which may also be deployed at political protest.

The term 'overt' surveillance is often used to designate surveillance which is 'visible', as opposed to surveillance which is secret, hidden or deceptive. This definition has considerable utility, and is a working definition that is adopted throughout this thesis. The definition is not, however, unproblematic: not all surveillance which is 'overt' is necessarily 'visible'. There are two key difficulties with equating overt surveillance with visible surveillance. The first relates to the distinction made in law between overt and covert forms of surveillance; the second to those aspects of surveillance (such as data processing) which, while not 'covert', are unlikely to be, in any real sense, 'visible'.

The distinction in law between covert and overt surveillance is not made on the basis of whether a surveillance subject sees, or knows about the surveillance that is taking place. Covert surveillance is defined as that 'which is carried out in a manner calculated to ensure that the persons subject to the surveillance are unaware that it is or may be taking place'<sup>65</sup>. The distinction is thus made by reference to the intentions and actions of the surveillance agency, and is not determined by the subjective awareness of the surveillance target.<sup>66</sup> Surveillance may thus be considered 'overt' even if it is carried out without the knowledge of the surveillance subject, if the mechanism used to monitor the subject is not intentionally hidden by surveillance agencies. Surveillance of social media output, for

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<sup>65</sup> Regulation of Investigatory Powers Act 2000 s26(9)(a) (my emphasis)

<sup>66</sup> See, for example, *R v Rosenberg* [2006] EWCA Crim 6.

example, may not always meet the criteria of covert surveillance; but that does not mean that the subject of that surveillance knows it is taking place.

A more fundamental problem arises from defining a form of surveillance purely in relation to the mechanism used. As we have already noted, surveillance cannot be conceived simply as an act of watching: by concentrating on the mechanism which is used, such as police photography, or the use of CCTV, there is a danger that we neglect other aspects of surveillance, such as the purpose for which it is carried out, or what is done with any resulting data. As Gill has argued, surveillance must be properly seen, not as an isolated act of observation, but as a 'chain or cycle of linked activities from the targeting and collection of data through to analysis to dissemination and the actions which can result.<sup>67</sup>

On this conception, only one set of activities – those relating to data collection or monitoring of behaviour – will in any sense be 'visible'. Other aspects of surveillance are invariably opaque. Decisions made as to how or when to 'target' surveillance, for example, (such as whether to focus surveillance on a particular individual or protest group) are unlikely to be subject to public scrutiny. Nor are decisions made on the basis of information collected through surveillance measures likely to be transparent. Further, the processing stages of surveillance are likely to make use of both overtly and covertly obtained data in combination: at this stage, therefore, the distinction between overt and covert surveillance disappears.

### **iii) Preventive surveillance**

It is important for this study to conceptualise surveillance not only in relation to its visibility or the location of its use, but also in the role it is expected to perform within the context of the policing of political protest. Surveillance, as we have already noted, does not sit apart from other aspects of policing, but both facilitates, and is facilitated by, strategic, tactical and policy decisions and the use of coercive powers. An understanding of the impact of surveillance is thus advanced by an understanding of its use and intent.

A key distinction in types of surveillance arises between surveillance undertaken for the purposes of preventing or detecting crime. While a single surveillance mechanism (such as the use of a camera) may be used for both purposes, there is conceptually an important distinction: the detection of crime relates to circumstances in which a crime has been

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<sup>67</sup> Peter Gill and Mark Phythian, *Intelligence in an Insecure World* (2nd edn Polity Press 2012)

committed, whereas the prevention of crime takes place in circumstances in which no criminality has taken place.

Preventive surveillance is itself not a homogenous activity. This thesis argues that there is a fundamental distinction between surveillance which is generalised and protective (or responsive) in nature, such as the monitoring of public places through CCTV; and the use of surveillance for pre-emptive purposes and anticipatory purposes.

This categorisation of preventive surveillance is, it is suggested, of central importance to any conceptualisation of overt surveillance, as it provides a means of understanding the way in which surveillance relates to broader policing strategies. Protective surveillance is, by definition, focused generally on a location or a crowd; it is a 'just-in-case' measure which involves the generalised scanning of an area in order to aid a prompt response to an emerging incident. In a non-technological sense, this may be seen as equivalent to the police constable 'on the beat', carrying out routine patrols. It is preventive, in the sense that it seeks to deter criminal behaviour on the basis that such behaviour will be seen (and thus the perpetrator will be more likely to be caught). Such surveillance may become responsive in response to an incident that has occurred or is about to occur. Responsive surveillance may thus be related to the detection of crime (i.e. the collection of evidence) but may also be used in order to aide tactical police responses. Surveillance of an incident of disorder may enable, for example, appropriate police resources to be despatched.

Pre-emptive surveillance, is a type of surveillance which is concerned with the mitigation or forestalling of risk. Pre-emptive surveillance is focused on individuals or groups of individuals who are considered to pose a *risk* of disorder or criminality. It is distinct from responsive surveillance, in that it is used in circumstances in which no crime has been committed or is considered imminent; and is distinct from protective or generalised surveillance in that it is targeted at specific individuals.

These forms of surveillance overlap and interlink. It is pre-emptive surveillance which, however, is the focus of this thesis. It was considered important, both in conducting interviews and in analysing data, to bear in mind the distinction between suspicion and risk. Risk is concerned with what Zedner has called 'pre-crime', which 'shifts the temporal perspective to anticipate and forestall that which has not yet occurred and may never do

so'.<sup>68</sup> The logic or risk, she notes, is 'less about reacting to, controlling or prosecuting crime than addressing the conditions precedent to it', necessitating the use of surveillance 'even before the commission of crime is a distant prospect'.<sup>69</sup>

### III Data Protection

This thesis attempts to investigate ways in which overt surveillance may be perceived as harmful to the right to a private life, and/or to the right to freedom of assembly; it has also set out to examine the validity of the claim that overt surveillance has a legal basis in common law, and in doing so, to examine the scope of discretion available to the police in carrying out overt surveillance activities. It also considers the potential threat from overt surveillance to Convention rights, particularly the right to respect for private life, and the right to freedom of assembly.

It has not, however, sought to focus this examination on issues of data protection. This is not to suggest that the processing of information does not play an integral role in overt surveillance strategies, nor that regulations on the processing of information (such as data protection provisions) are unimportant. Principles of fair processing and transparency, for example, grant data subjects the (albeit limited) right to obtain information about what data are being processed, by whom and for what purpose. Information about data processing obtained through subject access provisions, obtained by social movement actors, will play an important part in this thesis, and it is acknowledged that such provisions help to make more visible certain aspects of state surveillance – such as the categorisation of such actors in terms of the perceived 'risk' they may pose – that are not readily accessible.

It is nevertheless contended that data protection provisions are of limited assistance in furthering the key questions of this study – whether the police use of overt surveillance has a sufficiently clear and precise basis in law, and whether the potential for surveillance to intrude upon individual privacy and freedom of assembly is sufficiently acknowledged within the human rights framework. It is argued that data protection provisions do not compensate for a lack of clarity in common or statutory law, nor do they function as a way of 'filling in the gaps' in the applicability of human rights to the surveillance of public space.

The data protection regime consists of EU Directives and Regulations, as well as UK enacted legislation. Prior to the 25<sup>th</sup> May 2018, the relevant legislation was the EU Data Protection

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<sup>68</sup> Lucia Zedner, 'Pre-crime and post-criminology?' (2007) 11(2) *Theoretical Criminology* 261, 261-265

<sup>69</sup> *ibid*

Directive (Directive 95/46/EC) and the Data Protection Act 1998. The General Data Protection Regulation, which provided updated rules relating to the protection of natural persons with regard to the processing of personal data, was effective from 25<sup>th</sup> May 2018. It was complemented by the Law Enforcement Directive (LED), known as Directive 2016/680, which dealt with the processing of personal data for law enforcement purposes, and was enacted in UK law by the Data Protection Act 2018. The discussion below relates primarily to the most recent legislation.

The data protection regime, both pre and post 2018, requires that the processing of personal data for the purposes of law enforcement is both lawful and fair. The relevant provisions, as we discuss below, lay out certain conditions which must be complied with in order to render the processing of data lawful. It is important to recognise, however, that these do not compensate for a lack of clarity in relation to the legal basis for overt surveillance: the relevant conditions are broadly drawn, thus providing little assistance in defining the precise circumstances in which the processing of personal data for the purposes of overt surveillance may take place. Further, and more fundamentally, they do not set out to provide a lawful basis for overt surveillance *per se*. The act of overt surveillance is distinct from the act of processing data: a lawful basis for the latter cannot thus provide a lawful basis for the former.

A key element of the right to data protection is the application of the principle of necessity. Current provisions limit the processing of personal data to that which is necessary for a legitimate purpose. Inherent in this is the need also for processing to be proportionate to that purpose: processing must be the least intrusive means of attaining a legitimate aim; the data must be relevant and not excessive for that purpose; and it must be retaining for no longer than is necessary. In this, data protection provisions may be considered to be stronger than human rights provisions, because considerations of necessity and proportionality are relevant to all instances of data processing, whereas considerations of necessity within the framework of convention rights are contingent upon a prior need to establish that an interference with a fundamental right has taken place.

The key limitation of the data protection regime, for our purposes, is that it tends to focus attention narrowly on the necessity and proportionality of the activity of processing data, rather than on the necessity and proportionality of the activity of undertaking surveillance. The concepts are not identical, nor is one an adequate replacement for the other. In order for surveillance measures to be adequately justified, it is essential that considerations of

proportionality extend beyond issues of data protection, and include a recognition of the potential harms that may arise to other individual rights, including the right to privacy and freedom of assembly. It is far from clear whether such considerations play a part in the practical application of the Data Protection Act 2018, or whether the proportionality of processing will be decided more narrowly, with reference to issues of data minimisation and retention (i.e whether the data processed is relevant and not excessive, and not retained for longer than is necessary).

It has been at times suggested that data protection provisions adequately compensate for a lack of precision in the common law, and provide sufficient foreseeability and clarity such that overt surveillance is ‘in accordance with law’.<sup>70</sup> That argument is, however, rejected: the following discussion addresses the limitations of the data protection regime in this respect, and suggests in conclusion that, while data protection is not without relevance, it is insufficient in itself to protect the rights of the surveillance subject.

#### *Data processing v overt surveillance*

The expansive definition of data processing adopted by current data protection provisions means that such provisions have application to a broad range of surveillance activity. The GDPR defines processing as follows:

“processing’ means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction<sup>71</sup>

Further, personal data is itself expansively defined as any information concerning a living individual who can be identified, directly or indirectly, by reference to any identifier (including a number of location data) or by some other identifiable feature.<sup>72</sup> Data protection provisions are therefore applicable not merely to a named person, but to anyone who may be potentially identified as a result of data processing. It is therefore

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<sup>70</sup> This appeared to be the reasoning in, for example, *Catt v Commissioner of Police of the Metropolis* [2015] UKSC 9

<sup>71</sup> GDPR Article 4(2)

<sup>72</sup> Data Protection Act 2018 Part I section 3(2)

relevant to surveillance measures involving the identification, profiling or categorisation of persons.

It is notable that data protection provisions may thus have application in areas of surveillance which have tended to be considered to fall outside the scope of privacy rights. Privacy rights arise in relation to the collection and retention of personal data, but not in relation to the use of data in circumstances in which no data is permanently or systematically retained; privacy rights have been held not to be applicable, for example, to the use of CCTV systems to monitor behaviour in real-time.<sup>73</sup> On the other hand, data privacy rights tend to be restricted to technological forms of surveillance and are not applicable to direct forms of monitoring that cannot be said to be making use of data. One of the particular complaints of social movement actors is, for example, that police officers have been routinely deployed to physically accompany and escort them during public assemblies, thus directly monitoring their behaviour over a sustained period of time. In such circumstances, it is not necessarily the case that personal data is collected or used.

Fundamentally, for our purposes, data protection provisions are concerned with issues of informational autonomy, and do not provide an appropriate framework for consideration of potential harms arising from, for example, physical intrusion, the disruption of decisional autonomy, and stigmatisation.

### *Lawful processing*

Further while data protection provisions lay out conditions required for personal data to be lawfully processed for law enforcement purposes, these are broadly drawn. While they constrain policing bodies from carrying out the processing of data for a non-policing purpose, policing purposes are defined expansively, and the provisions provide little assistance in defining the scope of police discretion with clarity and precision.

The Data Protection Act 2018 addresses the processing of data for the purposes of law enforcement. Law enforcement is, for the purposes of these provisions, itself broadly defined as the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the safeguarding against and the prevention of threats to public security.<sup>74</sup> Prevention is, in this context widely drawn: there is an explicit recognition here that the scope of law enforcement extends beyond the prevention of

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<sup>73</sup> See, for example, *Herbecq and Another v. Belgium* App nos. 32200/96 and 32201/96, (Commission decision 14 January 1998)

<sup>74</sup> Data Protection Act 2018 Part III Section 31

identifiable and specific criminal acts, to include a much broader conception of prevention concerned with the avoidance or mitigation of threat or risk.

The Act also requires that the processing of all personal data is lawful and fair. Fair processing necessitates a degree of transparency, ensuring that certain information must be available to the data subject, including the identity of the controller, the purpose of the processing, and the rights of the data subject to obtain access to their data.<sup>75</sup> Lawful processing requires that one of two conditions must be met: either a) the data subject has given consent to the processing for that purpose, or b) the processing is necessary for the performance of a task carried out for that purpose by a competent authority.<sup>76</sup>

Further conditions apply to the processing of sensitive personal data. Surveillance measures may well involve the processing of sensitive personal data, defined in the Act as data revealing i) racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership; ii) genetic data, or of biometric data, for the purpose of uniquely identifying an individual; iii) data concerning health; and iv) the processing of data concerning an individual's sex life or sexual orientation.<sup>77</sup>

Section 35 (5) Data Protection Act 2018 lays down that the processing of sensitive personal data meet the following conditions:

- (a) the processing is strictly necessary for the law enforcement purpose,
- (b) the processing meets at least one of the conditions in Schedule 8, and
- (c) at the time when the processing is carried out, the controller has an appropriate policy document in place

The last of these conditions may be viewed as a procedural, rather than a substantive constraint upon the circumstances in which data may be lawfully processed, as it simply obliges policing bodies to specify their procedures for securing compliance with data principles, and their policies as regards the retention and erasure of personal data.

Schedule 8 of the Act lays out a number of conditions, at least one of which must be met by policing bodies processing data in the course of overt surveillance practices. These conditions are expansively drawn, however, and provide broad authorisation for policing

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<sup>75</sup> GDPR Article 5(1)

<sup>76</sup> Data Protection Act 2018 Part III Section 35(2)

<sup>77</sup> Data Protection Act 2018 Part III Section 35(8)

functions. Schedule 8(1), for example, authorises data processing where it is 'necessary for the exercise of a function conferred on a person by an enactment or rule of law', if the processing is 'necessary for reasons of substantial public interest'; Schedule 8(2) enables data processed for the administration of justice; Schedule 8(3) permits processing which is necessary to protect the 'vital interests of the data subject or of another individual'; and Schedule 8(4) allows processing necessary to protect the 'safeguarding of children and of individuals at risk'.

Further, data obtained directly from the public realm may automatically meet the conditions of Schedule 8. Schedule 8(5) provides that the requirements of schedule 8 will be met if the data concerned are 'manifestly made public by the data subject'. The term 'manifestly made public' is not further expanded or defined in the Law Enforcement Directive of 2016, or in the 2018 Act, however the Article 29 Data Protection Working Party has recommended that it should be narrowly interpreted, and should apply only if the data subject placed their data voluntarily in the public domain in the full knowledge that it would be accessible to law enforcement authorities.<sup>78</sup> For example, they note, data placed on a social networking sites may be available to the state, yet if the users of such a site 'are in fact not aware that their data are available to police authorities', the data are not manifestly made public.<sup>79</sup> The processing of sensitive personal data collected as a result of the police surveillance of the virtual public realm, such as social media sites and public forums may therefore, still need to meet at least one of the other conditions in Schedule 8. This may not be the case in relation to data collected directly from the physical public realm, for example through the filming and photography of public space.

In any case, it is clear that the circumstances in which policing bodies may process personal data for the purposes of overt surveillance are very broadly defined. The Act does not assist in clarifying the precise conditions in which the police may legitimately make use of overt surveillance, nor does it help to specify the category or categories of persons who may legitimately be subject to it.

### *Necessity*

The scope of police discretion in processing data may be more effectively constrained by the requirement of necessity. As the processing of personal data inevitably results in a limiting of the fundamental right to data protection, any processing of such data must be

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<sup>78</sup> Article 29 Working Party, Opinion on some key issues of the Law Enforcement Directive (EU 2016/680) Adopted on 29 November 2017, 8

<sup>79</sup> *ibid*

necessary for a legitimate aim. Further, the conditions for the processing of sensitive data in section 35(5) require that any processing must be ‘strictly necessary’ for a law enforcement purpose.

The UK courts have recognised that ‘necessity’ implies that the measure must be proportionate to a legitimate aim, and the least restrictive way of achievement that aim,<sup>80</sup> and Baroness Hale has noted that, ‘in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less.’<sup>81</sup> The European Data Protection Supervisor has noted that necessity is fundamental when assessing the lawfulness of the processing of personal data, and requires that the processing operations, the categories of data processed and the duration that data are kept must be necessary (and therefore not excessive) for the purpose of data processing.<sup>82</sup> Further the principle of proportionality dictates the need to ‘strike a balance between the means used and the intended aim’. In the context of data protection, this means that the use of the processing must be justified, appropriate safeguards are in place to protect the rights of the data subject, and that ‘only that personal data which is adequate and relevant for the purposes of the processing is collected and processed.’<sup>83</sup> The distinction between what is ‘necessary’ and what is ‘strictly necessary’ is not defined in the Act, or in the EU directive, although the Article 29 working party has commented that ‘strict necessity’ indicates also the need to ‘foresee precise and particularly solid justifications for the processing of such data’.<sup>84</sup>

The question of proportionality in data processing is therefore likely to focus particularly on considerations of data minimisation, i.e. whether the personal data being processed is relevant and limited to that which is necessary, and whether the data is held for a longer period than is necessary for the purposes of the processing.<sup>85</sup> The importance of this protection should not be trivialised. However, a reliance on data protection legislation alone provides an inadequate basis for the recognition of other broader harms arising from overt surveillance.

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<sup>80</sup> South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55, 27

<sup>81</sup> See South Lanarkshire Council v Scottish Information Commissioner [2013] UKSC 55; [2013] 1 WLR 2421, 27 per Baroness Hale

<sup>82</sup> Statement of the European Data Protection Supervisor available at [https://edps.europa.eu/data-protection/our-work/subjects/necessity-proportionality\\_en](https://edps.europa.eu/data-protection/our-work/subjects/necessity-proportionality_en) accessed 22/05/2019

<sup>83</sup> *ibid*

<sup>84</sup> Article 29 Working Party, Opinion on some key issues of the Law Enforcement Directive (EU 2016/680), 29 November 2017, 8

<sup>85</sup> See for example, Catt v Commissioner of Police of the Metropolis [2015] UKSC 9

The harm to individuals from state surveillance cannot be fully assessed in terms of informational autonomy. It is often not the fact that information has been collected that is important, but also the *way* it is collected; further it may be the fact that surveillance takes place, rather than the collection (or use) of personal data, that has an impact on the autonomy of the surveillance subject. While considerations of proportionality may be an important legal safeguard of the rights of the individual, the effectiveness of such safeguards with respect to overt surveillance must depend on judicial recognition of the range of potential harms that may result. They cannot be reduced only to issues of data protection, a reliance on data protection alone is an insufficient means of protecting fundamental rights in the face of state surveillance.

#### IV Research validity and the selection of research method

There has been much academic discussion as to the extent to which qualitative research is capable of achieving validity. It is sometimes suggested that the difficulties in replicating qualitative studies restricts their generalisability. It is important to recognise, however, that the goal of qualitative research is not (as in quantitative research) to produce a set of standardised findings that are validated by the extent that they can be reproduced by other researchers working in the same area or studying the same questions. Rather it is, as Schofield has noted, 'to produce a coherent and illuminating description of and perspective on a situation that is based on and consistent with a detailed study of that situation'<sup>86</sup>. The reliability of qualitative research therefore depends on its internal, rather than external validity. It is important therefore that appropriate mechanisms are used for the processes of collecting and analysing data, and these are explored further below.

It was anticipated however, that the findings will have relevance beyond the sample group. It is argued that the examination of the experiences of social movement actors in the context of specific instances of state surveillance can assist in understanding the potential impact of state surveillance on social movement actors (and by extension, social movements) in other, similar situations.

It is important to note that this study does not set out to make claims about the 'typical' or usual experience of participants in protest in relation to police surveillance; nor does it seek to demonstrate a strict causal relationship such that police activity x will always result in

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<sup>86</sup> Janet Ward Schofield, 'Increasing the Generalizability of Qualitative Research' in Martyn Hammersley (ed) *Social Research: Philosophy, Politics and Practice* (Sage 1993), 202

social movement response *y*. It is recognised at the outset that the relationship between individual social movement actors and specific police surveillance activities is complex and varied, and that different people may react in different ways to different forms of police attention. Rather the aim of the research is to shed light upon what *can* happen to social movement actors, and by extension to social movements, as a result of police surveillance activity.

To this end, the aim of the research was to locate the study in situations which were known or expected to be exceptional, and to examine what, in those situations, was actually going on. It did not seek to examine the 'typical' protest experience, but rather to identify and examine the way in which protesters experienced different surveillance activities of varying intensity.

The use of individual interviews was considered the most appropriate means of examining these experiences. This would allow an exploration of people's experiences of surveillance at different times and in different locations, allowing the researcher to move beyond discussion of 'typical' experiences to include those that were non-typical or exceptional. Alternative means of data collection were less able to deliver this: ethnographic observation, for example, would confine the research to the current 'moment', and would not allow an examination of people's experiences of surveillance strategies over time. The option of a single case study – of a particular protest, protest group, or social movement – was rejected for similar reasons.

## V Sampling and interview design

Having decided upon a research method making use of interviews with social movement actors, it was then necessary to develop an interview design that could allow the researcher fully to explore participants' experiences of overt, pre-emptive surveillance, taking place within the confines of political protest. This involved two key stages: the selection of interview candidates; and selection of an appropriate method for conducting interviews.

### i) Research sampling

Given our thematization of the research area above, what was required for the purposes of this study was access to individuals who had, within the context of political protest, been subject to surveillance which was non-generalised (i.e. was focused personally on them as individuals, or on their relevant group); and which was pre-emptive rather than responsive

(i.e. it was not carried out in response to the commission of offences, or for the primary purpose of investigating or prosecuting criminality). A purposive, rather than random sample was therefore required. A random sample of people who had been engaged in protest activity was thus unlikely to yield useful results: it was necessary to seek out groups and individuals who were most likely to have experienced the type of surveillance under investigation.

Interviewees were therefore sought from a sub-set of protest participants: those involved in contentious protest within the context of a social movement organisation. Social movements engage in protest in the context of a broader campaign which involves a challenge to established powerholders or what Tarrow terms as 'elites, opponents and authorities'.<sup>87</sup> They are contentious in the sense that they challenge entrenched practices and power dynamics by means of 'repeated public displays of that population's numbers, commitment, unity and worthiness'.<sup>88</sup> Social movement protests are therefore not 'one-offs': they form part of on-going calls on powerholders to take some form of action (or inaction). Social movement protests may (although do not necessarily) include forms of direct action or civil disobedience. They may involve contention over space, by means of utilising obstructive protest, or protest which disrupts or impedes the access of others to public (or private) space.<sup>89</sup> Social movement activities are not always, although they may be transgressive. They do however, often involve innovative and creative forms of claim-making which may be distinct from traditional forms of protest, and may thus lack legitimacy in the eyes of state authorities.

These forms of protest attract a degree of state attention that does not necessarily attach to protest involving established political actors; or which is likely to arise in local disputes relating to issues of personal interest. As social movement protests are part of an on-going campaign, surveillance is likely to feature at a strategic level of policing, and encompass all stages of the surveillance cycle as identified by Gill above. In short, protests taking place in the context of social movements are likely to experience state surveillance of all types, including, of course, pre-emptive or preventive forms of targeted overt surveillance.

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<sup>87</sup> Sidney Tarrow, *Power in Movement* (3<sup>rd</sup> edn CUP 2011) 4

<sup>88</sup> Charles Tilly, 'Social Movements as Historically Specific Clusters of Political Performances' (1993-1994) 38 Berkeley Journal of Sociology 7

<sup>89</sup> Mike Sajko and Daniel Béland, 'Space and protest policing at international summits' (2008) 26 *Society and Space* 719

Obtaining information about the use of surveillance in this context necessitated interviews with social movement actors. In order to provide sufficient research breadth while preventing the data from becoming overt ‘scattergun’, it was decided to seek interviewees who were active in one or more of three social movements prominent in the UK between the years 2000 and 2016. These movements were selected to provide a cross section of protest groups, and consisted of: the environmental movement; the pacifist or anti-militarist movement; and the anti-capitalist or anti-globalisation movement.

The environmental movement encompasses various organisations opposed to fossil fuel extraction and processing. This movement has made extensive use of non-violent direct action (usually involving minor infractions such as trespass) and placed a strong emphasis on mass activist gatherings in protest camps (some of which were termed ‘climate camps’). A week long ‘climate camp’ near Heathrow in 2008, for example, was accompanied by various ‘direct action’ protests and acts of civil disobedience, including protests at the airport, the ‘invasion’ of the lobby the headquarters of British Petroleum by eight protesters who glued themselves to the doors, and a blockade of the road access to Sizewell nuclear power station.<sup>90</sup>

The anti-militarist movement encompasses a diverse range of groups, including some with a strong pacifist ideology. They too have made considerable use of direct action, which most of which has been obstructive or disruptive, sometimes involving incursions into military bases. In isolated cases movement actors have undertaken actions which have resulted in significant acts of damage, although not all such acts of destruction have amounted to criminal offences. In 2009, six people caused £200,000 worth of damage to an arms production factory in Brighton. All six were ultimately acquitted of charges of criminal damage, after successfully arguing they believed their action was necessary to prevent military equipment being unlawfully exported and used against civilians in Palestine.<sup>91</sup>

The third movement is variously termed as the anti-capitalist or anti-globalisation movement. In contrast to the other two movements, this movement has often made use of large scale mass demonstrations, often (although not exclusively) in response to summit meetings or meetings of neoliberal institutions such as the International Monetary Fund

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<sup>90</sup> John Vidal, ‘Climate change protests spread for a day of disobedience’ *The Guardian* 21 Aug 2007

<sup>91</sup> ‘Not Guilty – “Resisting War Crimes Is Not A Crime” – Its Official’

<https://decommissioners.wordpress.com/> accessed 06 September 2018

(IMF) or World Trade Organisation (WTO). Such protests have often involved creative and innovative actions, such as the call for protesters to engage in the ‘guerrilla gardening’ of London as part of protests on Mayday 2000, and to turn up ‘armed’ as one leaflet put it, ‘with trowels, seeds and imagination’. <sup>92</sup> The use of public space for anti-capitalist protest has often been contested, and resulted in confrontation between protesters and the police.

The selection of interviewees was made through the use of pre-existing social networks and through the use of snowball sampling. This method of sampling is often used in qualitative studies to develop samples from hard-to-reach groups, and involves a process in which initially identified subjects refer the researcher to other potential respondents. The aim of snowball sampling is not to produce a representative sample, but to obtain a pool of respondents appropriate for the study in question.<sup>93</sup> Although not statistically representative, it is recognised that this approach to the selection of primary sources, which is based on their relevance to the theoretical focus of the research, does allow for a degree of generalisability.<sup>94</sup> As the sampling has led to the selection of respondents in which a phenomena is most likely to occur, generalisation arises from the ‘generalisability of case to the theoretical proposition rather than to populations or universes’.<sup>95</sup>

Using this method of sample selection thirty participants were obtained from across the three target movements. Most were activists, although some were involved with social movements in other ways. Two interviewees were journalists who, although had been designed by police as being engaged with social movement organisations, had attended protests only in a professional capacity. Some were primarily involved in what may be broadly described as protest support networks, such as providing legal advice or support, acting as legal observers, or assisting with the provision of food or mobile kitchens. All had direct experience of being subject to various forms of police surveillance in the context of protest.

## ii) Interview design

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<sup>92</sup> Natasha Walter, ‘From Seattle to guerrilla gardeners on May Day, the activists are learning to do joined-up protest’ *The Independent* 22 April 2000

<sup>93</sup> Matt Henn, Mark Weinstein, Nick Foard, *A Short Introduction to Social Research* (Sage2006), 133

<sup>94</sup> Matt Henn, Mark Weinstein, Nick Foard, *A Short Introduction to Social Research* (Sage2006), 156

<sup>95</sup> Alan Bryman, *Quantity and Quality in Social Research* (Sage 1988), 90

In keeping with the adopted methodology of grounded theory, interviews were conducted in an open and flexible manner. Initially two interviews were conducted to assist the researcher with thematization, and adjustments were made to interview design before other respondents were interviewed. Initial questions were framed broadly, asking respondents whether they had experience of surveillance while being involved in protest or protest planning; what that surveillance consisted of; and what effect they thought the surveillance had on them personally, and the mobilisation or protest that was taking place.

In initial interviews, an attempt was made to ask respondents specifically about *overt* surveillance; however it was difficult to define the term in a way that was easily understood and did not pre-determine their response, and this was abandoned. Instead, the interviewer allowed respondents to talk generally about all aspects of surveillance that they had experienced, and follow-up questions were then focused on their experience of overt, preventive surveillance. The broad approach did, however demonstrate the interrelation between overt and covert forms of surveillance. At the time the interviews took place, many interviewees had become aware that they had not only been subject to overt forms of surveillance, their groups had also been infiltrated by undercover police officers. One interviewee described a particular meeting he attended: while overt surveillance teams took photographs of individuals arriving for the meeting, the meeting itself was attended by an undercover police officer. It was the combination of both forms of surveillance that provided the police with a complete picture of who attended and what was said.

Interviews were predominantly conducted face-to-face, and took place in various locations across England and Wales. A small number of interviews could not be carried out in person, as the respondents were not in the UK at the time the interviews took place. In these cases, the interview was conducted using video conferencing technology. Interviews were mainly conducted with respondents singly, although in some cases took place with two or three people together. Interviews were electronically recorded and transcribed in full.

All respondents were given assurances of anonymity and confidentiality: that the person would be nameless, and as far as possible unidentifiable; and that the data would be held in confidence and not be made available, in its entirety, for public consumption. This was critical, as the testimony of respondents in its raw form contains references to sensitive information, including in some cases references to criminal conduct or police investigations

involving the respondent themselves or others. It also contains information that may lead others to be able to identify the respondent.

Interviewees were informed however, that extracts from their testimony would be included within this thesis and may be published. Efforts were made to ensure that, as far as possible, the relevant extracts would not contain information that would enable any respondent to be identified. In some cases, however, where it is relevant to the thesis, a person's role in the social movement is given in general terms (i.e. that they were an organiser). The greatest threat to anonymity arises in relation to the two journalists who were interviewed about their experiences of surveillance. Although there are many thousands of people participating in social movements, there are a much smaller number of journalists that consistently cover these events, therefore the risk that they may be identified from the extracts given in this thesis is greater. These risks were explained to the respondents before beginning the interviews.

### **iii) Data analysis and reporting**

The data was analysed initially through the use of open coding, a process described by Glaser and Strauss as referring to the 'breaking down, examining, comparing, conceptualising and categorising data'.<sup>96</sup> Initial codes related to the form of surveillance that had been experienced (e.g. being photographed, being identified or being stopped and searched); the ways in which the individual described or reacted to it (e.g. it was accepted as normal, caused anxiety, described as intimidating); and the way in which it affected the mobilisation (e.g. it was disruptive, or put people off). Ultimately more conceptual categorisations emerged enabling the construction of a matrix of harms, relating to police actions of intrusion, identification and persistent monitoring, and an accompanying loss of personal integrity, public anonymity and decisional autonomy. Conceptualisations on the impact of surveillance on assembly mobilisations related to a loss of political opportunity, social capital and the de-legitimisation of collective frames.

Extracts of interview data are used in the following chapters to illustrate and explain these conceptualisations, which have been further developed with reference to relevant literature. The purpose of the empirical data is to demonstrate the ways in which surveillance is considered harmful, and the circumstances in which those harms arise. The data is presented, in the following chapters, to counter judicial assumptions of surveillance

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<sup>96</sup> Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Transaction Publishers 2009), 61

as being essentially benign and harmless, and to address the misconception of overt surveillance being merely equivalent to observation of the public realm. In the absence of a full understanding of the harms that arise from overt surveillance, the courts are unable to properly balance the competing interests that arise in the application of rights to privacy or freedom of assembly; or to ensure, as we shall shortly see, that the practice has an adequate basis in law.

## Chapter 2: The common law as a basis for overt surveillance

While covert forms of surveillance have been placed on a statutory footing, most forms of overt surveillance have a legal basis in the common law. In this section we consider the extent to which the common law provides a sufficiently sure and certain basis for the operation of police surveillance practices. The courts have frequently asserted or assumed that non-statutory forms of surveillance have an adequate basis in the common law, but have consistently failed to define, explain or delineate its nature or scope. This section explores two antithetical grounds on which the courts appear to have based their reasoning: that the police constable has, as the natural person has, the freedom to take any actions which are not tortious or prohibited by law; or alternatively that the police constable may rely on a broad and largely undefined positive police power to prevent and detect crime.

Neither position, it is argued here, is unproblematic. The freedom to do that which is not forbidden entails an extensive degree of discretion such that is not possessed by statutory bodies, and which is (at least arguably) constrained even for ministers of government. Such a claim appears to be predicated on the conception of the constable as a 'citizen in uniform',<sup>97</sup> a person who is not 'distinct from the general body of citizens',<sup>98</sup> but who is simply employed to 'do tasks that any citizen would do as a moral duty'.<sup>99</sup> It is argued here that not only does this conception of the constable fail to reflect the position of the modern constable, with a range of coercive powers and extensive resources at his disposal, it is unsupported by the study of the historical development of the police.

The alternative conception, that the police have a positive basis in law to undertake overt surveillance practices is also not without difficulty, not least because such a broad and undefined common law power also poses a risk of the arbitrary abuse of power. The courts, in relying on such a power, have not sought to define its scope or explain its heritage. From a historical perspective, however, it is argued that any traditional concept of crime prevention is inadequate to provide a legal basis for modern and sophisticated pre-emptive forms of surveillance. The duty of the constable has always been concerned with protective surveillance, with patrolling the streets, and 'setting the watch', and with

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<sup>97</sup> Robert Reiner, *Policing, Popular Culture and Political Economy: Towards a Social Democratic Criminology* (Routledge 2011) 133

<sup>98</sup> Home Office, *Royal Commission on Police Powers and Procedure* (Cmd 3297 1929) 6

<sup>99</sup> Robert Reiner, *Policing, Popular Culture and Political Economy: Towards a Social Democratic Criminology* (Routledge 2011) 133

preventing crime by apprehending criminals and bringing them to justice. It is a considerable leap, however, to assert that such duties and powers provide an adequate basis for pre-emptive forms of surveillance, predicated on conceptions of risk rather than imminent danger, and in circumstances in which no crime has been committed and there is no evidence of criminal intent.

Further, it is argued there is an urgent need for judicial clarification and delineation of the common law powers of the police in this regard. There is an inherent contradiction between the police officer as citizen, reliant only on the authority of the ordinary person; and the police constable as state actor, able to access and utilise the extensive resources and authority of the state. The police officer may have the residual freedoms of the ordinary citizen; or he may have the specialist positive powers of the constable. To claim simultaneously to be both provides a degree of unfettered discretion which must surely run counter to rule of law principles.

This work therefore proceeds as follows, in three parts. It begins by proving a brief doctrinal overview of judicial approaches to establishing or asserting a common law basis for state surveillance actions. In the second part it examines on the claim that the constable has the ability to do that which is not forbidden. It approaches this claim by examining the status of the constable within a historical context, and highlighting the ambiguous nature of the constable as both 'citizen in uniform' and as servant or office holder of the Crown. It is argued here that the uncertain and contradictory constitutional status of the constable does not provide a sound basis for granting the constable the residual liberties enjoyed by the ordinary citizen. In the third part, this thesis considers the alternative claim, that the police have a positive power to carry out overt surveillance measures, based on their duty and power to prevent crime. While it is not disputed that the police possess a common law power to prevent and detect crime, it is nevertheless argued that the reliance on this as a legal basis for pre-emptive forms of surveillance has no historical basis, and amounts to a significant extension of police powers. In conclusion, this work points to the difficulties of such an uncertain and precarious basis for overt surveillance powers, not least in establishing that surveillance measures are 'in accordance with law' for the purposes of compliance with Convention requirements.

## Judicial approaches to the common law as a basis for overt surveillance.

Before turning to an examination of the historical development of the constable, it is perhaps useful to lay out a brief judicial history of the circumstances in which the courts have found that state surveillance measures have required no positive basis in statute. The UK courts have, as we shall see, not been particularly expansive in delineating or explaining the nature, scope and extent of police powers, or in providing a discussion of the historical basis for, of constitutional implications of, these claims. Frequently the courts have done little more than assert or assume the existence of a legal basis in the common law for the taking of images, and the recording and dissemination of personal data. There has been little by way of further elucidation: rather it appears to be considered simply something that the police have a clear and evident power to do.

Although neither fully explained nor explicitly recognised by the courts, there is evidence of a degree of movement in judicial thinking about the role of the common law in relation to police surveillance activity. While in the early cases of *Malone* and *Murray* the courts appear content to rely on the claim that the police may do 'that which is not forbidden', more recent judicial thinking (such as arises in *Catt* and *Re JR38*) appears to favour the alternative claim, that there is a broad positive police power to prevent and detect crime which provides a valid legal basis for surveillance activities.

This shift in judicial approach must be seen in the context of development of the human rights framework in the UK. The 1998 Human Rights Act (HRA) fundamentally altered the legal landscape in relation to the exercise by the police of coercive powers in two ways. First, the HRA places a direct obligation on the police to act in a way that is compatible with Convention rights, and (in most cases and certainly where qualified rights are at play) to act in a proportionate manner.<sup>100</sup> This required the police to act, not merely according to the letter of the law, but to actively give regard, in all their activities, to the Convention rights of all members of the public. Inevitably, this must cast some doubt as to the extent to which the police, operating within a post-HRA framework, can be said to be free to do 'that which is not forbidden'. Secondly, the HRA requires, by virtue of s.3, Convention-compatible interpretations of statutory powers – for example in the Police and Criminal Evidence Act 1984 – wherever that is possible.

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<sup>100</sup> Section 6(1) Human Rights Act 1998

A further relevant factor may be the corresponding development in judicial attitudes towards the broader question of whether it is constitutionally valid for state authorities to rely on the residual liberties available to the natural person. This is explored in more detail later in this chapter, but may be aptly summed up by the dicta of Lord Justice Laws in the case of *R v Somerset County Council ex parte Fewings and Others*:

. . . Public bodies and private persons are both subject to the Rule of Law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose.<sup>101</sup>

It is not suggested that individual police officers require a positive power to do normal everyday tasks that any of us could do – no-one would argue, for example, that a constable does not have the liberty to go into a shop while on duty to buy a chocolate bar. The decision in *Fewings* would suggest, however, that there must be some doubt as to whether as police officer, when acting as a police officer, may rely on the residual liberty of the natural person, particularly when undertaking intrusive or coercive activities.

The case of *Malone* predates both the HRA and the *Fewings* judgment. The High Court concluded that state bodies did not require an express statutory power to obtain information from the tapping of a telephone line.<sup>102</sup> The issue arose following a trial, during which it came to light that the police had intercepted the plaintiff's telephone conversations. Strictly speaking the interception had not been carried out by the police, but by the Post Office acting on the request of the police, under a warrant issued by the Secretary of State, although this was not a distinction upon which the court attached much weight. Sir Robert Megarry VC, delivering the judgment made it clear he believed that this

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<sup>101</sup> *R v Somerset County Council ex parte Fewings and Others* [1995] 1 WLR 1037

<sup>102</sup> *Malone v Metropolitan Police Commissioner* [1979] Ch. 344

was an area which 'cries out' for legislation; nevertheless, he was not 'unduly troubled by the lack of English Authority'. He noted,

...apart from certain limited statutory provisions, there was nothing to make governmental telephone tapping illegal; and the statutory provisions of themselves assume that such tapping is not in other respects illegal. That being so, there is no general right to immunity from such tapping. England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden.<sup>103</sup>

The decision in *Malone* was subject to criticism for restricting liberties through the development of the common law. The implication of the judgment, Fenwick has noted, was that 'unless a right could be said to be recognised by the common law, public authorities could invade it without relying on statute, the prerogative or common law rules'.<sup>104</sup>

The European Court of Human Rights (ECtHR) subsequently held that the reliance on the common law was not in such circumstances sufficient, as it did not 'indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities'.<sup>105</sup> Before legal proceedings concluded, however, the government had taken measures to place the interception of communications on a statutory footing.<sup>106</sup>

In *Murray*<sup>107</sup> the issue of the scope of common law for authorising state surveillance practices arose again. This case was concerned with the actions, not of the police, but of the armed forces who had effected an arrest under the Northern Ireland (Emergency Provisions) Act 1978, and taken a woman into custody. The case primarily concerned a claim for false imprisonment, but also included a claim relating to the taking of photographs of a person detained in custody by the armed forces in Northern Ireland. While the police had statutory powers to take a photograph of a person detained in custody, using force if required, no equivalent power was available to the army. The Court of Appeal concluded however, that, as the taking of photographs involved no assault, and therefore was not tortious, there were no grounds to consider it to be unlawful. 'According

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<sup>103</sup> *Malone v Metropolitan Police Commissioner* [1979] Ch. 344

<sup>104</sup> Helen Fenwick, *Civil Liberties and Human Rights* (4<sup>th</sup> edn Routledge 2007), 115

<sup>105</sup> *Malone v United Kingdom* (1985) 7 EHRR 14 [79]

<sup>106</sup> *Interception of Communications Act* 1985

<sup>107</sup> *Murray v Ministry of Defence* [1987] NI 219

to the common law, the court stated, there is no remedy if someone takes a photograph of another against his will.<sup>108</sup>

The case was subsequently heard by the European Court of Human Rights, which found there had been no violation of Mrs Murray's Article 5 or Article 8 rights. The ECtHR held in this case that the measure was in accordance with law, on the basis that the taking of photographs of Mrs Murray while in detention did not infringe any recognised tort in English law. The Court noted that, in general law 'it is lawful to take a photograph of a person without his or her consent, provided no force is used', and that as a result, '[t]he common-law rule entitling the Army to take a photograph equally provides the legal basis for its retention.<sup>109</sup>

In *Wood* the Court of Appeal further considered the taking of photographs.<sup>110</sup> On this occasion the images were taken by a dedicated police surveillance unit of a campaigner in a public street. The court found that the taking and retention of the images amounted to a disproportionate interference with privacy rights, but reached no concluded view on whether the taking (and subsequent retention) of photographs of the claimant by the police in a public place was 'in accordance with law'. Lord Collins nevertheless asserted without further explanation that 'the taking of the photographs in the present case was lawful at common law'.<sup>111</sup> Lord Justice Laws similarly stated, citing *Murray*, that, as a legal basis for the taking of photographs in a public place, 'the common law suffices'.<sup>112</sup>

This line of cases appears to suggest that the mere absence of prohibition, ultimately considered inadequate by the ECtHR in *Malone* as a legal basis for the tapping of telephones, may nonetheless be considered to provide a sufficient degree of certainty and clarity to form a legal basis for overt surveillance measures such as the taking and retention of photographs.

In *Catt*, however, the Supreme Court appeared to take a different tack. This case involved police actions in monitoring the participation of the claimant, a veteran campaigner, in a series of public protests, collecting and retaining the claimant's personal data in police information systems. The legal basis for such surveillance activities, the Supreme Court

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<sup>108</sup> *Murray v Ministry of Defence* [1987] NI 219

<sup>109</sup> *Murray v United Kingdom* (1995) 19 EHRR 193 [40]

<sup>110</sup> *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414

<sup>111</sup> *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 [98]

<sup>112</sup> *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 [55]

noted, lay not in a residual power of the police to do that which is not tortious, but in a positive common law power of the police to prevent crime. Lord Sumption noted,

At common law the police have the power to obtain and store information for policing purposes, i.e. broadly speaking for the maintenance of public order and the prevention and detection of crime. These powers do not authorise intrusive methods of obtaining information, such as entry upon private property or acts (other than arrest under common law powers) which would constitute an assault. But they were amply sufficient to authorise the obtaining and storage of the kind of public information in question on these appeals.<sup>113</sup>

The issue of overt photographic police surveillance further arose in the case of *In Re JR38*, in which the Supreme Court considered the applicability of privacy rights to the dissemination of images taken by police in a public place. The images in question were taken overtly by police camera teams during an incident of public disorder, and the image was publicly disseminated in order to assist police with the identification of a person suspected of having committed public order offences. The court concluded that there had been no violation of the claimants rights, but was divided on whether the dissemination of the image had amounted to an interference which required justification under Article 8(2).

The court paid relatively little attention to the question of whether either the initial filming or the subsequent act of publicly disseminating the image, had a legal basis in law. Lord Kerr, who briefly addressed the issue, placed weight on the ‘general duty on police officers to prevent the commission of offences and, where an offence has been committed, to take measures to bring the offender to justice’.<sup>114</sup> He also, however, suggested that the requirement for police actions to be ‘in accordance with law’ may have been met simply because there was ‘no breach of data legislation’.<sup>115</sup> In the circumstances however, having found no breach of the claimant’s rights, the court was not required to decide the issue, and so Lord Kerr’s comments are clearly *obiter*.

These cases raise two broad questions. The first relates to the legitimacy of making the claim, in English law, that the police have either the freedom of the natural person to do

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<sup>113</sup> *Catt v Commissioner of Police of the Metropolis* [2015] UKSC 9 [7]

<sup>114</sup> In the matter of an application by JR38 for Judicial Review (Northern Ireland) [2015] UKSC 42 per Lord Kerr [69]

<sup>115</sup> In the matter of an application by JR38 for Judicial Review (Northern Ireland) [2015] UKSC 42 per Lord Kerr [70]

that which is not forbidden; or that they may rely on a positive common law power to undertaken surveillance measures. The second relates to whether, in any case, such a claim provides sufficient certainty so as to meet Convention requirements that measures which involve an interference with individual privacy rights are 'in accordance with law'.

While the ECtHR in *Murray* appeared to suggest that the common law was an adequate basis for the taking of photographs, more recent decisions have cast doubt as to whether the common law will provide sufficient certainty for measures which involve the taking and retention of personal data.

In *Marper*, the European Court of Human Rights considered the taking and retention of biometric data of a person held in police custody. It held that statutory regimes for the retention of personal biometric data obtained in police custody were overly blanket and indiscriminate, thus providing insufficient safeguards against the risk of abuse or arbitrariness.<sup>116</sup> On this basis it seems unlikely that the common law alone would provide a sufficient legal basis for the retention of custody images.

The claims made by the courts about the function of the common law in this context are not only distinct, they are antithetical. The claim made in *Murray* and *Malone* is that there is no need for a positive power to undertake surveillance, as the police may rely on a residual liberty to take any such actions which are not tortious, i.e. which do not involve a use of force or coercion, or any trespass onto the person or property, or otherwise prohibited. The second claim (advanced in *Catt*) is that there can be found, within the common law, a positive power for the police to undertake surveillance measures deriving from the constable's specific duty to prevent and detect crime, at least to the extent that these measures involve the collection and retention of personal data from the public realm.

These two conflicting claims reflect more generally the ambiguous and contradictory nature of the legal status of the police: laying claim to a status of being no more than a 'citizen in uniform' while simultaneously acting as a representative of a powerful and expansively resourced state body. In order to get to the heart of this apparent incongruity, we need to examine in more detail the development of the modern police from an historical context. The status of the police suggests two possible grounds for the claim that the police may do that which is not forbidden, arising first from their status as citizens, and secondly from their status as servants of the Crown. Ultimately it is argued that

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<sup>116</sup> *Marper and S v United Kingdom* (2009) 48 EHRR

neither claim is persuasive: the police are fundamentally a public body, and as such are subject to the constraints of public law.

### **The status of the constable**

The status of police constables has been the subject of long and still unresolved debate.

The orthodox view is that the constable (a term which applies to all police officers, including the Chief Constable of regional forces, and the Commissioner of the Metropolitan Police) has its origins in the medieval constable, who was no more than a citizen in status, with no powers over and above others in his community.

While there is no absolute certainty about the exact origins of the police, it is generally assumed that they developed from a perceived need within defined communities to bring offenders to justice, and to protect towns and villagers from wandering thieves and vagabonds.<sup>117</sup> By the twelfth and thirteenth centuries, while clear peacekeeping structures had evolved, policing remained a fundamentally shared, communal responsibility. The constable was responsible for ensuring that warrants were enacted, and for 'setting the watch' – ensuring that volunteers were posted to keep watch, and raise the alarm if the King's peace was threatened by violence or crime. If such incidents occurred, it was the responsibility of the whole community to attend to the 'hue and cry' and come to the constable's aid – a system that 'appears to have originated in the normal expectation that this is what neighbours would do'<sup>118</sup>. Policing was, therefore, an essentially collective, inclusive activity: citizens of a town would keep watch over their own locality, and would depend upon their neighbours for help if it were needed. The Crown had little involvement in such affairs, over which it had little inclination – or resources – to intervene.<sup>119</sup> The constable's role appeared to have been largely a co-ordinating one: he had no particular status, would have been chosen from his local community<sup>120</sup>, working part-time and often unpaid, carrying out his duties in addition to his normal employment<sup>121</sup>.

The early constable, while assuming particular responsibilities and duties, thus had no greater powers than other citizens. H. B. Simpson has described the role in the following terms;

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<sup>117</sup> Clive Emsley, *The English Police: A Political and Social History* (2<sup>nd</sup> ed Longman 1996) 9

<sup>118</sup> Philip Rawlings, 'Policing before the Police' in Tim Newburn (ed) *Handbook of Policing* (Willan 2003) 42

<sup>119</sup> *ibid* 42

<sup>120</sup> Tony Bunyan, *The History and Practice of the Political Police* ( Quartet 1976) 59

<sup>121</sup> Clive Emsley, *The English Police* (2nd ed Longman 1996) 99

“...the constable in the eye of the law was not merely the officer of the township...or tithing for which he was appointed, but its true representative, exercising in his own person its communal rights, and subject to its communal responsibilities.”<sup>122</sup>

Over time, however, the role became more specialised, and subject to hierarchies and bureaucracies. Emsley suggests that an increasing role for justices of the peace, who were (unlike the constable) drawn from local gentry, may have compromised the position of the constable, particularly by the seventeenth century. By this time, Emsley argues, the justice’s had adopted a more rigid approach, seeking consistent and uniform enforcement of statutory law. The constable, however, as a member of the community in which he worked, may be more disposed to flexibility, tolerance of local custom and practice, and the avoidance of conflict.<sup>123</sup> The constable may therefore have been susceptible to being portrayed as negligent or corrupt in not ‘properly’ applying the law; or conversely as lacking independence, and being ‘the justice’s man’.<sup>124</sup>

By the nineteenth century direct community engagement in ‘keeping the watch’ and responding to the ‘hue and cry’ had given way to a divergence of paid thief-takers, ‘night watchmen’ and security personnel.<sup>125</sup> Policing had become at least semi-professionalised, and overseen by local authorities and formal watch committees. Historians differ as to the efficiency and effectiveness of these systems, which had evolved from the traditions of constables and night-watches.

Orthodox historical accounts have stressed the pressures on traditional structures from rising crime levels<sup>126</sup> and tensions arising from increasing urbanisation<sup>127</sup>, and have suggested that the newly respectable middle classes were keen to abdicate their peace-keeping responsibilities.<sup>128</sup> Policing reformists made accusations of incompetence and corruption, suggesting that policing was ‘open to purchase’;<sup>129</sup> and that in London particularly, watchmen and committees were no longer able to effectively protect its residents. One account went so far as to claim that certain areas of London were

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<sup>122</sup> H.B. Simpson, ‘The Office of Constable’ [1895] English Historical Review 625

<sup>123</sup> Clive Emsley, *The English Police* (2nd ed Longman 1996) 12

<sup>124</sup> Clive Emsley, *The English Police* (2nd ed Longman 1996) 9

<sup>125</sup> Les Johnson, *Policing Britain: Risk, Security and Governance* (Longman 2000) 11

<sup>126</sup> Robert Reiner, *The Politics of the Police* (3<sup>rd</sup> edn OUP 2000) 55

<sup>127</sup> Les Johnston, *Policing Britain: Risk, Security and Governance* (Longman 2000) 11

<sup>128</sup> John Styles, ‘The Emergence of the Police – Explaining Police Reform in Eighteenth and Nineteenth Century England’ (1987) 27 (1) *Brit J Criminology*

<sup>129</sup> Les Johnson, *Policing Britain: Risk, Security and Governance* (Longman 2000) 11

ungovernable, with state rule reduced to 'an elaborate, negotiated and tenuous artifice'.<sup>130</sup>

Even the 1829 Metropolitan Police Act itself contained the following preamble:

Whereas Offences against Property have of late increased in and near the Metropolis; and the local Establishments of Nightly Watch and Nightly Police have been found inadequate to the Prevention and Detection of Crime, by reason of the frequent Unfitness of the individuals employed, the Insufficiency of their Number, the limited Sphere of their Authority, and their Want of Connection and Cooperation with each other...<sup>131</sup>

Revisionist historians have, however, questioned that perspective, and have suggested that portrayals of the 'old' system as incompetent and ineffectual may have been exaggerated to create a political environment conducive to police reform and ultimately the introduction of 1829 Act. Reynolds, for example, notes that watch committees actively responding to complaints from residents, and took steps to improve both accountability and the certainty of prevention and detection, making use of hierarchical structures, bureaucratic management techniques and recruiting full-time men.<sup>132</sup> Emsley has similarly noted that a series of Acts were passed on behalf of the London City Watch, resulting in regular patrols and the effective organisations of paid watchmen. These emerging systems were criticised at the time and by subsequent historians for their ingrained corruption, Emsley argues, yet the history of the 'new police' demonstrates that 'opportunities for profiting from conspiracy, perjury and subornation' could hardly be perceived as ending with the passing of the Metropolitan Police Act in 1829.<sup>133</sup>

Some historical accounts have suggested that it was the extent to which policing was embedded in the community – the degree to which the constable was, indeed, merely a citizen – that was perceived by the emerging middle classes as one of the key problems with the 'old policing'. Reiner, for example, suggests that allegations of corruption and inefficiency may have been motivated by 'fear of the sympathy between old police and their own communities which made them unreliable as the policing of morality, crime and

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<sup>130</sup> J.L McMullan, 'Policing the criminal underworld: state power and decentralized social control in London 1550-1700' in John Lowman, Robert J. Menzies, T. S. Palys (eds) *Transcarceration: Essays in the Sociology of Social Control* (Gower 1987) 123

<sup>131</sup> Metropolitan Police Act 1829, Preamble

<sup>132</sup> Elaine A Reynolds, *Before the Bobbies: The Night Watch and Police Reform in Metropolitan London* (Springer 1998) 83

<sup>133</sup> Clive Emsley, *The English Police* (2nd ed Longman 1996) 20

disorder became politicized.<sup>134</sup> Storch also places emphasis on the support given to the Metropolitan police from millowners and other industrialists. They supported the 'New Police', Storch suggests, not because they were inherently more efficient, but because they were less engaged with their communities, and therefore more willing to suppress 'undesirable' working class activities, organisations, and habits.<sup>135</sup>

While there was clearly support from some aspects of society for activities such as 'suppressing cock-fightings, drunkenness, pugilistic combats [and] any other outrage'<sup>136</sup>, this does not mean that there was not also considerable opposition to the Metropolitan Police Act 1829 (from all sectors of society), revolving around concerns about incipient militarisation and the removal of local democratic accountability.<sup>137</sup> Opposition arose not only from the radical working class, who were wary of increased state capacity for repression, but also from a proportion of newly wealthy industrialists, who were powerful in local borough government, and were wary of ceding power and influence.<sup>138</sup>

Historians have pointed out that the coming of the 'new police' created a seismic shift in the structures of control and accountability for the function of policing in society. They signified a move away from the degree of popular control that had previously existed over parish constables; they also asserted an increasing autonomy from local government structures and the magistracy.<sup>139</sup> Emsley notes that while 'each watch had been directly under the control of the local authority for which it worked; the commissioners of the Metropolitan Police alone gave orders to the superintendents in charge of the police divisions, and the commissioners themselves were answerable only to the Home Secretary'.<sup>140</sup> While watch committees remained, their role was reduced and in decline; although their potential for intervention endured, the practical reality was that by the end

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<sup>134</sup> Robert Reiner, *The Politics of the Police* (3rd edn OUP 2000) 49

<sup>135</sup> Robert D Storch, 'The Plague of the Blue Locusts: Police Reform and Popular Resistance in Northern England, 1840-57' (2008) 20(1) *International Review of Social History*. Storch cites these examples as contained in Parliamentary Papers 1839, XIX, *Report of the Royal Commission on the Constabulary Force* pp 82, 75-76, 104-105 respectively.

<sup>136</sup> *ibid*

<sup>137</sup> Clive Emsley, *The English Police: A Political and Social History* (2<sup>nd</sup> edn Longman 1991) 22

<sup>138</sup> Robert Reiner, *The Politics of the Police* (3rd ed OUP 2000) 39. Reiner notes that 'fears about threats to liberty, concern about fiscal prudence, anxieties about local democratic accountability of the police, were neither irrational nor readily correlated with identifiable sectional interests.'

<sup>139</sup> Robert Reiner, *The Politics of the Police* (3rd ed OUP 2000) 65

<sup>140</sup> Clive Emsley, *The English Police: A Political and Social History* (2<sup>nd</sup> edn Longman 1991) 26

of the nineteenth century the Chief Constable or Commissioner had obtained a high degree of autonomy over local political control.<sup>141</sup>

Although the Metropolitan Police Act 1829, and subsequent Acts setting up Metropolitan and County police forces around the country, signified a centralisation of policing power, this was never made explicit – no doubt because of the degree of political hostility that existed to it. The constitutional status of the ‘new constable’ was not explicitly addressed in either the Metropolitan Police Act 1829 or subsequent legislation that established other Municipal or County police forces.<sup>142</sup> Brogden notes,

Their legal status was left in an ambiguous void. Neither those statutes nor the earlier treatise by the man credited with the first scheme for a professional force, Patrick Colquhoun (1797) gave any attention to the question of whether or not the new forces would require statutory powers, or whether the traditional common law power would suffice. The issue was set aside. The relation between the New Police and their predecessors, as law enforcers, was constructed in default.<sup>143</sup>

What was constructed subsequently, Reiner suggests, was the myth of the constable in uniform. In the absence of explicit structures of accountability, police chiefs were held to be answerable, not through any recognised structures of central or local government, but directly to the people themselves. Reiner notes,

They were purported to be accountable through an almost mythical process of identification with the British people, not the state. Although lacking any tangible control by elected institutions, they were supposedly in tune with the popular will because of their social representativeness and lack of special powers. The ideology developed of the constable as ‘citizen in uniform’ doing on a paid basis what all citizens had the power and social duty to do<sup>144</sup>

The ‘myth’ was reinforced by the 1929 Royal Commission, who noted,

“The police of this country have never been recognised, either in law or by tradition, as a force distinct from the general body of citizens. Despite the imposition of many extraneous duties on the police by legislation or administrative

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<sup>141</sup> Michael Brogden, *The Police: Autonomy and Consent* (Academic Press 1982) 90

<sup>142</sup> For example Municipal Corporation Act 1835 and the County Police Act 1839

<sup>143</sup> Michael Brogden, *The Police: Autonomy and Consent* (Academic Press 1982) 125

<sup>144</sup> Robert Reiner, *The Politics of the Police* (3rd ed OUP 2000) 75

action, the principle remains that a policeman, in the view of the common law, is only 'a person paid to perform, as a matter of duty, acts which if he were so minded he might have done voluntarily'.

"Indeed a policeman possesses few powers not enjoyed by the ordinary citizen, and public opinion, expressed in Parliament and elsewhere, has shown great jealousy of any attempts to give increased authority to the police. This attitude is due, we believe, not to any distrust of the police as a body, but to an instinctive feeling that, as a matter of principle, they should have as few powers as possible which are not possessed by the ordinary citizen, and that their authority should rest on the broad basis of the consent and active cooperation of all law-abiding people.<sup>145</sup>

This position was uncritically accepted and advanced by the judiciary. In the case of *Fisher v Oldham Corporation*, for example, which dealt with the issue of establishing vicarious liability, the court was content to advance the conception of the police officer as exercising 'original authority'. McCardie J cited with particular approval the following passage from the Australian case of *Enever* without commenting on the apparent contradiction inherent in seeing the police officers as both a servant of central government, and a constable exercising 'original authority'.

'the powers of a constable, quâ peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself. .... A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application."<sup>146</sup>

By the mid twentieth century this myth was under pressure. It was clear that the police did, indeed possess powers, resources and authority far beyond that of the ordinary citizen. The citizen in uniform remained, however, a convenient legal fiction. The apparent contradictions and ambiguities of the status of constables was acknowledged by the Royal Commission of 1962, but the resulting report made no argument for altering or clarifying this status. Instead it was proposed that the status of the constable should be accepted as

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<sup>145</sup> Home Office, *Royal Commission on Police Powers and Procedure* (Cmd 3297 1929) 6

<sup>146</sup> Fisher v Oldham Corporation, [1930] 2 K.B. 364, per McCardie J citing the Australian case of *Enever v The King* (1906) 3 Commonwealth L. R. 969

a useful constitutional device for reinforcing conceptions of police operational autonomy, enabling police forces to function independently from political influence.<sup>147</sup>

If the police officer retains (while exercising their duty) the status of an ordinary citizen, it will at least arguably follow that they must also enjoy the residual liberties of the ordinary citizen. There is a convincing argument however, that the modern police officer is not derived from thirteenth century communal policing, but born of the Metropolitan Police Act 1829. He is, in Lustgarten's phrase, less a direct descendant from the historic idea of a constable, than a 'distant cousin several times removed'.<sup>148</sup> While the concept of 'citizen in uniform' is constitutionally useful, providing support for the much lauded principle of policing by consent, it is an uncertain and ultimate unpersuasive basis for bestowing on the police the freedom of the common citizen to do that which is not forbidden. The police are a powerful and institutionalised state body: the police officer has expansive statutory powers, an extensive support network, and access to sophisticated technologies; his status is far removed from the initial concept of the police constable as a co-ordinator and overseer of community enforcement actions.

There is another potential argument however: that the power to do that which is not forbidden may arise from the other 'limb' of the legal status of police officers: the constable's status as an office holder or servant of the Crown. In the next section we examine the contention that the freedom to 'do that which is not forbidden' may also extend to Crown Servants.

### [The common law powers of the Crown](#)

Public authorities are, generally speaking, not free to do that which is not forbidden: rather they are required to act within the boundaries of power that are delegated to them.<sup>149</sup> The police however, have an ambiguous legal status, in which they are simultaneously 'ordinary citizens' and office holders or servants of the Crown.

An alternative claim may be made for the police to lay claim to the freedom to do that which is not forbidden may be made on the basis of his status as a Crown Servant. The Crown Servant, it may be argued, is not subject to the obligation incumbent on public

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<sup>147</sup> Home Office, *Royal Commission on the Police* (Cmd 1728 1962) 19

<sup>148</sup> Laurence Lustgarten, *The Governance of Police* (Sweet and Maxwell 1986) 29

<sup>149</sup> See for example, *R v Hull University Visiter ex parte Page* [1993] 1 All ER 97 in which Lord Browne-Wilkinson remarked, '[i]f the decision maker exercises his powers outside the jurisdiction conferred...he is acting ultra vires his powers and therefore unlawfully'.

authorities, which is to have a positive basis in law for their actions; instead they may rely on broad common law powers (often termed ‘third source’ powers) bounded only by the requirement of lawfulness. Such a claim is problematic, not least because it is far from clear that the police constable is, in fact, a Crown Servant; but also because it is far from clear that Crown Servants can in any instance enjoy such a level of discretion.

The ambiguous legal status of the police means that their relationships to the Crown is uncertain. They may be described as ‘holding office under the Crown’ rather than occupying a position of Crown Servant, given their constitutional separation from government.<sup>150</sup> Nevertheless, it is clear that in certain contexts the police may be treated as Crown Servants: the Official Secrets Act, for example, lists the police, alongside Ministers of government, First Ministers of devolved assemblies, members of the armed forces and civil servants, as Crown servants.<sup>151</sup> The court in *Fisher v Oldham*, finding that the police were not a statutory authority, reached the conclusion that the constable was instead a servant of the Crown, answerable directly to the Home Secretary.<sup>152</sup> This is, however, to over-simplify the relationship. While the Home Secretary has extensive powers to ensure the preservation of the peace,<sup>153</sup> to establish strategic priorities and to ‘promote the efficiency and effectiveness of the police’,<sup>154</sup> the police retain at least a notional level of operational independence. This concept is stated at its strongest in Lord Denning’s much quoted speech in *Blackburn*:

‘No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement is on him. He is answerable to the law and to the law alone.’<sup>155</sup>

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<sup>150</sup> Richard Ward and Amanda Akhtar, *Walker and Walker’s English Legal System* (11<sup>th</sup> edn OUP 2011) 434

<sup>151</sup> The Official Secrets Act 1989 s12

<sup>152</sup> *Fisher v Oldham Corporation* [1930] 2 KB 364. McCardie J also found that while the source of constabulary authority emanated from his ‘original’ status, this authority did not manifest itself by requiring the constable to be directly accountable to his local community. He was not answerable to borough councils or local government or watch committees – although they administered his wages. Instead, he was a servant or officer of the Crown, answerable only to the Home Secretary. While the constable was essentially a citizen, he was also a manifestation of the state.

<sup>153</sup> *R v Secretary of State for the Home Department ex parte Northumbria Police Authority* [1989] QB 26

<sup>154</sup> Police Act 1996 s36

<sup>155</sup> *R v Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 QB 118

Controversy over the common law powers of the Crown Servant has stemmed from what has become known as the ‘Ram doctrine’, purported to originate from legal advice provided to the government in 1945 by Sir Granville, First Parliamentary Counsel. This advice was interpreted by government as suggesting that government ministers, as Crown servants, had powers to ‘do anything a natural person can, provided it is not forbidden from doing so’<sup>156</sup>. Such powers have been used most controversially by ministers to make decisions about government policy and practice, effectively pre-empting Parliament.<sup>157</sup>

The Ram Memorandum, as cited by the House of Lords Select Committee on the Constitution, expressed the following opinion;

A minister of the Crown is not in the same position as a statutory corporation. A statutory corporation ... is entirely a creature of statute and has no powers except those conferred upon it by or under statute, but a minister of the Crown, even though there may have been a statute authorising his appointment, is not a creature of statute and may, as an agent of the Crown, exercise any powers which the Crown has power to exercise, except so far as he is precluded from doing so by statute. In other words, in the case of a government department, one must look at the statutes to see what it may not do.<sup>158</sup>

Disclosure of the ‘Ram Memorandum’ to the public in 2003 prompted a fresh look at the validity of the claim that government ministers, as agents of the Crown, could rely on such broad common law powers. The government interpretation of the memorandum was questioned: not only was it far from clear that the memorandum had any legal authority as a source of law,<sup>159</sup> it was also disputed that the advice could reasonably be interpreted, as the government had clearly interpreted it, as suggesting that the powers of the Crown extended to do anything a natural person may do.<sup>160</sup> Sir Jeffrey Jowell gave evidence to the House of Lords Constitutional Committee to the effect that equating the powers of

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<sup>156</sup> Cabinet Office Performance and Innovation Unit, *Privacy and data-sharing: The way forward for public services* (2002) para 3.46. The government used the ‘ram doctrine’ in this instance as a legal basis to share personal information, in the absence of statutory powers to do so.

<sup>157</sup> House of Lords Select Committee on the Constitution, *The Pre-emption of Parliament* (HL 2012-2013 165-I) paras 50

<sup>158</sup> House of Lords Select Committee on the Constitution, *The Pre-emption of Parliament* (HL 2012-2013 165-I) para 51

<sup>159</sup> House of Lords Select Committee on the Constitution, *The Pre-emption of Parliament* (HL 2012-2013 165-I)

<sup>160</sup> Anthony Lester and Matthew Weait, ‘The Use of Ministerial Powers without Parliamentary Authority: The Ram Doctrine’ [2003] *Public Law* 415

ministers with those of a private individual would be 'a constitutional heresy', counter to the rule of law'.<sup>161</sup> The Committee subsequently noted that, regardless of the status the doctrine had acquired within Government, it did not possess any inherent legal authority. Rather, the Committee suggested, 'the Ram memorandum is no more than an opinion prepared by a lawyer for his client' and as such 'is not a source of law'.<sup>162</sup> Furthermore, the Committee expressed their belief that the interpretation adopted by government was, simply, wrong. They noted,

It is clear that the description of the scope of Government power denoted by the term "Ram doctrine" is unhelpful and inaccurate: it does not reflect important restrictions on ministerial powers under the common law, and creates an impression that ministers possess greater legal authority than is the case.<sup>163</sup>

The courts have also re-examined the extent to which the Crown could exercise the freedoms of a natural person. The claim had been relied upon, in the case of *R. v Secretary of State for Health Ex p. C*<sup>164</sup> as a legal basis for the gathering and retention of personal data by the Department of Health in the form of an index of convictions and cautions relevant to suitability of working with children. There was no statutory basis for holding such an index, but the court found the Crown could rely on 'third source'<sup>165</sup> powers, or 'its ability to act as a corporation possessing legal personality, [which] has the capacities of a natural person and thus the same liberties as the individual'.<sup>166</sup>

Subsequent judicial considerations, however, have been more circumspect. The Court of Appeal in *Shrewsbury*<sup>167</sup> although bound by the House of Lords in *Ex p. C*, nevertheless expressed reservations about the existence of substantial common law powers, beyond those merely incidental or ancillary in nature.

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<sup>161</sup> House of Lords Select Committee on the Constitution, *The Pre-emption of Parliament* (HL 2012-2013 165-I) para 57

<sup>162</sup> House of Lords Select Committee on the Constitution, *The Pre-emption of Parliament* (HL 2012-2013 165-I) para 52

<sup>163</sup> House of Lords Select Committee on the Constitution, *The Pre-emption of Parliament* (HL 2012-2013 165-I) para 61

<sup>164</sup> *R v Secretary of State for Health, ex parte C*, [2000] H.R.L.R. 400 [405]

<sup>165</sup> B V Harris, 'Government 'Third Source' Action and Common Law Constitutionalism' (2010) 126 *Law Quarterly Review* 373

<sup>166</sup> *R v Secretary of State for Health, ex parte C*, [2000] H.R.L.R. 400 [405] per Hale LJ

<sup>167</sup> *Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148

Hale L.J. found support for a more general “common law” power (or “third source” power, as Professor Harris describes it) in a passage in Wade and Forsyth. However, the examples given in that extract (“the power to make contracts, employ servants and convey land”) do seem to me, with respect, of limited assistance. They are in the nature of ancillary powers, necessary for the carrying out of any substantive governmental (or indeed non-governmental) function, whether statutory, corporate or common law. Similarly, the passage cited from Halsbury’s Laws refers to an earlier passage (Vol.8(2) para.6(1)), dealing with the “general legal capacity” of the Crown as a “corporation sole or aggregate”, which also gives as examples the power to enter contracts or own property. The obvious need for such powers to my mind throws no light on what, if any, non-statutory substantive functions the Crown retains beyond the scope of the “prerogative”, as traditionally understood.<sup>168</sup>

The Supreme Court also considered the question in New College London.<sup>169</sup> Although on the facts of the case, a statutory basis was found to exist, Lord Sumption nevertheless questioned, obiter, whether the ‘third source’ really provided a sound legal basis for government actions.

...it is open to question whether the analogy with a natural person is really apt in the case of public or governmental action, as opposed to purely managerial acts of a kind that any natural person could do, such as making contracts, acquiring or disposing of property, hiring and firing staff and the like.<sup>170</sup>

Lord Sumption also helpfully delineated the boundaries of governmental non-statutory power.

“Without specific statutory authority, [the Secretary of State] cannot adopt measures which are coercive; or which infringe the legal rights of others (including their rights under the Convention for the Protection of Human Rights and

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<sup>168</sup> Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government [2008] EWCA Civ 148 [45] per Carnwath LJ

<sup>169</sup> R (on the application of New London College Ltd) v Secretary of State for the Home Department [2013] UKSC 51

<sup>170</sup> R (on the application of New London College Ltd) v Secretary of State for the Home Department [2013] UKSC 51 [28]

Fundamental Freedoms ); or which are irrational or unfair or otherwise conflict with the general constraints on administrative action imposed by public law.

Where then, does this leave the notion that the police, in undertaking surveillance activities, may undertake activities, without statutory authority, on the basis that they may be done by the 'ordinary citizen'? The debate over third source powers has developed in relation to the discretion that may be exercised by government ministers, not Chief Constables. If the discretionary powers of government ministers, including the Home Secretary are constrained, however, it would be surprising if this were not also the case for those answering to them. There can surely be no constitutional case that a Chief Constable or the Commissioner of the Metropolitan Police may exercise a greater degree of discretion in public action than that available to the Home Secretary.

The position must be that neither government ministers nor Chief Constables can exercise unfettered discretion to operate as they choose. The police are clearly subject to public law challenge in a manner that the natural person would not; they do not have unfettered freedom in the spending of public money; and they cannot act in a manner that does not provide due respect for the rights of others. Further, it cannot be the case that the police may properly operate in ways that are reckless, or irresponsible.

Whatever the origins of the constable, and whatever the ambiguities of their current status, it cannot be the case that such a powerful public body can simply do 'whatever is not forbidden'. Judicial reliance on such a broad scope of discretion for carrying out overt surveillance practices is therefore surely wrong. Overt surveillance is not a minor or trivial act: it is a powerful policing strategy, forming part of a panoply of statutory and non-statutory public order measures to influence and manage populations including those participating in public protest. Further, as we shall see later in this thesis, it may cause considerable harm to individuals and restrict fundamental rights.

As we have noted, however, the absence of prohibition is not the only basis on which the police may claim a common law basis for their actions. As Lord Sumption has suggested in Catt, they may have a positive power to do so, arising from the common law powers of the police to prevent and detect crime. It is to this claim that we now turn: it is argued below, however, that this claim is also problematic. While the police undoubtedly possess such a power, its scope is undefined and uncertain, thus once again creating a risk of the arbitrary use of state power.

## The Common Law Power to Prevent and Detect Crime

As we shall see below, there is a compelling argument that the police constable has always exercised some form of preventive powers. The duty placed on the ancient constable to 'preserve the peace' must surely have encompassed the expectation that the constable would avert, as well as respond to, criminal acts. The setting of the watch is a clear example: it was surely intended to prevent crime by alerting townsfolk when suspicious persons approached. It had both a deterrent and repressive effect: by enabling a prompt response to an emergent threat, it both deterred would-be criminals from entering the town, and facilitated the supervision of their behaviour if they insisted on doing so.

The problem with the claim that the police officer has a positive power to prevent crime, derived from the ancient common law duty of the constable, is not that such a positive power does not exist *per se*. The problem lies in the extent or scope of police activity which may be based upon it. The term 'crime prevention' is broad and undefined: it may refer to a very extensive range of policing actions and measures, relating not only to the prevention of immediately anticipated crime, or with general deterrence, but with broader concepts that may more accurately be described in other terms, such as prediction, pre-emption and the forestalling of risk.

The following section is in two parts. In the first part, we look at the evolution and development of preventive police powers from a historical perspective. It considers whether it is reasonable to base a broad, expansively defined power to prevent crime on the 'ancient' common law. The second part considers in more depth the failure of the judiciary to define or curtail the scope of the common law power to prevent crime; and asks whether the existence of such a broad and unrestrained policing power raises concerns for the rule of law.

### **The historic claim for common law powers of crime prevention.**

The centrality of 'crime prevention' to policing strategies is not new: indeed, the modern emphasis on preventing crime can be said to be rooted in the ancient practices of 'setting the watch'. It is arguable therefore, that to at least some extent, preventive practices have a long-standing basis in common law. Such arguments do not, however, recognise the breadth of modern police practices that can be said to amount to 'preventive policing'. It is far from clear that the common law can provide a valid legal basis for the wide range of complex and powerful policing strategies that can now be conceptualised as 'preventing crime'.

In this section we will discuss the historical basis for the concept of a common law power to prevent crime; we will also examine the development of preventive policing, and consider the extent to which modern pre-emptive methods can be said to have a basis in traditional policing functions for the prevention of crime.

The common law duty to ‘preserve the King’s peace’, applicable to the constable as it is to the citizen, has a long heritage. The following, for example, has been attributed to Henry Bratton, writing in the thirteenth century:

“First of all, of the king's peace and justice and the breaches thereof by murderers, robbers and burglars, who commit their crimes by day and night, not only against those who journey from place to place but even against those asleep in their beds. And [let him declare] that the king orders all his lieges, in the faith whereby they are bound to him and as they wish to save their possessions, to lend effective and diligent counsel and aid for the preservation of his peace and justice and the suppression and extirpation of wrongdoing”<sup>171</sup>

The ‘original’ constable utilised a variety of measures to ‘preserve the peace’, including generalised surveillance (the setting of the watch); the repression of disorder and criminality (through the mechanism of the ‘hue and cry’); and the apprehension of wrongdoers (by virtue of constable’s common law powers to effect an arrest). All of these may be said to have a preventive as well as a responsive element.<sup>172</sup>

A great amount of academic debate has focused on extent to which policing methodology has shifted since the coming of the ‘new police’ and in particular over the last few decades. Much of this debate has focused on the nature of ‘preventive policing’ and whether the current emphasis on prevention marks a departure from traditional policing methods, or whether it is merely a modern-day continuation of policing methods which have been in use from the earliest days of policing.

The latter camp make the case that policing has been essentially preventive in nature from the thirteenth century onwards. It is undoubtedly the case that the ancient system of ‘ward and watch’ (developed under the common law, but later codified in the Statute of Winchester 1285) consisted of elements which are preventive as well as responsive and

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<sup>171</sup> Henry de Bracton, *Bracton on the Laws and Customs of England*’ attributed to Henry of Bratton, c. 1210-1268 Vol II, (Samuel E Thorne (trans) Harvard University Press 1968) 327

<sup>172</sup> See, for example, Paul Lawrence, ‘The Vagrancy Act (1824) and the Persistence of Pre-Emptive Policing in England Since 1750’ (2017) 57(3) Br J Criminol 513

repressive. The preventive aspects included those of monitoring and deterrence: as we have seen, constables had a particular responsibility to 'set the watch' and recruit watchmen (usually ordinary residents of a town) to 'ward' by day and watch by night.<sup>173</sup> The responsive elements included the authority of the watchmen to require travellers and strangers to account for themselves; and to arrest them, if necessary with help summoned through the 'hue and cry', in any case 'where they had Cause for Suspicion'.<sup>174</sup>

This basic system of prevention and response appears to have been essentially unchanged as policing developed through the eighteenth and nineteenth centuries. Like the twelfth century constable, the system of paid watchmen that had, by then, developed, continued to rely on the preventive deterrence of systematic 'watches' and the responsive capacity of watchmen and constables. Reynolds, for instance, has documented that watchmen were 'primarily intended to be a preventive force': the nature of this prevention was, however, primarily related with the efficiency and effectiveness of watch patrols. This was, she argues, a task they took very seriously; and by the late eighteenth century local watch committees were giving considerable attention to maximising their effectiveness in crime prevention, as they 'used more men, different shifts, shorter beats and other tactics to increase the certainty that crime would be observed and thus prevented or detected.'<sup>175</sup>

The 'new police', arriving with the 1829 Metropolitan Police Act, expressly emphasised the need, not only to apprehend and punish wrongdoers, but to prevent crimes occurring in the first place. The development of the Metropolitan, and later the County police forces were driven by the Benthamite principles and utilitarian concerns of the key reformers, who advocated placing greater emphasis on the prevention of crime as a more humane and effective approach than one based on detection and punishment.<sup>176</sup> Colquhoun, a leading reformer, stated that,

if the evils in society may be cured at all, that 'must be by the promotion and encouragement of an active principle, under proper superintendance, calculated to prevent every class of dealers, who are known to live partly or wholly by fraud,

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<sup>173</sup> Philip Rawlings, 'Policing before the police' in Tim Newburn ed *Handbook of Policing* (Willan 2003), 45

<sup>174</sup> Statute of Winchester 1285 cited in Philip Rawlings, 'Policing before the police' in Tim Newburn (ed) *Handbook of Policing* (Willan 2003), 42

<sup>175</sup> Elaine A Reynolds, *Before the Bobbies: The Night Watch and Police Reform in Metropolitan London* (Springer 1998) Reynolds, 83

<sup>176</sup> Andrew Ashworth and Lucia Zedner, *Preventative Justice* (OUP 2014) 32

from pursuing those illegal practices; which nothing but a watchful Police, aided by a correct system of restraints, can possibly effect.<sup>177</sup>

Sir Edwin Chadwick similarly promoted the idea that the role of the police was not merely to arrest offenders, nor just to 'keep watch' and maintain the peace. His ideas of preventative policing involved establishing a 'well-organised body of men acting upon a system of precautions, to prevent crimes and public calamities'<sup>178</sup>.

Preventive policing thus remained focused on preventive patrols and the 'keeping of the watch'. It is fair to say, however, that other aspects of policing had begun to emerge in the eighteenth and nineteenth centuries, which would fall under a broader definition of crime prevention. Some historians such as Lawrence, have suggested that there is substantial evidence of an expansion of pre-emptive strategies in the eighteenth century, illustrated by the increase in preventive powers granted to the criminal justice system.<sup>179</sup> The Disorderly Houses Act (1751/2) for example, gave magistrates the power to detain and question (for six days) anyone 'suspicious' apprehended during a search of common lodging houses and other premises); and the London Streets Act (1771) empowered watchmen to apprehend those 'whom the said Watchmen shall have reason to suspect of any evil designs'.

The post 1829 era was also littered with new statutory regulations aimed at repressing behaviours thought to give rise to crime. The principle of regulating 'dangerous activities' such as drunkenness and gambling was, Colquhoun noted, 'the only practicable means of preserving the morals of a vast body of the Community; and of preventing those numerous and increasing crimes and misdemeanors (sic), which are ultimately attended with as much evil to the perpetrators as to the sufferers'.<sup>180</sup> The Police Act of 1839 for example, providing police with the powers to, amongst other things, apprehend any 'common prostitute loitering or being in any thoroughfare', or remove street musicians from a neighbourhood<sup>181</sup>.

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<sup>177</sup> Patrick Colquhoun : The Project Gutenberg EBook of A Treatise on the Police of the Metropolis, 1806, Chapter 1, para 13 available at <http://www.gutenberg.org/files/35650/35650-h/35650-h.htm> accessed 12th July 2016

<sup>178</sup> Sir Edwin Chadwick 'Preventative Police' (1829) London Review 1, 252

<sup>179</sup> Lawrence P, 'The Vagrancy Act (1824) and the Persistence of Pre-Emptive Policing in England Since 1750' (2017) 57(3) Br J Criminol 513

<sup>180</sup> Patrick Colquhoun : The Project Gutenberg EBook of A Treatise on the Police of the Metropolis, 1806. Chapter 1, para 14 available at <http://www.gutenberg.org/files/35650/35650-h/35650-h.htm> accessed 12th July 2016

<sup>181</sup> Police Act 1839

It is notable, however, that such expansion in the scope of crime prevention that did take place, appears to have been concerned with enabling the police to respond to immediate or imminent situations; and what is more, it happened through legislative means. These were express powers providing constables (or watchmen) with the ability to intervene where there was suspicion that criminal offences had taken place; or to regulate or eradicate otherwise 'undesirable' behaviour. There remains a considerable distinction between these strategies aimed at imminent threats to the 'King's peace', and the type of pre-emptive, anticipatory measure which is a feature of modern surveillance-based and intelligence-led policing tactics.

Criminologists and historians have highlighted the considerable shift in preventive policing that occurred during the latter half of the twentieth century. They argue that the modern focus on prevention and pre-emption is not simply a continuation of the kind of preventive policing engaged in by the early constable, but that it involves elements of anticipatory policing that are discrete and distinct from that which has gone before. Modern preventive policing is not concerned only with the regulation of those suspected of having intent to cause harm; but with the regulation of those considered to pose a *risk* of harm. The modern day focus on risk has, it is argued, caused a fundamental change to the way that policing is carried out, and resulted in a seismic shift in the nature and purpose of surveillance and the size of the population subgroups that are subject to it.

Reiner suggests that a turning point came in the 1960's as police forces made fundamental changes both to structure and strategy. Preventive policing based on the watchful eye of uniformed patrols gave way to a new focus on the centrality of information, and development of 'intelligence-led', risk orientated approaches. Crime prevention, Reiner notes 'transmuted into a notion of prevention as pre-emption'.<sup>182</sup>

Such approaches are far from being equivalent to the response of the thirteenth century constable faced with the perceived threat from strangers arriving at night. The focus of what Feeley and Simon have called the 'new penology'<sup>183</sup> is not simply to anticipate threat, but to discover the potential sources of such a threat and minimise 'risks'<sup>184</sup> before they emerge. The focus of risk-based approaches is therefore not simply to confront or investigate dangerous groups who, like the strangers in the thirteenth century are

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<sup>182</sup> Robert Reiner, *The Politics of the Police* (3rd edn OUP 2000) 92

<sup>183</sup> Malcolm Feeley and Jonathon Simon, 'The New Penology: Notes on the emerging strategy of corrections and its implications' (1992) 30(4) *Criminology* 449

<sup>184</sup> Ulrich Beck, *Risk Society: Towards a New Modernity* (Mark Ritter trans Sage 1992)

considered to pose a direct and immediate threat (regardless of whether that would actually be the case); but to use surveillance and intensive data-gathering to identify and manage certain population subgroups, and those associated with them, to forestall that risk at the earliest opportunity. Krasmann, for example, notes that,

Risk technologies differ decisively from a common concept of prevention in the sense of averting danger. Risks do not refer to a concrete or real danger, but represent in a way an artificial entity of calculation...[w]e are thus no longer concerned with prevention in the sense of averting a more or less concrete danger, but with a kind of anticipated prevention...<sup>185</sup>

Pre-emptive policing is concerned not with immediate dangers but with potential future threats. It is not suspects that form the focus of pre-emptive operations, but risk subgroups, members of which do not necessarily have criminal intent. Importantly, the purpose of pre-emptive surveillance is not deterrence; nor is it to detect incidents and inform the policing response: it is to control, manage and gather intelligence on, people who have been identified as being part of, or associated with, a relevant 'risk' group. This is what Lucia Zedner has referred to as 'pre-crime': conditions in which the 'possibility of forestalling risks competes with and even takes precedence over responding to wrongs done'.<sup>186</sup>

The forestalling of risks in pre-crime societies is entirely a mechanism of crime control.<sup>187</sup> Unlike the type of preventive regulations discussed above, aimed at altering the conditions in which crime occurs, pre-emptive policing is not concerned with enforcing legislation. Pre-emptive policing is not, therefore, concerned with tangible offences, nor is it concerned with blame or guilt, or any of the features, safeguards or civil rights protections of due process. The objective of pre-emptive policing is instead to eradicate, reduce or manage risk. This involves a process of surveillance, intelligence gathering and disruption that takes place away from direct judicial oversight.<sup>188</sup>

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<sup>185</sup> Susanne Krasmann, 'The enemy on the border: Critique of a programme in favour of a preventive state' (2007) 9(3) *Punishment and Society* 301

<sup>186</sup> Lucia Zedner, 'Pre-crime and Post Criminology' (2007) 11(2) *Theoretical Criminology* 261–281, 262

<sup>187</sup> Herbert Packer, 'Two Models of the Criminal Process' (1964) 113 *University of Pennsylvania Law Review* 1

<sup>188</sup> Peter Gill, 'Not just joining the dots but bridging the voids: constructing security networks after 11 September 2001' (2006) 16(1) *Policing and Security* 27. Peter Gill has noted, for example, the adoption of 'disruption' as a formal objective of police interventions in the 80's and 90's. Disruption

Difficulties arise in considering these shifts in policing, in the language that is used to describe them. The terms 'preventive' and 'pre-emptive' are relatively broad terms, and can be used to describe a wide range of policing objectives and approaches. In some senses of the word, preventive policing has a long heritage, and is not a feature only of modern policing: there is a long tradition of visible patrols and watches which were clearly intended not only to enforce laws and regulations and to catch criminals, but to deter the presence or actions of those with criminal intent. Early constables clearly aimed to prevent, and to an extent, pre-empt crime. The forms of prevention and pre-emption utilised by traditional policing practices are not, however, equivalent to modern 'pre-crime' strategies. Rather they are of a different type: while the former are based on generalised surveillance, the investigation of suspicious behaviour, and the interruption of intent, the latter are based on tasked surveillance, the calculation of risk, and the disruption of 'pre-crime' activity.

The question arises, therefore, whether the common law duty or power of the constable to prevent crime should be interpreted so broadly as to enable the police to rely upon it for pre-emptive measures. The difficulty in answering this, as we shall shortly see, is that the courts have not sought or attempted to define what is meant by preventive policing; nor have they attempted to distinguish between preventive and pre-emptive measures. In the next section we shall evaluate judicial interpretations of the scope of the common law power to prevent crime.

#### **The scope of the duty to prevent crime**

It is at least arguable that, from a historical context, the scope of the common law power of the police to prevent crime is limited to general deterrence and responsive policing: the need to act when there is an immediate threat of criminality. Over time, however, the scope and nature of the police power to prevent crime has steadily expanded to encompass new and emerging policing strategies and methods. The courts have not, however, sought to delineate or define the scope or extent of this power.

Unlike police powers to prevent a breach of the peace, police powers to prevent crime are not time-bound, and are not restricted to circumstances in which crime is considered immediate or imminent. To paraphrase Lord Bingham in *Laporte*, it is surely surprising that alongside the extensive statutory powers provided to the police to prevent crime, there is

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involves police actions, based on intelligence, 'that prevented the commission of a crime or disrupted the operations of a crime market without seeking to prosecute the perpetrators.'

also a broad and uncertain common law power, bounded only by the requirement of reasonableness.<sup>189</sup>

The nature of the duty placed on the constable is itself vague and uncertain. It is uncontentious that there is a general duty on all citizens to 'preserve the peace'. There is however, a particular duty on the constable to do so, which 'is greater than that attached to the ordinary citizen'<sup>190</sup>. To this date the constable takes an 'attestation' or oath, affirming that they will "cause the peace to be kept and preserved and prevent all offences against people and property."<sup>191</sup>

The duty to preserve the peace is a broad one, encompassing the full range of the duties of the constable to protect persons and property from crime and disorder.<sup>192</sup> It has been interpreted by the courts in various ways, consistent only in their breadth and ambiguity. The 1925 case of *Glasbrook* suggested that the duty of the police consists of actions for 'keeping the peace, for preventing crime, or for protecting property from criminal injury'.<sup>193</sup> In the later case of *Blackburn*, Lord Denning took the view that it was the duty of police to 'enforce the law of the land' so that 'crimes may be detected; and that honest citizens may go about their affairs in peace'.<sup>194</sup> In more recent times, it was expressed in *Brooks* as 'preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence'.<sup>195</sup> In *Hellewell*, the court spoke in vague terms of the duty to 'prevent and detect crime'<sup>196</sup>; and in *Robinson* the court similarly referenced the duty 'for the prevention of violence and disorder' alongside the 'function' of the police in 'preventing and investigating crime'.<sup>197</sup> One of the most influential descriptions of the duty of the police, however, remains that in *Rice v Connolly*:

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<sup>189</sup> R (on the application of Laporte) v. Chief Constable of Gloucestershire [2006] UKHL 55 (13 November 2006) Lord Bingham noted at [46] that 'Parliament plainly appreciated the need for appropriate police powers to control disorderly demonstrations but was also sensitive to the democratic values inherent in recognition of a right to demonstrate. It would, I think, be surprising if, alongside these closely defined powers and duties, there existed a common law power and duty, exercisable and imposed not only by and on any constable but by and on every member of the public, bounded only by an uncertain and undefined condition of reasonableness.'

<sup>190</sup> R v Dytham [1979] 3 W.L.R. 467

<sup>191</sup> Police Reform Act 2002 s83

<sup>192</sup> Richard Glover, 'Keeping the Peace and Preventive Justice – A New Test for Breach of the Peace?' (2018) Public Law 444

<sup>193</sup> *Glasbrook Brothers v Glamorgan County Council and Others* [1925] A.C. 270

<sup>194</sup> *Regina v Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 W.L.R. 893 per Lord Denning

<sup>195</sup> *Brooks v Commissioner of Police of the Metropolis and others* [2005] UKHL 24

<sup>196</sup> *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804

<sup>197</sup> *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4

"It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice."<sup>198</sup>

It was Viscount Cave in the 1924 case of *Glasbrook*, however, who had first made the strong claim that the duty of the police was to take 'all steps necessary' for preserving the peace.<sup>199</sup> Both cases have been used as authority for the argument that the police may, in circumstances where there is no relevant statutory regulation, take any measure they see fit in order to prevent crime.<sup>200</sup>

It is far from clear, however, that the courts in the case of *Glasbrook* or *Rice v Connolly*, were making anything like such a broad and all-encompassing statement: in neither case was it found that the police were under an obligation, or possessed a power, sufficient to require or enable them to take 'all steps necessary' for the prevention of crime. *Glasbrook* was a case brought by a colliery owner, when the police refused to provide (without payment) police officers to protect his colliery, and those continuing to work, from aggrieved strikers. There was, in these circumstances, a clear likelihood of violence and property damage. The court found however, that the police were not under a public duty to provide protection for the colliery free of charge. The duty on the police clearly did not extent to taking all *possible* steps to prevent crime.

Lord Parker's statement in *Rice v Connolly* appeared to be similarly categorical, suggesting that it was 'part of the obligations and duties of a police constable' to take 'all steps' they considered necessary for the prevention of crime. This case, however, concerned the powers of the police to coercively question a person who was not under arrest, but who the officer concerned believed had been acting suspiciously. The court found that they could not. The power of the constable did not extend, in this case, to taking all steps he considered necessary for the prevention (or detection) of crime. Instead, Lord Parker concluded that, in the absence of a statutory power to do so, the common law did not enable the constable to restrict the liberty of the individual 'to refuse to answer questions

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<sup>198</sup> *Rice v Connolly* [1966] 2 Q.B. 414, 419 per Lord Parker

<sup>199</sup> *Glasbrook Brothers Ltd. v. Glamorgan County Council* [1925] A.C. 270, 277

<sup>200</sup> See, for example, *R v Chief Constable of North Wales Ex. Parte Thorpe* [1999] QB 396

put to him by persons in authority'.<sup>201</sup> Rather than establishing the power of the constable to take all steps he considers necessary for the prevention of crime, the case of *Rice v Connolly* could be interpreted instead as establishing clear limits on the powers of the police to take preventive measures where those measures curtail the liberty of those subject to them.

Rather than curtailing the common law powers of the police, however, the decisions in *Glasbrook* and *Rice v Connolly* have been used as authority to support a broad and extensive common law power to prevent crime, encompassing the power to undertake surveillance measures, and to collect, retain and disseminate personal data. The decisions of *Hellewell, Thorpe, and Wood*, discussed below, have expansively interpreted the power of the constable to provide a legal basis for measures which are not concerned with aversion of imminent or even foreseeable criminal actions, but the pre-emption of possible future crime. The broad powers of the police to preserve the peace were thus not, as was suggested in *Glasbrook* or *Rice v Connolly* available only where such actions were considered *necessary*; but where policing measures were reasonable, or merely desirable, for preventing the commission of offences.

The 1995 case of *Hellewell*<sup>202</sup> concerned police actions in distributing a photograph of a convicted shoplifter to traders in the area, as part of a scheme to bar troublemakers and shoplifters from the town's shops. The photograph concerned was clearly a police 'mug shot', and although guidance was issued that it should not be publicly displayed, the image was visible to shopkeepers and staff.

The photographic image in this case had been obtained in accordance with statutory powers of the police – it was therefore not in contention that the police possessed a legal basis for taking and retaining the original photograph.<sup>203</sup> The issue for the court was whether the police could rely on their common law powers in disseminating the image in order to enable traders to exclude him from their premises. Lord Justice Laws found that they could. He concluded,

The short point, at all events, is that common sense and law alike dictate that the police should be subject to no legal sanctions if they make honest and reasonable

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<sup>201</sup> *Rice v Connolly* [1966] 2 QB 414

<sup>202</sup> *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804

<sup>203</sup> Police and Criminal Evidence Act 1984 s66 provides an express power to photograph individuals detained in police custody.

use of a suspect's photograph in the fight against crime...[t]he police have acted well within the scope of such obligation as the law imposes upon them in relation to the plaintiff's photograph. What they did was obviously and unarguably in the public interest: it was reasonably directed to the prevention of crime.

The argument of Lord Justice Laws is broad and blunt: that the police may take any action that is *reasonable* for any preventive purpose. He provides little discussion of his position; he does however, appear to rely on the Court of Appeal case of *Marcel*, and draws attention to the following passage:

'In my judgment, subject to any express statutory provision in other Acts, the police are authorised to seize, retain and use documents only for public purposes related to the investigation and prosecution of crime...'<sup>204</sup>

This is somewhat surprising: the court in *Marcel* was concerned not with preventive police powers, but with common law police powers for the investigation and detection of crime. It is not easy to see how an argument relating to the scope of investigative powers may be of assistance to Laws in determining the scope of preventive powers.

While the investigation and detection of crime surely falls within the scope of the duty of the constable, they provide a very distinct basis for police action. This is a distinction too rarely acknowledged by the courts, who often (as we have noted above) use the terms 'prevent' and 'detect' (or alternatively 'investigate' or 'prosecute') in a manner that fails to recognise the important difference between the two. Not only are these terms used interchangeably, they are used as a conjunctive pair: synonyms that are never used in isolation. It is necessarily the case however, that a common law power to take action to detect and investigate crime is not identical to a common law power to prevent crime.

The former relates to an actual offence that has already occurred; while the latter relates to the likelihood or a possibility that an offence (often of unspecified nature) may occur. Police powers to investigate and prosecute an offence are necessarily curtailed by the limits of what may be possible in investigating or prosecuting that offence: what is more, police discretion will effectively be curtailed by required compliance with statutory procedures, and the direct supervision of the courts. To a great extent the powers exercised by the police in relation to these duties have been codified in statutory law: the

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<sup>204</sup> *Marcel and Others v Commissioner of Police of the Metropolis and Others* [1990 M. No. 11717] per Sir Nicolas Browne-Wilkinson V.-C.

Criminal Procedure and Investigations Act 1996, for example, mandates that all reasonable steps are taken for the purposes of the investigation and all reasonable lines of inquiry are pursued; and that relevant information obtained in the course of that investigation or inquiry is recorded and retained, and where appropriate disclosed to relevant parties.<sup>205</sup>

The prevention of crime, in contrast, will usually occupy the far more nebulous domain of 'crime control' rather than the more strictly regulated field of 'due process'. It is this distinction, therefore, that is at the heart of the problem: the particularly uncertain scope of preventive powers, and the broad (potentially unchecked) discretion available to the police. *Marcel* was not itself inconsistent with previous case law that had established common law powers to retain evidence for court<sup>206</sup>. To use this as a basis for the disclosure of information to third parties for the purposes of the prevention of crime appears to be a substantial extension of previous interpretations of common law police powers.

*Hellewell* was itself relied upon in the case of *Thorpe*<sup>207</sup>, which remains a leading case on common law powers of the police to take action for the prevention of *possible* future crime. *Thorpe* concerned the actions of North Wales Police in disclosing personal information relating to two convicted child sex offenders. The appellants were living on a caravan park, having been twice hounded out of previous accommodation when their record was discovered by local people. They were approached by the police, who asked them to leave the park, on the grounds that it was not an appropriate location. When the couple failed to move on, the police drew the attention of the park management to newspaper clippings that gave details of their previous offences. As a result the pair were forced to leave the area.

Lord Woolf, giving judgment, endorsed *Hellewell*, concluding that the police were entitled to make 'reasonable use' of information 'for the purpose of the prevention and detection of crime, the investigation of offences and the apprehension of suspects'. The term 'reasonable' Lord Woolf commented, was 'fluid in its application' and it was both impossible and undesirable to lay down a 'lexicon of the circumstances that will amount to reasonable use.' All that was required to establish reasonableness, he suggested was that the use in question is decided upon 'as a result of the exercise of an honest judgment of

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<sup>205</sup> Criminal Procedure and Investigations Act 1996 s23 (1)(a-d)

<sup>206</sup> See, for example, *R v Commissioner of Police for the Metropolis ex parte Blackburn* [1968] 2 QB 118

<sup>207</sup> *R v Chief Constable of North Wales ex parte Thorpe* [1998] 3 W.L.R. 57

professional police officers.<sup>208</sup> This is an evident extension of police powers from the requirement of necessity noted in *Glasbrook and Rice v Connolly*.

What is notably absent from the discussions in *Hellewell* and *Thorpe* about the scope of a common law police power to prevent and detect crime, is a consideration of the issue of imminence. This contrasts starkly with the approach taken by the courts in relation to delineating the scope of the common law power to prevent a *breach of the peace*, in which significant emphasis has been placed on whether a breach of the peace is imminently anticipated or about to happen.<sup>209</sup>

Lord Parker in *Piddington v Bates* notes that the police must anticipate 'a real, not a remote, possibility' of a breach of the peace before they may take preventive action such as an arrest.<sup>210</sup> Likewise in *R v Howell* the court held that the common law power to arrest to prevent a breach of the peace arises only if 'the arrestor reasonably believes that such a breach will be committed in the *immediate future*'<sup>211</sup>. Further, Lord Diplock giving judgment in *Albert v Lavin*, referred to the 'well-established principle' that a constable (or citizen) has the right to take 'reasonable steps' to prevent a breach of the peace that 'is being or reasonably appears to be about to be, committed'.<sup>212</sup>

This principle was called into question in *Moss v McLachlan*.<sup>213</sup> This case concerned the lawfulness of police actions in stopping a group of striking miners who were intending to join a picket line. As Phillipson has noted, the court's reasoning did not appear to require that there was anything about these particular miners that would suggest they themselves might cause a breach of the peace.<sup>214</sup> Rather the court concluded that police actions were lawful on the basis that a breach of the peace was, on the basis of previous confrontations between striking miners and the police, a 'real possibility', which was not too 'remote'.

Most notably Skinner J, giving judgment in the Divisional Court, suggested that police actions short of arrest required a lesser test of imminence than the arrest of an individual

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<sup>208</sup> *R v Chief Constable of North Wales ex parte Thorpe* [1998] 3 W.L.R. 57 per Lord Woolf M.R.

<sup>209</sup> For further discussion of this point, see Helen Fenwick and Gavin Phillipson, 'The Human Rights Act, Public Protest and Judicial Activism', in András Sajó (ed) *Free to Protest: Constituent power and street demonstration* (Eleven International Publishing, 2009) 189-219

<sup>210</sup> *Piddington v Bates* (1960) 3 AER 660, 663

<sup>211</sup> *R v Howell* [1981] 3 WLR 501 (1981, 388 (*my emphasis*))

<sup>212</sup> *Albert v Lavin* [1981] 3 WLR 955 per Lord Diplock

<sup>213</sup> *Moss v McLachlan* [1985] 1 WLUK 376

<sup>214</sup> Helen Fenwick and Gavin Phillipson, 'The Human Rights Act, Public Protest and Judicial Activism', in András Sajó (ed) *Free to Protest: Constituent power and street demonstration* (Eleven International Publishing, 2009) 189-219, 202

to prevent a breach of the peace: '[t]he imminence or immediacy of the threat to the peace', he stated, 'determines what action is reasonable.'<sup>215</sup>

Skinner J appears to suggest an approach to preventive powers that imposes stricter 'imminence' constraints for more coercive police actions, while permitting broader police discretion for less restrictive measures. The logical extension of this position is that preventive measures which do not involve arrest or detention, or do not result in physical restrictions on movement, will be less constrained by considerations of imminence. Such a stance provides a possibly explanation for the notable absence of any discussion of imminence in case law relating to preventive surveillance.

The 'sliding scale' approach adopted by Skinner J in *Moss v McLachlan* was, however, roundly rejected in *Laporte*.<sup>216</sup> This case concerned the decision taken by the Gloucester Constabulary to turn back coaches full of protesters intending to attend an anti-war protest outside the RAF base in Fairford. The police claimed that the measure was necessary, as they possessed intelligence that some of those travelling on the coach had criminal intentions, and that the only way to prevent criminal actions taking place was to refuse to allow the coaches to proceed, and instead to escort them back to London. The issue in question was whether the police had a valid legal basis for preventive actions short of arrest, which were intended to avert the possibility or likelihood of a breach of the peace at a future point.

The House of Lords held that they did not. Lord Bingham dismissed arguments put forward on behalf of Gloucestershire Constabulary that they were able to rely on common law powers to prevent a breach of the peace. Instead the court held that as common law preventive powers existed alongside extensive statutory powers, the use of common law must be carefully limited. In the case of preventive actions designed to prevent a breach of the peace, the use of preventive powers were limited to circumstances in which their use was necessary to prevent an incident which was about to occur.

As we have previously noted, Lord Bingham stated that it would be 'surprising' if alongside the carefully crafted powers provided to the police by parliament, there was a common law

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<sup>215</sup> *Moss v McLachlan* [1985] 1 WLUK 376, 24

<sup>216</sup> *R (on the application of Laporte ) v. Chief Constable of Gloucestershire* [2006] UKHL 55, discussed in Helen Fenwick "Marginalising human rights: breach of the peace, "kettling", the Human Rights Act and public protest" [2009] PL 737 and David Mead *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart, 2010) 335-348.

‘bounded only by an uncertain and undefined condition of reasonableness’ Instead, he suggested, preventive powers should be available only ‘in an emergency to prevent something which is about to happen.’<sup>217</sup> It was ‘not enough to justify action that a breach of the peace is anticipated to be a real possibility, and neither constables nor private citizens are empowered or bound to take such steps as on the evidence before them they think proper’.<sup>218</sup>

Lord Bingham also specifically endorsed a passage contained in the judgment of the divisional court, which emphasised the need for preventive powers to be carefully contained.

For them to be prescribed by law, it is necessary that the law sufficiently defines the circumstances in which the police may lawfully take preventive measures of this kind.... The essential features are that a senior police officer should honestly and reasonably form the opinion that there is a real risk of a breach of the peace in close proximity both in place and time; that the possibility of a breach must be real; that the preventive measures must be reasonable; and that the imminence or immediacy of the threat to the peace determines what action is reasonable...<sup>219</sup>

The effect of *Laporte*, therefore is that while it does not alter the powers that can be invoked to prevent a breach of the peace, it imposes constraints on the point at which those powers may be invoked.<sup>220</sup> It is far from clear, on this basis, why some preventive police powers are bounded by the constraints of imminence and immediacy while others are not. A general police power to ‘prevent crime’ exists, in a similar way to the power to prevent a breach of the peace, alongside a range of statutory powers closely defined by parliament. In the area of crime prevention, for the sake of illustration, these include powers to arrest for inchoate offences (such as attempts, incitement or conspiracy),<sup>221</sup>

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<sup>217</sup> *Laporte, R (on the application of ) v. Chief Constable of Gloucestershire* [2006] UKHL 55 [49]

<sup>218</sup> *Laporte, R (on the application of ) v. Chief Constable of Gloucestershire* [2006] UKHL 55 (13 November 2006) [47]

<sup>219</sup> *Laporte, R (on the application of ) v. Chief Constable of Gloucestershire* [2006] UKHL 55 (13 November 2006) [39] per May LJ

<sup>220</sup> Helen Fenwick and Gavin Phillipson, ‘The Human Rights Act, Public Protest and Judicial Activism’ , in András Sajó (ed) *Free to Protest: Constituent power and street demonstration* (Eleven International Publishing, 2009) 189-219, 207

<sup>221</sup> English criminal law contains various statutes that make it an offence to undertake acts preparatory to a criminal offence. In general terms, section 1 of the Criminal Attempts Act 1981 makes it an offence to undertake an act which is ‘more than merely preparatory’ to a criminal offence. There are also specific offences such as ‘engag[ing] in any conduct in preparation for’ an act of terrorism (section 5 Terrorism Act 2006). The Serious Crime Act 2007 also makes it an offence to ‘do an act capable of encouraging or assisting the commission of an offence’ (section 44).

powers of seizure and search (with or without ‘reasonable suspicion’);<sup>222</sup> ‘crime reduction’ powers of licensing, certification and other regulatory measures;<sup>223</sup> and powers to impose pre-emptive restraints on behaviour, including anti-social behaviour orders, football banning orders and anti-terrorism measures.<sup>224</sup> It certainly does appear to be surprising that, alongside such extensive statutory measures, there existed a common law power to prevent crime of uncertain and undefined extent, bounded only by a requirement of reasonableness.

Important rule-of-law issues are raised, not only by the lack of certainty inherent in a requirement of mere ‘reasonableness’, but by the lack of any obligation on police to establish a nexus between the preventive measure, and the crime to be prevented. Preventive measures may be considerably remote from the intended outcome, thus creating extensive discretion for them to be utilised in a very wide range of circumstances, which may not be foreseeable to those subject to them. If the common law power to prevent crime is a positive law, enabling the restriction of individual liberties or rights, and it may be utilised in circumstances where there is no clear connection to the crime purportedly being prevented, there must be an intrinsic and significant risk of arbitrary action by law enforcement bodies.

### The requirement of legality

We have seen that there are considerable doubts as to whether the common law can be said to provide a valid basis in law for some, if not all, preventive police functions. It has been argued here that it cannot be the case, as was once claimed in *Malone*, that the police have uncurbed freedoms to ‘do that which is not forbidden’. The alternative argument, that the constable possesses a positive common law power to prevent crime, based on traditional functions of the common law constable (and later, the uniformed police officer) is in part persuasive: difficulties arise however, in relation to the scope of preventive powers. While there is a strong case that common law powers exist to take measures to respond to the imminent or immediate threat of crime, the case that such powers should extend to modern methods of pre-emptive, risk based policing is far less convincing.

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<sup>222</sup> See, for example, Police and Criminal Evidence Act Parts I and II; the Criminal Justice and Public Order Act 1994 (section 60); the Terrorism Act 2000 (sections 42, 43 and 43A).

<sup>223</sup> The police are, for example, a ‘relevant authority’ for the purposes of the Licensing Act 2003, which entitles them to make representations on licensing applications

<sup>224</sup> See Anti-social Behaviour, Crime and Policing Act 2014; Football Spectators Act 1989; Terrorism Prevention and Investigation Measures Act 2011

Moreover, an undefined common law power risks over-extending the discretion available to the police, and creating the risk of arbitrary state action.

In order to be lawful, of course, it is not sufficient that a policing measure has a valid basis in law. In order to meet the requirements of the Convention, any policing power which restricts individual rights must be 'in accordance with law'<sup>225</sup>. This requires not only that such measures have a valid basis in law, but that they also meet the requisite standard of 'quality of law'.

While the ECtHR has accepted that the common law may provide a valid basis in law, it mandates that the law must be 'formulated with sufficient precision to enable the citizen to regulate his conduct'.<sup>226</sup> The individual must be able - if necessary with appropriate advice - 'to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.<sup>227</sup> Whether by common law or statute, domestic law 'must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise'.<sup>228</sup>

Whereas surveillance measures may not be 'open to scrutiny by the individuals concerned or the public at large', legal discretion granted to the executive must not 'be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference'.<sup>229</sup> There must also be adequate and effective safeguards, 'since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it'.<sup>230</sup> These should include, 'duration, storage, usage, access of third parties, procedures for preserving the integrity

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<sup>225</sup> See Chapters 3 and 4 for a discussion of the extent to which overt surveillance may amount to an interference with privacy rights and the right to freedom of assembly.

<sup>226</sup> *Sunday Times v United Kingdom* (No.1) (1979) 2 EHRR 245 [49]

<sup>227</sup> *Sunday Times v United Kingdom* (No.1) (1979) 2 EHRR 245 [49]

<sup>228</sup> *MM v United Kingdom* App no. 24029/07 (ECtHR 13 November 2012) [193] See also *Malone v UK* 7 EHRR 14 [66-68]; *Rotaru v Romania* App. No. 28341/95 (ECtHR 4 May 2000) [52-55]

<sup>229</sup> *Weber v Germany* 2008) 46 EHRR SE5. See also *Malone* (1985) 7 EHRR 14 [32]; *Leander* (1987) 9 EHRR 433 [23]

<sup>230</sup> *Rotaru v Romania* App. No. 28341/95 (ECtHR 4 May 2000) [59]

and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness'.<sup>231</sup>

There is some evidence however, of a divergent approach between Strasbourg and the UK courts, on the degree of precision that may be required to render a particular measure 'in accordance with law'. The UK courts have adopted a more deferential approach. In a number of key recent decisions they have appeared notably reluctant to strictly enforce Convention safeguards against arbitrary state action, and have instead been willing to tolerate extensive police discretion in determining when, how and against whom a policing measure may be used.<sup>232</sup> Further, the courts have indicated support for what Sir John Laws has termed a 'relativist approach' by which a lesser degree of precision is required to protect against what have been termed 'less serious' infringements of Convention rights

Arbitrary action has been interpreted narrowly by the UK courts, not as the operation of excessive discretion, but as the abuse or over-extension of police powers. The need for 'clear and publicly accessible rules of law', Lord Bingham notes in *Gillan*, is not explicitly to constrain very precisely the limits of police discretion but rather to protect the public from 'interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred'. This, he suggests, is what in this context, 'is meant by arbitrariness, which is the antithesis of legality'.<sup>233</sup>

A similar position was taken by Lord Hope, who argued that section 44 powers to stop and search persons without suspicion were not arbitrary, because the legislation placed constraints on the 'things that a constable can do':

'he may not require the person to remove any clothing in public except that which is specified, and the person may be detained only for such time as is reasonably

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<sup>231</sup> Marper and S v United Kingdom (2009) 48 EHRR [99]

<sup>232</sup> See on this Gavin Phillipson (2007) 60 (1) 'Deference, Discretion, and Democracy in the Human Rights Act Era', *Current Legal Problems*, 40–78. Phillipson argues that excessive judicial deference of the courts to the legislature can result in the failure of the courts to enforce the legal safeguards of the Convention, even though a strict compliance with Convention guarantees may have been a key factor in parliamentary thinking. Thus, 'while excessive judicial deference may prevent its guarantees from being legally enforced against the Executive, the Act may be waved reassuringly in front of Parliament so as also to prevent proper political scrutiny of rights-infringing legislation.

<sup>233</sup> R (Gillan) v Commissioner of Police of the Metropolis [2006] 2 AC 307, 34 per Lord Bingham of Cornhill

required to permit the search to be carried out at or near the place where the person or vehicle has been stopped.’<sup>234</sup>

Although it was true, he noted, from the perspective of the person being searched, ‘the situation is one where all the cards are in the hands of the police’,<sup>235</sup> police powers of stop and search had to be seen in the wider context of the legislation in question, which did not have to be formulated with ‘excessive rigidity’<sup>236</sup>. Further, Lord Hope argued, the law provided a ‘system of regulatory control’ which was sufficient in the circumstances given that ‘the sufficiency of these measures must be balanced against the nature and degree of the interference with the citizen’s Convention rights’.<sup>237</sup>

This latter statement was relied upon by Lord Justice Laws, in the later case of *Wood*, in advancing what he termed a ‘relativist approach’, by which he meant that the degree of certainty and precision required from the law should depend upon the intrusiveness of the interfering measure in question.

‘I would attach particular importance to the nature of the intrusion said to violate art 8. There is some suggestion in the cases of a relativist approach, so that the more intrusive the act complained of, the more precise and specific must be the law said to justify it.’<sup>238</sup>

An intrusion that was ‘no more than modest’ thus imposed a lesser requirement of certainty in order to establish compliance with the requirement of legality. In this case, which involved a campaigner being photographed by the police in a public street, Laws LJ asserted that the broad legal basis provided by the common law was sufficient, without more, to establish compliance with the requirement of legality.

‘...the Respondent in my judgment does not need to rely on the terms of his policy, or any established internal procedures relating to overt photography, in order to establish compliance with the requirement of legality. The common law power suffices. For the same reason I do not find it necessary to enter into the further

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<sup>234</sup> R (Gillan) v Commissioner of Police of the Metropolis [2006] 2 AC 307, 56

<sup>235</sup> R (Gillan) v Commissioner of Police of the Metropolis [2006] 2 AC 307, 49

<sup>236</sup> Kuijper v The Netherlands 41 EHRR SE 16

<sup>237</sup> R (Gillan) v Commissioner of Police of the Metropolis [2006] 2 AC 307, 56

<sup>238</sup> Wood v Commissioner of Police for the Metropolis [2009] EWCA Civ 414

debate between the parties as to whether the legality requirement might be met by the provisions of the Data Protection Act 1998<sup>239</sup>

His Lordship's comments were, it must be noted, *obiter*. Further, they were not shared by Dyson LJ or Lord Collins, neither of whom gave a concluded view on the issue of 'in accordance with law', finding instead that the retention was not, in this case, proportionate. Perhaps the main difficulty with a holding that more modest intrusions impose lesser requirements of certainty is that it assumes an objective measure of modesty, or at least assumes a uniformly agreed understanding of what such might mean. The reverse is true. Modesty, here, is a quality of effect, one that must be conceived of individually. Indeed, to stress the point at the heart of this thesis, imbuing photography on the street with the quality of modesty will very much fail to accord any weight to the other, wider harms such an activity might cause.

Strasbourg jurisprudence appears to lend little support to such an approach. In *Gillan* the ECtHR placed significant emphasis on the scope of police discretion permitted by section 44 of the Terrorism Act 2000, and rejected the argument that such discretion was justified by the 'insufficiently serious' degree of intrusion that resulted from the stop and search procedure.<sup>240</sup> The broad discretion available to the police was, it held, 'neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse', thus constituting a real risk of arbitrary use.<sup>241</sup>

The 'in accordance with law' issue further arose in *Marper*. The case concerned biometric data obtained from persons held in custody, a practice authorised by the Police and Criminal Evidence Act 1998. The House of Lords had dealt with the 'in accordance with law' question with surprising brevity; Lord Steyn giving lead judgment stated simply that such an 'obviously unmeritorious point does not require elaborate examination'.<sup>242</sup>

The Court in Strasbourg took a different view. It concluded that there had been a violation of Article 8, as the blanket and indiscriminate nature of the power of retention failed to strike a fair balance between competing public and private interests. Although it decided the case on proportionality grounds, the Court made a point of noting that the questions of whether the interference was necessary in a democratic society was closely related to the

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<sup>239</sup> *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, 55

<sup>240</sup> *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45

<sup>241</sup> *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45

<sup>242</sup> *R (S and Marper) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, 36

question of whether the measure was ‘in accordance with law’. The ‘open ended retention regime’ the Court concluded, was ‘blanket and indiscriminate’ in that data could be retained irrespective of the nature or gravity of the offence; the retention was not time-limited; and there was only limited possibilities for the person concerned to have the material destroyed.<sup>243</sup>

The decisions of the ECtHR make it clear that even statutory measures may fall foul of ‘in accordance with law’ requirements, if they are not sufficiently precise so as to constrain state discretion in the use of measures which interfere with privacy rights.

There appears no support for the argument made by Lord Justice Laws, that there is some form of sliding scale requiring less precision for measures which only modestly interfere with privacy rights, or indeed that there is any such thing as a ‘modest’ interference with fundamental rights.

An alternative approach taken by the UK courts has been to argue that sufficient provision in the collection and retention of personal data by policing bodies is provided by related statutory and non-statutory provisions, including the Data Protection Act 1998 and the statutory guidance for the management of police information (MoPI). Although Laws LJ had held in *Wood* that reliance on such provisions was unnecessary as the common law alone sufficed, the UK courts have increasingly placed reliance on data protection regulation and information management as a means of establishing sufficient precision and clarity in law.

The role of ‘soft law’, in particular the MoPI guidance, was considered in *RMC and another v Commissioner of Police for the Metropolis*. The Divisional Court, following *Marper*, had reviewed whether statutory law on the retention of custody photographs met quality of law obligations. The Court concluded that while the relevant statutory law alone was not sufficiently precise, this requirement was met by the MoPI guidance, on the grounds that it included a detailed regime for the retention of personal data<sup>244</sup>.

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<sup>243</sup> S and Marper v. The United Kingdom (2009) 48 EHRR 50 at [119]

<sup>244</sup> *RMC and another v Commissioner of Police for the Metropolis* [2012] EWHC 1681 (Admin). The Divisional Court, following *Marper*, had reviewed whether statutory law on the retention of custody photographs met quality of law obligations. The Court concluded that while the relevant statutory law alone was not sufficiently precise, this requirement was met by the MoPI guidance, which included detailed retention regimes. This case, however, differed from *Wood* and *Catt* in that the circumstances in which photographs could be taken were clearly laid out in statutory law.

A similar approach was taken in *Catt*. Lady Hale noted that,

the combination of the requirements of the Data Protection Act 1998, coupled with the Code of Practice issued by the Secretary of State under the Police Act 1996 and the detailed Guidance on the Management of Police Information issued by the Association of Chief Police Officers, provided sufficient protection against arbitrary police behaviour, so that the collection and retention of this information was “in accordance with the law” for the purpose of article 8(2) of the Convention.<sup>245</sup>

Lord Sumption giving lead judgment noted that 1998 Act provided a number of safeguards: that data can be processed only where necessary for the prevention and detection of crime or other public purpose; data held cannot be excessive, inaccurate or irrelevant; it cannot be retained for longer than necessary, or used for purposes unrelated to that for which it is collected. He noted further that the purposes for which information may be obtained and retained by the police were ‘narrowly defined’ by the statutory MoPI Code of Practice.

It is argued here that this reliance on the broader legal framework - on generalised legislation and codes of practice - is insufficient to meet ‘in accordance with law’ requirements. For reasons previously discussed such an approach is inadequate as a means of addressing legality issues arising in the context of overt surveillance. This is not to say that data protection provisions, particularly when viewed alongside statutory guidance on police retention and use of personal data, are unimportant or of no utility. Current provisions limit the processing of personal data to that which is necessary for a legitimate law enforcement purpose. Inherent within this is the need for processing to be proportionate to that purpose: processing must be the least intrusive means of attaining a legitimate aim; the data must be relevant and not excessive for that purpose; must be accurate and up-to-date; and it must be retaining for no longer than is necessary. The provisions also protect the rights of the data subject to information about the processing of their data.

The provisions thus provide important protections against the misuse of data by public officials acting on any ‘personal whim, caprice [or] malice’. However, such provisions do not (and are not intended to) determine or delineate the scope of police discretion in carrying out overt surveillance practices. Surveillance and data processing are not identical practices: personal data is processed by policing bodies for a range of purposes, many of

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<sup>245</sup> *Catt v Commissioner of Police for the Metropolis* [2015] UKSC 9, 47

which are unconnected with surveillance. There is no reason to suppose that provisions crafted to regulate the processing of personal data will be sufficient to constrain police discretion in the use of overt surveillance. What is required, it is argued, is much greater clarity and precision as to when, how, and against whom the police may legitimately make use of overt surveillance measures.

## Conclusion

Overt surveillance measures have become a ubiquitous part of modern life. The debate about the extent to which such mechanisms may be used to prevent and pre-empt the possibility or risk of future crime has, however, become particularly acute in recent years, as more advanced technologies become available to the police. Modern police forces have recourse to a sophisticated range of technologies to 'prevent' crime, including predictive policing algorithms, advanced profiling mechanisms, and facial recognition software. Alongside these technologies lies the capacity of the police to collect, retain and analyse vast quantities of personal data, obtained from diverse sources, including camera feeds, social media output, and other monitoring of public places. Those identified as posing 'risk' are likely to be subject to a range of policing interventions, including visible – and often conspicuous – forms of monitoring. All of this, it is claimed, has a basis in the common law power of the constable to prevent crime. As a result, such measures are not required to be subject to the parliamentary scrutiny that accompanies the passing of new legislation.

Such technologically advanced policing techniques and strategies appear very distant from the use of common law preventive powers in the era of the common law constable. We have come a very long way since the law, unpaid, constable of the tithe relied on his common law powers – the same powers as the ordinary citizen – to keep the King's peace by setting the watch and apprehending wrongdoers. Modern policing is not only technologically very different from traditional forms of policing, it is different in style and approach. It does not only seek to prevent crime, it seeks to prevent the *risk* of crime, and thus facilitates interventions at a much earlier stage than that at which 'reasonable suspicion' arises. We shall see later on, that surveillance is used not only to identify individuals and groups thought to pose 'risk', but also to monitor and modify their behaviour.

The reliance on the common law to provide a legal basis for overt surveillance is problematic. The common law is not a legal dinosaur, stuck in an era of the past; it is necessarily an evolving instrument, adapting to societal and legal developments. It is the

role of the courts to apply established legal principles to changing and new circumstances; but it is not legitimate for the judiciary to invent new law. Specifically, in this context, it is suggested that it is not legitimate to expand the scope of police powers far beyond that which were provided to the police by the common law. The essence of common law powers is that they were powers that may be exercised by the constable and the citizen alike. It is stretching the bounds of credibility to suggest that modern forms of prevention, using the technology, resources and authority available to the modern police officer, may be exercised equally by the constable and the ordinary person.

The appropriate place for the development of new policing powers is, of course, parliament. It is somewhat surprising that parliament has not intervened in this respect, given that over the last two centuries parliament has consistently sought to regulate, define, and delineate police powers of varying descriptions. One reason for this is that preventive strategies are seen to be largely benign. Preventive surveillance, of the type discussed here, operates in the public not the private domain; it is perceived to be a form of action that does not limit individual liberty. Research undertaken for this study, however, demonstrates that from the perspective of those subject to preventive surveillance, this is not the case.<sup>246</sup>

In the absence of the parliamentary intervention, the approach taken by the judiciary has been consistently to 'find' a legal basis for surveillance measures as they arise. Over time, as we have seen, the domestic courts have made continued, but shifting, claims for the existence of a common law power policing power to prevent crime. The first was simply to assert that an explicit power was not needed: under the common law the police constable could do, as the natural person could do, that which was not forbidden. This was the proposition put forward by the UK government in the ECtHR case of *Malone*, and which was also successfully argued in *Murray*. When it was clear that the absence of prohibition would no longer suffice, the courts asserted instead the existence of a positive power to prevent crime, of broad definition and uncertain scope. This approach has been used to provide a legal basis for photographing people in the street (*Wood*); for publishing photographs of suspects (*Hellewell*); and for disclosing private information (*Thorpe*). In order to satisfy concerns about the extent to which such powers are 'in accordance with law' the courts have sought to rely on a combination of common law alongside a broader

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<sup>246</sup> See Chapters 3 and 4

framework of statutory and non-statutory guidance and codes of practice, as we have seen in *Catt* and *Re JR 38*.

The internal contradictions inherent in these positions have not been judicially acknowledged. A reliance on the absence of law, providing the constable with the freedom of the natural person to do that which is not forbidden, is a very different legal basis to that provided by a positive common law power to prevent crime. While a residual liberty is bounded by the limits of the law, a positive power for the police to take action where necessary for the prevention of crime, implies a capacity to take action which is coercive. This distinction has not, however, been explicitly addressed by the courts; nor have they addressed the extent to which the common law power of the police retains a coercive element.

It is important, of course, that the state is not permitted to mix and match. Different restrictions, and different opportunities for action, are inherent in each approach. If reliant on a residual liberty, the constable may take no action that would prohibited for any citizen to take – they are constrained by the law. They suffer no constraints, however, in taking any action not proscribed by law. If exercising a positive power, on the other hand, the police may act coercively, but are not free to do anything the natural citizen may do. Being able to choose between the two approaches thus effectively removes the restraints intrinsic in either approach.

The application of Convention rights has undeniably restricted the scope of police powers exercisable under the common law. It is surely unsatisfactory, however, that there is a reliance on the Convention, rather than domestic law, to curtail and delineate police powers. What is more, there is continuing doubt as to whether the current approach of the UK state, which is to rely on largely undefined common law powers, will meet Convention obligations. As we have seen, the lawfulness requirement refers not only to the existence of a legal basis in domestic law but also to the quality of the law, which should be clear, foreseeable as to its effects and accessible to the person concerned, who must be in a position to foresee the consequences of his or her acts.<sup>247</sup> In the context of surveillance, the ECtHR has held that the law must be sufficiently clear in its terms to give citizens an adequate indication of the conditions and circumstances in which the authorities are empowered to resort to measures of surveillance and collection of data.<sup>248</sup>

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<sup>247</sup> *Silver and Others v. the United Kingdom* [1983] 5 EHRR 347 [88]

<sup>248</sup> *Shimovolos v Russia* (2011) 50 EHRR 26 [68]

The judiciary have sought to rely on the application of data protection regulation and 'soft law' detailing retention regimes in order to meet such requirements. It has been argued here that this, too, is inadequate: while it provides welcome additional safeguards, it fails to address the central issue: the circumstances in which the state may undertake surveillance and intelligence-gathering measures.

Underlying all the problems discussed above is the failure to consider what is meant, in different situations, by the 'prevention of crime'. The courts have studiously steered away from the challenge of subjecting the common law power to prevent crime, to the same degree of judicial examination that has been evident in relation to the common law power to prevent a breach of the peace. Historically speaking, it is far from clear that there was a significant distinction between the two: the duty to preserve the King's peace imbued upon the constable a duty to prevent both crime and disorder, and there is no evidence that the powers of the constable to intervene to prevent disorder were in any way distinct to his powers to similarly intervene to prevent crime. Yet, in the modern day, the power to prevent a breach of the peace is carefully constrained, both in relation to arrest, and actions short of arrest, to situations in which violence or disorder is immediately, or imminently anticipated. The power to prevent crime, on the other hand, contains no such restrictions: it appears to be applicable across any time frame; and does not relate to any particular categories of crime. It seemingly allows the police unrestrained abilities to take any action they perceive necessary (or even, perhaps, expedient) to prevent any kind of criminality, curbed only by the extent to which police powers are constrained by existing legislation, including the application of Convention rights.

There can be no doubt that the constable has, to at least some degree, a common law power to prevent crime. This has historical antecedence in the powers exercised by the common law constable from at least as far back as the twelfth or thirteenth centuries. The problem is not that such a positive power does not exist *per se*. The problem lies in the extent or scope of police activity which may reasonably claim such a heritage. The term 'crime prevention' is broad and undefined: it may refer to a very extensive range of policing actions and measures, relating not only to the prevention of immediately anticipated crime, or with general deterrence, but with broader concepts that may more accurately be described in other terms, such as prediction, pre-emption and the forestalling of risk.

Surveillance for purposes of deterring or responding to imminent threats has a clear historical basis in the common law. The early constable 'set the watch' and apprehended

‘suspicious persons’. To this extent, common law powers to prevent crime appear to be on safe ground. It is also well established that the constable’s duty to prevent crime has traditionally extended to obtaining and recording information about criminal offences, and their perpetrators, to enable detection of crimes that have happened, and to facilitate the detection of crimes that may happen in the future.

The failure to define or limit crime prevention has, however, expanded the scope of the common law, far beyond this. What is needed is a clear definition which distinguishes between different types of prevention. There are arguably three ‘types’ of preventive surveillance. The first type is protective: it may be said to be equivalent to the setting of the watch. This involves the observation of a set location in order to protect persons and property by enabling a prompt response to any incidents that occur. The second type is responsive: it may be said to be equivalent to the ‘hue and cry’. This encapsulates the duty of the constable (and to a lesser extent the citizen) to intervene if they perceive that a crime is about to take place. The third type is pre-emptive, and there is no equivalent measure in traditional policing. This type, it is argued, is distinct from other types of surveillance. It is not concerned with monitoring space, as is the first type, but rather it is focused specifically on individuals or groups thought to pose a future risk. Nor is it, like the second type, prompted by an emerging incident, or the anticipation of imminent or immediate crime or disorder.

This approach to differentiating and delineating what is meant by the ‘prevention of crime’ provides a means of distinguishing police measures that may reasonably be said to have a basis in the common law, from those for which such a basis is (at best) somewhat strained. It supports the contention that the police have an established common law power to prevent crime that enables them to retain their current operational discretion to observe the public realm, and to respond to imminent threats of crime and disorder. It provides a means, however, of restricting the scope of the common law, to enhance its capacity to meet Convention requirements, and to provide more certainty and foreseeability in the law.

## Chapter 3: Overt police surveillance and Public Privacy

The circumstances in which privacy rights should be applicable to the public domain remains an area of contention, both academically and judicially. This work seeks to examine the question of public privacy in the context of police surveillance of public protest. It considers the nature of police surveillance activities in this context, and the privacy issues that consequently arise, and argues while simply being watched or observed in a public place (or even photographed) does not cause significant privacy problems, there are a number of circumstances in which significant privacy harms arise from overt surveillance practices.

The methodology adopted here draws on the empirical approach suggested by both Solove and Hughes: that privacy must be understood and examined in the context in which it arises, rather than in a purely theoretical and abstract manner. Privacy, Hughes notes, is 'a multi-faceted concept which derives its meaning in particular situations from the social context and the ways in which people experience and respond to those situations'.<sup>249</sup> It must, as Solove has argued, 'be worked out contextually rather than in the abstract'.<sup>250</sup> This does not mean, of course, that privacy should be understood only as a series of isolated examples; rather that theory should be developed as a response to practical problems of privacy, arising in the 'real' world.<sup>251</sup>

Drawing on empirical data obtained in interviews with thirty social movement actors, all of whom had direct experience of overt police surveillance in the context of political protest, this work seeks to examine the kinds of privacy harms that arise in this context. It seeks to challenge the conception, which remains prominent in judicial debate, that police surveillance of public assemblies is broadly equivalent to 'public observation', in that it causes no greater privacy harm than simply being observed or seen by others in public places. Instead it argues that there are at least three circumstances, in which such surveillance is materially distinct: unlike the general observation of others in the public realm, surveillance may be physically intrusive; it may result in a loss of public anonymity; and it may involve the persistent and sustained monitoring of an identified individual over time. Each and any of these, this chapter argues, is capable of constituting a harm to what

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<sup>249</sup> Kirsty Hughes, 'A Behavioural Understanding of Privacy' (2012) 75(5) MLR 806, 806

<sup>250</sup> Daniel Solove, *Understanding Privacy* (HUP 2009) 40

<sup>251</sup> *ibid*

we can sensibly and appropriately categorise as a ‘privacy interest’ or, in short, constitute a privacy-harm.

It is suggested however, that the courts (both domestic and in Strasbourg) lack a legal framework that is adequate for the recognition of privacy harms that arise in these circumstances. The UK courts have tended to adopt a narrow notion of privacy that places strong emphasis on locational elements: privacy on this conception is concerned with those aspects of ourselves that we seek to keep from public view. Privacy is related to the protection of intimacy, seclusion and confidentiality, and arises in the public realm only to the extent necessary to restrict the dissemination of information relating to our ‘private’ lives; it therefore has limited applicability to what are essentially and by definition ‘public’ activities such as protest.

The ECtHR, in contrast, has taken a more expansive approach to privacy which recognises its application outside the ‘inner circle’ of a person’s life. The Court has, however, placed particular emphasis on informational privacy, and particularly (in the context of surveillance) on the extent to which the state obtains and retains data relating to an identified individual in state information systems. While the approach taken by the ECtHR enables greater recognition of public privacy harms than that taken by domestic courts, it is nevertheless an inadequate framework with which to recognise the distinct kinds of privacy harm that arise from the police surveillance activities, which do not necessarily involve the collection and recording of ‘new’ information.

The aim of the chapter is to construct a notion of privacy that is both wider and different to the more usual individualised understanding, generally premised either locationally or informationally. It seeks to argue that neither of those (nor both) provides a sufficiently sensitive or comprehensive framework with which to approach the question of privacy harms suffered by protesters in public. To that end, the discussion proceeds in three parts. Firstly, it will undertake a brief examination of key theoretical conceptions of public privacy. Secondly, drawing from Daniel Solove’s taxonomy of privacy, and from interviews conducted with social movement actors, it will seek to construct a partial ‘taxonomy’ of surveillance activities and the privacy harms that arise from them. Thirdly, and finally, it will evaluate and examine the varying approaches taken by the courts, both domestically and in Strasbourg, in relation to the applicability of privacy rights to harms arising different kinds of state surveillance activity. It concludes by suggesting that a more sophisticated and balanced approach to public privacy may be achieved placing emphasis, in addition to

locational and informational notions of privacy, to concepts of physical and psychological integrity, identity, and individual autonomy.

### Theoretical conceptions of public privacy.

As a great many privacy theorists have indicated, privacy is a vague and expansive notion which is notoriously difficult to delineate. Westin begins his seminal work on Privacy and Freedom by noting that 'few values so fundamental to society as privacy have been left so undefined in social theory'.<sup>252</sup> This work does not attempt to add to the already significant weight of academic literature aimed at achieving a general theory of privacy. It does however, aim to explore what privacy means, and how it functions as a legal right, in the narrow context of state surveillance of public assemblies. I have used the term public privacy, in this sense, to convey not only the extension of privacy rights to *public locations*, but also the application of privacy rights to *public activities*.

What follows is a necessarily brief discussion of the idea of public privacy as it has been conceptualised by privacy theorists. It considers various approaches that have been taken in relation to the question of how and when, and in which circumstance, the notion of privacy has relevance in the public realm: the extent that we may rely on privacy while in public places, and while engaging in public activities.

We first consider arguments put forward by Nicole Moreham that the prime function of privacy is to prevent others from obtaining unwanted access to us; on this basis the concept of public privacy is limited to the extent to which we may reasonably restrict access to ourselves while in a public place. Secondly we consider broader arguments for public privacy put forward by theorists such as Alan Westin and Kirsty Hughes. Hughes argues however that the dichotomy between that which is private and that which is public is far less clear, and that privacy is maintained in the public domain by various forms of 'privacy barrier' which relate both to the actions we take ourselves, and our expectations of others.<sup>253</sup> Thus our public privacy is maintained, as Westin has argued, by our recourse to 'public anonymity' and our ability to merge into the situational background.<sup>254</sup> Thirdly, we consider the approach taken to issues of public privacy by Daniel Solove, who argues that privacy should be conceptualised in relation to the harms that arise from surveillance activities: and that in particular privacy harms arise from surveillance activities which

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<sup>252</sup> Alan Westin, *Privacy and Freedom* (The Bodley Head, 1970), 1

<sup>253</sup> Kirsty Hughes, *A Behavioural Understanding of Privacy*, (2012) 75(5) MLR 806

<sup>254</sup> Alan Westin, *Privacy and Freedom* (The Bodley Head, 1970), 1

involve the intrusions and decisional interference, in addition to informational harms arising from the collection, processing and use (or dissemination) of personal information.<sup>255</sup>

Nicole Moreham defines privacy as the state of ‘desired ‘inaccess’ or as ‘freedom from unwanted access’.<sup>256</sup> She considers that a person will be in a state of privacy if ‘he or she is only seen, heard, touched or found out about if, and to the extent that, he or she wants to be seen, heard, touched or found out about.’ Privacy is therefore determined primarily by a person’s desire to control access to themselves. Thus, she notes, ‘a place, event or activity will be ‘private’ if a person wishes to be free from outside access when attending or undertaking it, and information will be ‘private’ if the person to whom it relates does not want people to know about it.’<sup>257</sup>

Privacy is necessarily lost, on Moreham’s conception, when we go out in public and we may be observed by others, listened to by others, and come into physical contact with others, such as inevitably occurs in crowded areas. ‘Public privacy’ for Moreham therefore consists only of the extent to which we can protect ourselves from unwanted access in the public realm – by, for example, wearing clothes to cover our bodies; talking quietly so that no-one else can hear our conversations; or choosing to be in secluded area. An actionable loss of privacy in these circumstances, Moreham suggests, will only occur if these defences are breached by the actions of others: if, for example, a surveillance device is used which can see through our clothes; or if our desire for seclusion is violated by the taking and publication of images to a much larger or differently constituted audience.<sup>258</sup> Privacy is therefore primarily determined by locational factors: whether we are ‘in public’ or ‘in private’; and by the nature of what we are doing: whether we are engaged in an inherently ‘private’ activity, even if it takes place in a ‘public’ place.

Moreham’s conception of privacy thus extends to the public realm: it is clearly possible for a person to have a *desire* for inaccess regardless of their location. The practical application of Moreham’s conception of privacy to the public domain is, however, limited by the concept of reasonableness . Privacy is necessarily lost, she states, when we go out in public

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<sup>255</sup> See, for example, Daniel Solove, *Nothing to Hide: The False Tradeoff between Privacy and Security* (Yale University Press 2013)

<sup>256</sup> Nicole Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis (2005) 121 LQR 628

<sup>257</sup> Nicole Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis (2005) 121 LQR 628, 633

<sup>258</sup> Nicole Moreham, ‘Privacy in Public Places’ (2006) 65 CLJ 606, 618

and come into contact with others, who may make physical contact with us, and observe us and hear what we say. Not every loss of privacy, on that basis, can constitute a legal claim. Rather, such a claim must be restricted to such expectations of privacy that are, in the circumstances, reasonable.

The inevitable difficulty therefore is thus how to determine when a claim to privacy in the public domain is a ‘reasonable’ one. Moreham suggests two ways in which a right to privacy may be breached in public places. Firstly, Moreham argues that a person protects their desire for privacy in a public place by taking certain actions, such as wearing clothes to cover those parts of themselves they do not wish to reveal, or by talking quietly so they are not overheard. A person’s privacy would therefore be breached by actions which undermine those measures by, for example, using a technological device to see through their clothes, or surreptitiously listen to their conversations. Secondly, Moreham contends that a reasonable expectation of privacy may be lost if images of a person were to be disseminated to a larger or differently constituted audience. Thus that person may have a privacy claim if a photograph of them were taken and then subsequently published.

Moreham recognises explicitly that intrusions ‘such as spying on, photographing or following a person’ can upset a person’s desire for, and expectation of privacy. However, she appears to suggest that such actions are capable of constituting harm only if they breach those measures a person has taken to defend themselves from the ‘access of others’, or if they reveal aspects of a person intended to be kept from public view: for example, they are engaged in intimate, embarrassing or traumatic events. Further, a right to privacy will not normally extend to circumstances in which a person has placed themselves in public view, and/or has deliberately drawn attention to themselves. On this basis there appears very little scope for the application of privacy rights to individuals engaging in the act of public protest. Protest assemblies not only tend to take place in public locations, they are often viewed, in Habermasian terms, as essentially ‘public activities’; by participating in such activities, in public view, we can indeed be said to be attracting attention to ourselves.

It is worth noting that when Moreham talks of unwanted access, she explicitly has in mind physical proximity, sensory perception, and information.<sup>259</sup> Each of these is threatened by surveillance of protesters in public, it should be conceded, but as this chapter will explore, those are simply aspects of what we might term public privacy – inclusionary but not

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<sup>259</sup> Nicole Moreham, ‘Privacy in Public Places’ (2006) 65 CLJ 606, 617

comprehensive when we configure the possible harms. Further, she appears only to consider that certain compounding factors are capable of constituting harm if we are engaged in private activities in public: that it is if we are engaged in Intimate, embarrassing or traumatic events, or when we are not drawing attention to ourselves.<sup>260</sup> Neither seems to have purchase in our context; neither properly captures the possible privacy harms occasioned during a protest in public. Lastly, while some of the four factors that might hold sway when judging whether or not there has been a harm to someone's privacy interests – the location, our conduct or activity, the manner in which the information or data was obtained, and whether or not the focus was on the individual claimant<sup>261</sup> – militate in favour of holding that a protester's public privacy has been restricted, not all do, and several point the other way. The focus of course of all information in the sorts of scenarios we are considering is on the individual, satisfying that last, but it must be doubtful of larger numbers will view whatever it was the protester was doing; we are not really thinking about wider broadcasts, and it will certainly not be the case that information was surreptitiously acquired; the sorts of issues complained about by the activists in the empirical study is very much open or overt surveillance.

Other theorists have attempted to conceptualise privacy in a way that does not involve a locational view of the public/private dichotomy, adopting an approach which places more emphasis on privacy as a means to regulate human associations. Alan Westin, for example, has argued that a central feature of privacy is in the role it plays in enabling us to construct personal relationships in a range of situations. Central to his concept of 'public privacy' is the maintenance of anonymity and the protection against intrusion. Anonymity is a state of privacy which is distinct from those of solitude or intimacy. It relates to circumstances in which an individual 'is in public places or performing public acts but still seeks, and finds, freedom from identification and surveillance'. It is in this state that the individual is able to 'merge into the situational landscape'<sup>262</sup>, to be in public and yet be simply another face on the street or body in a crowd.

We also depend for our public privacy, Westin suggests, on public 'reserve', which, he says, creates a 'psychological barrier against unwanted intrusion'. He notes that '[t]he manner in which individuals claim reserve and the extent to which it is respected or disregarded by

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<sup>260</sup> Nicole Moreham, 'Privacy in Public Places' (2006) 65 CLJ 606, 623-627.

<sup>261</sup> Nicole Moreham, 'Privacy in Public Places' (2006) 65 CLJ 606, 621-632.

<sup>262</sup> Alan Westin, *Privacy and Freedom* (The Bodley Head, 1970) 31

others is at the heart of securing meaningful privacy in the crowded, organisation-dominated settings of modern industrial society and urban life'.<sup>263</sup>

Hughes conceptualises this aspect of privacy as relating to our use of 'privacy barriers'. She argues that not only do we take physical measures to protect our privacy when we go out in public – such as wearing clothes, we also communicate our privacy preferences to others in verbal and non-verbal ways, and in turn we depend upon the way others behave for the protection of our privacy. In order to illustrate this, Hughes provides the example of the use by X of a public toilet.

'he uses the cubicle walls and door as a physical barrier, his behaviour in choosing to use a public toilet rather than the street indicates (amongst other things) that he desires privacy – this creates a behavioural barrier, and X relies upon a social norm that Y will not look over the toilet cubicle door whilst X is using the toilet, or that Y will not have set-up a secret video camera in the cubicle. An invasion of privacy takes place when Y does not respect these barriers'<sup>264</sup>

The extent to which we are able to rely on the protections of 'public privacy' thus involves expectations of others. We expect that others will not bother us, will not sit too close, or intrude into our conversations with friends or colleagues. While others will undoubtedly see us when we go out in public, we do not expect them to stare, to track our movements, or follow us from place to place. Hughes terms this as the application of social norms<sup>265</sup>, Larsen describes it as 'conventions of discretion'<sup>266</sup>; and Goffman has called it "civil inattention".<sup>267</sup> It boils down to this: we do not object to being seen by others, but we may do if they behave inappropriately: if they come too close, listen to our conversations, stare at or follow us.<sup>268</sup> Such behaviour may physically intrude upon our personal space; it cause us anxiety; it may restrict our autonomy.

Importantly, we do not normally expect those we encounter in a public place to them to take measures to identify us, to remove our public anonymity. Social norms include, Larsen suggests, a prohibition against the removal of public anonymity. We expect to be

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<sup>263</sup> Alan Westin, *Privacy and Freedom* (The Bodley Head, 1970), 32

<sup>264</sup> Kirsty Hughes, *A Behavioural Understanding of Privacy*, (2012) 75(5) MLR 806, 813

<sup>265</sup> *ibid*

<sup>266</sup> Beatrice von Silva-Tarouca Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Hart 2011) 21

<sup>267</sup> Anthony Giddens, *The Consequences of Modernity* (Polity Press 1991) 81 citing Erving Goffman, *Behaviour in Public Places* (Free Press, 1963)

<sup>268</sup> *ibid*

seen by others, she notes, but we do not expect to be identified, to be picked out of the crowd, or to become the focus of particular scrutiny:

‘Another rule is that members of the crowd are to be treated as part of the crowd. Picking out an individual and making him the target of special attention would be rude and inappropriate. A person who goes out in public must put up with being seen, but he can reasonably expect to be left to his own devices and not be singled out or made the subject of comment.’

A reliance on social conventions or norms of behaviour is, however, a problematic approach to defining privacy. As Solove has rightly pointed out, a dependence on social norms and individual anticipations in defining the scope of privacy is problematic. What is, or is not, privacy intrusive cannot be determined solely by society’s expectations of what is, or is not appropriate. Such a stance risks creating a dangerous degree of circularity, in which declining expectations of privacy result in a declining sphere of privacy rights.<sup>269</sup> The normalisation of surveillance may erode society’s conceptions of expected behaviour. In the context of protest assemblies, for example, the ubiquity of police filming may, at least arguably, normalise police filming and photography, to the extent that it becomes merely an ‘expected’ activity, which does not breach social norms.

Theories of social conventions and public anonymity, allow us, however to identify certain forms of behaviour that are damaging to privacy, even in a public place. Solove’s approach to privacy is not to attempt to define an overarching concept of privacy, but to develop a pluralistic conception of privacy which sees it not as a single entity, defined by a common denominator, but a ‘cluster of many distinct yet related things’. He therefore approaches privacy by focusing on privacy problems: identifying the circumstances in which privacy harms arise. His taxonomy of privacy identifies four principal groups of activities in which harms may arise: information collection; information processing; information dissemination; and invasion. He further sub-divides the concept of invasion into two: intrusions and decisional interference.<sup>270</sup>

Solove’s taxonomy thus recognises the harmful effects of surveillance as arising at various stages of surveillance processes; and while he places emphasis on informational aspects of privacy, he also acknowledges circumstances in which privacy harms may arise from

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<sup>269</sup> Daniel Solove, *Nothing to Hide: The False Tradeoff between Privacy and Security* (Yale University Press 2013), 117

<sup>270</sup> Daniel Solove, *Understanding Privacy* (Harvard University Press 2009), 103

surveillance independently of information collection. Thus at the stage of information collection, harms arise not only from state acquisition of data, but from the awareness a surveillance subject may have that he is (or may be) being watched. The disciplinary 'Panoptic' effect depends on the subjects of surveillance knowing that they are, in Foucault's words, 'perfectly individualized and constantly visible'<sup>271</sup>

Further Solove recognises that privacy is also harmed by surveillance activities which involve intrusion. Intrusion, Solove argues, harms privacy through spatial incursion, disrupting a person's activities 'through the unwanted presence or activities of another person'.<sup>272</sup> Intrusion is thus, on Solove's view, closely related to decisional interference, in that it provides a means by which state interests can alter or restrict individual behaviour.

Informational harms identified by Solove relate to the processing, dissemination and use of personal data. Processing harms include those of aggregation and identification: the gathering together of information relating to an identified person. Aggregation poses a potential threat to privacy because the combination of disparate pieces of information forms a portrait of a person that is capable of revealing 'new' knowledge about a person that goes far beyond that which may have been expected when the original data was obtained.<sup>273</sup> The aggregation of data, and the subsequent construction of personal profiles – what Solove has called 'digital dossiers'<sup>274</sup> – may have profound effects. In the context of police surveillance, as we shall see below, the identification of an individual and the subsequent aggregation of personal data, may result in categorisations which, in turn, make that person more likely to be a focus of surveillance. Surveillance may therefore be self-sustaining, with an in-built bias or skew: the more information that is collected about a person, the more that person is likely to be subject to further data-gathering.

Solove's taxonomy provides a useful framework with which to understand and examine privacy problems. This work will therefore attempt to build on the pluralistic conception of privacy as developed by Daniel Solove, in order to develop a taxonomy of privacy as it relates to the surveillance of assemblies. In particular, this taxonomy attempts to identify some of the circumstances in which privacy harms arise from the police surveillance of 'public' activities such as protest assemblies. Put another way, and more sharply, conceiving as (public) privacy as founded on and driven by notions of autonomy and control

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<sup>271</sup> Michel Foucault, *Discipline and Punish* (Alan Sheridan tr, Penguin 1991) 200

<sup>272</sup> Daniel Solove, *Understanding Privacy* (Harvard University Press 2009), 163

<sup>273</sup> Daniel Solove, *Understanding Privacy* (Harvard University Press 2009), 118

<sup>274</sup> Daniel Solove, *Understanding Privacy* (Harvard University Press 2009), 119

– over one’s self, over identity, over information about one’s self – we can concede (probably?) that we consent to, and accept a loss of control, to those also out on the street with us, but we would not without more do so for others more widely.

### A Taxonomy of Protest Surveillance Privacy Harms.

The application of privacy, not merely to public spaces, but to public activities, such as protest, is itself contentious. In choosing to participate in public protest activity there is a sense in which we are placing ourselves on a public stage: protest does not only occupy, in Habermasian terms, the ‘public sphere’, it is also often intended to be a public spectacle, designed to attract the attention of others. Social conventions designed to protect our public privacy in normal circumstances may therefore be redundant: in participating in protest we expect to be the focus of others attention, to be stared at in a way that we would certainly not expect if we were simply going to the shops for a pint of milk. In such circumstances, the argument continues, we cannot therefore object to surveillance activities – to being watched, photographed or filmed by others. Further, protest is by its nature a collective activity: we are often, in participating in public protest, in the midst of a crowd, and in close proximity to others. The intrusion of others (in the sense of them obtaining proximity to us) is not in such circumstances disruptive: rather it enhances the spectacle and expressive strength of the protest activity we are part of. Our normal expectations of privacy no longer apply: privacy therefore has limited application.

Interviews of those with experience of overt police surveillance in the context of protest suggests, however, that police surveillance is perceived as being distinct from the general observation of proximity of others, both in its nature and purpose. In empirical data obtained for this study interviewees make a clear distinction between general observation and forms of surveillance which are privacy intrusive. While interviewees accepted that, during a demonstration they would be seen and even photographed by others, such observation was expected to be general in nature (i.e. focused on the protest as a whole, rather than them as an individual); to maintain a discrete distance and avoid coming uncomfortably close; and to be time-limited (if not necessarily fleeting, then of short duration). Police surveillance, on the other hand, was sometimes experienced as being materially different to this: it could be visibly focused or targeted at an individual level; as being physically or bodily intrusive, and invading personal space; and as being pervasive or sustained over time.

It has often been noted by privacy and surveillance theorists that state surveillance is necessarily distinct from the observation of the general public by virtue both of its surveillance capability and capacity and as a result of the uniquely coercive and authoritative status of state actors. Benjamin Goold notes, for example, that a key distinction between the mere observation of public space and state surveillance is the state's capacity for coercive action.

...the state has a monopoly on the use of legitimate force and can, under certain circumstances, deprive me of both my liberty and my property. As a consequence, we seek to limit the things that may be done by the state in an effort to protect individuals from the dangers that are attendant with the existence of such power.<sup>275</sup>

The nature of the body carrying out the surveillance is relevant in many respects: police bodies have a unique coercive capacity, which enables them to create conditions for surveillance that would be unavailable to others: they may detain, for example, a person for purpose of a stop and search, and gain access to locations inaccessible to the general public. The state also has, as Brubaker and Cooper have noted, a particular capacity 'to name, to identify, to categorize, to state what is what and who is who'.<sup>276</sup> This power is, in Bourdieusian terms, both physical and symbolic<sup>277</sup>: the state not only has the capacity and capability to collect (by coercion if necessary) and aggregate identification data in large volumes, it is able to categorise those individuals in ways that may have significant consequences for life chances, and which may impact on future dealings with a variety of state or private sector entities (including employers, regulatory bodies, or financial institutions)<sup>278</sup>, as well as for further interactions with law enforcement bodies. As Foucault and others have emphasised, surveillance is intimately associated with the exercise of power.<sup>279</sup>

This does not, however, fully explain the potential harms from overt police surveillance. Interviewees clearly and frequently distinguished between simply being seen by police

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<sup>275</sup> Benjamin Goold, 'The Difference Between Lonely Old Ladies and CCTV Cameras: A Response to Ryberg' (2008) 14 *Res Publica* 43, 45

<sup>276</sup> Rogers Brubaker and Frederick Cooper, 'Beyond "Identity"' (2000) 29(1) *Theory and Society*, 14

<sup>277</sup> Pierre Bourdieu, *Language and Symbolic Power* (Polity Press 1991)

<sup>278</sup> David Lyon, *Surveillance as Social Sorting: Privacy, Risk, and Digital Discrimination* (Psychology Press 2003)

<sup>279</sup> This point has been made by, amongst others, Oscar H Gandy, 'Coming to Terms with the Panoptic Sort' in David Lyon and Elia Zureik (eds) *Computers, Surveillance and Privacy* (University of Minnesota Press 1996), 135

officers (which is often an inevitable part of protest participation); and being subject to certain forms of surveillance activity. Their objections often did not attach to surveillance *per se*, but arose when the surveillance took on particular forms or displayed particular characteristics. These most notably included the following situations: surveillance was focused on an identified individual; it involved 'close-up' interventions and physical intrusion; and it involved a persistent and sustained level of monitoring.

The taxonomy below seeks to explore some of these differences, and in doing so develop our understanding of the privacy harms arising from overt police surveillance of the public realm. It examines the multiple activities involved in surveillance operations, and the matrix of interlinked and overlapping privacy harms that arise from them. Activities such as a stop and search, for example, involves a physical, and possibly a bodily level of intrusion to the person; but it may also be accompanied by a loss of anonymity if a person's identity is obtained; and a loss of informational autonomy if that data is retained in police information systems. Surveillance activities may also set in train a sequential series of privacy harms: the initial identification of a surveillance subject (i.e. the noting of a person's name), for example, creates the circumstances in which a person will be subsequently recognised and 'picked out' for further scrutiny or monitoring. The privacy impact of any of these surveillance activities may be intensified if they are persistent over time, either because they are consistently or regularly repeated; or because a person is subject to a sustained period of surveillance.

Privacy-harmful surveillance activities may be related to the collection and processing of personal data: interviewees reported that their personal data was recorded and retained; and that they were not only identified by individual police officers, but were repeatedly recognised by surveillance officers in differing locations and contexts. The empirical evidence demonstrates, however that privacy harms were often perceived to arise independently from structured data gathering or processing activities. The following taxonomy also explores the extent to which informational conceptions of privacy may provide an insufficient framework to recognise privacy harms in this context. The following taxonomy therefore explores the following three aspects of overt police surveillance in turn: i) physical intrusion; ii) identification; iii) persistent 'watching' or surveillance.

### Surveillance harms: intrusion.

This set of harms corresponds to what Solove has termed 'intrusion' - it arises when surveillance invades our person or our personal space. Intrusive surveillance is commonly a term used for covert forms of surveillance, such as those which involve use of recording or listening devices in our homes or vehicles. Surveillance may, however also be 'intrusive' in the common sense of the word, if it is invasive of a person's body or personal space.

Privacy intrusion in the public domain arises in a different way to privacy intrusion in secluded or 'private' places. Intrusion into our homes, bedrooms or secluded areas arises from the mere presence of others: the fact that somebody else is present is sufficient, as Solove has noted, to intrude on a person's life by disturbing activities, altering routines, destroying solitude, and making the 'victim' uncomfortable and uneasy. When we go out in public, however, the mere presence of others is unlikely to be perceived as intrusion. Behaviour will be physically intrusive, however, if it involves unwanted bodily contact or interference with our person; or if it involves the non-consensual proximity or closeness of others. Empirical data obtained for this study shows that surveillance may, in some situations, be perceived to be physically intrusive: i) if it involves bodily intrusion such that may occur during a stop and search ii) if it involves a level of close proximity; iii) if it involves an incursion into space which, although it may not be explicitly 'private' has nevertheless been claimed by protesters as 'collective space' over which they may have sought to exert a degree of exclusionary control.

The following section explores in more detail the above taxonomy of intrusion harms with reference to relevant empirical data and extracts from interviews with surveillance subjects. In such circumstances, it is argued, privacy is to some degree locational, in that it relates to the environment of the person, and may involve the protection of aspects of ourselves we seek to hide from public view. An emphasis on physical location, however, which determines privacy by recourse to a distinction between 'private space' and 'public space' is both artificial and unhelpful. It is also recognised that intrusions are related to informational aspects of privacy, in that intrusions are often (although not necessarily) carried out for the purpose of obtaining information, and informational harms may overlap with and even exacerbate harms arising from intrusions. Privacy harms in this context cannot, however, be understood only in informational terms: privacy harms arise from intrusive activities regardless of whether information is actually obtained and recorded. What is needed instead is an approach to privacy which recognises the privacy harms

flowing directly from physical intrusions to the person, regardless of the ‘privateness’ of the location or the extent of information flow.

### i) Stop and search

The physical impact on the person of stop and search powers is tangible, in that such powers require a person to submit to a highly intimate degree of physical contact, allowing someone to touch and feel around the body, as well as to handle and inspect personal property carried on the person, such as in pockets or bags, that a person may not want on public display. By enabling the police to look inside bags and require the removal of items of clothing, a stop and search provides a means by which state authorities may breach privacy barriers.

Privacy harms arising from stop and search are not, however, limited to a loss of physical integrity; the removal or breach of physical barriers may facilitate the disclosure or discovery of personal information. As we discuss further below, interviewees report that state authorities often appeared to exploit stop and search powers as an opportunity to obtain identification data. In Craig’s case the data collected consisted not only of his name and address, but included the recording of aspects of his appearance he had not chosen to display in public.

I had to take my top off so they could photograph and take evidence, they marked every tattoo I had and everything I was wearing was finely detailed. And there were about five people this happened to. And they logged every little detail of what we were wearing and markings...I think they took photographs of us from a distance, but they took notes of every little detail.

### ii) Personal space

The second of our two scenarios arise in relation to the loss of personal space. Interviewees here clearly distinguished between being photographed at a discrete distance, and being photographed at close proximity. It is thus not simply the act of being photographed which precipitates the privacy harm, but the manner in which it is done. Evan, for example, notes:

Cameras were the norm by the early 2000’s. They came in two forms, there were definitely officers filming from a distance, taking photographs from a distance. But there were also officers who were quite aggressive with their photograph taking and would come up very close to take photographs, often very large numbers of

photographs from a very short distance. This would often include, you know, occasional derogatory marks from the officers...getting in people's faces, completely unnecessarily, as a form of intimidation, I would argue.

Experiences such as this are, it is argued, qualitatively different from simply being observed – or even photographed – by others in a public place. Understanding this type of intrusion requires a conception of personal space as a social construct, which is determined by the individual (or group) in a specific social context.<sup>280</sup> The privacy impact of the intrusion of others into our sense of personal space is therefore determined by a range of factors, such as the degree of available space, our relationship with those who intrude upon that space, and the behaviour of those who do so. Thus we do not normally perceive it to be an assault upon our privacy if we get into a crowded tube train, even if we are forced to stand in close proximity, and even in physical contact, with those around us; although we may do if a person suddenly or aggressively comes 'up close' without any apparent reason to do so.

In this context, the perception of physical intrusion is likely to be exacerbated both by the authoritative status of the police, and by their actions in taking a photograph. The experience of intrusion may arise as a combination of factors. Firstly, protesters are likely to have a fundamentally different relationship with police officers than with other demonstrators or sympathetic supporters. The power of protest may be said to arise, at least in part, from the collective strength arising from a coming together of like-minded people, with a shared message, experience, or demand. While the perceived intrusiveness of surveillance may depend on individual attitudes towards the police (possibly coloured by prior experiences of surveillance), the police officer is necessarily intruding space occupied by people with a common connection or bond.

Secondly, the experience of intrusion, is likely to be influenced by the purpose of that intrusion. In this case, the purpose clearly involves the collection of personal data. In this sense the privacy harm is informational, although it should be noted that the harm arises directly from the collection of data, and not from the retention or further processing of that data: evidently at this point, Evan is unaware of whether or how his data will be retained, although privacy harms may arise from expectations or anxieties that it will be stored and used for some (unknown) further purpose.

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<sup>280</sup> Irwin Altman and Martin Chemers, *Culture and Environment* (CUP 1984)

Thirdly, the experience of intrusion is concerned with the behaviour of the police officer. In Evan's case, this included a perception that he came unnecessarily close; was aggressive in his demeanour; and made derogatory remarks. The experience of proximity is thus exacerbated by perceptions of threat. The actions of the police officer communicated not merely that the crowd in general was being monitored, perhaps in order to deter possible criminality: it communicated that the subject of the surveillance was, in particular, the subject of attention. He had been 'picked out' of the crowd, singled out for further attention.

Evan's experiences of surveillance are thus distinct from being merely subject to the general observation of others: they involve a matrix of harms, relating not only to information collection, but to unwanted proximity, and a loss of public anonymity.

### iii) Collective space

Turning to the last of our three scenarios, the data also suggests that surveillance may violate and intrude upon a collectively experienced 'personal space'. In certain circumstances the environment of the protest may acquire some of the qualities associated with the home. In this sense, therefore, the mere presence of surveillance in that space may be considered intrusive and disruptive to the day-to-day activities of those present. Privacy harms arising from such measures may therefore relate to the disclosure of private information, but also to a loss of autonomy.

Not all protests take place on an unequivocally 'public' space, such as a public highway. Protests often involve the use of space which is occupied exclusively for protest purposes. In such circumstances, it may be that the 'taking of space' constitutes a significant aspect of the protest, and in some cases becomes the very essence of the nature of the protest that is taking place.<sup>281</sup> The protest becomes a way of living, albeit on a temporary basis: the environment of the protest becomes not merely a place of expression and collective assembly, but an impermanent home. Such environments are often constructed so as to provide facilities for eating, sleeping and washing, as well as space for discussion and debate.

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<sup>281</sup> *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 [37]. Laws LJ remarks that the Aldermaston Women's Peace Camp, which had 'borne consistent, long-standing, and peaceful witness to the convictions of the women who have belonged to it' was 'the "manner and form" of the protest itself'.

In the absence of proprietary rights, protest ‘occupiers’ are unlikely to be able to exclude police officers from ‘their’ space; if the police do not have recourse to coercive powers, they are likely to be able to obtain the consent of property owners – who, whether a public body or private individual, may be less than sympathetic to protesters who may be trespassing on their land.<sup>282</sup> As a result, protesters may be denied use of exclusionary privacy protections we enjoy in many other circumstances. Ricki for example, provided this testimony of the experience of police surveillance at an environmental protest camp.

These days we have got quite sophisticated with our compost loo design, but those early ones it was literally a row of bales with tarps around and you had to squat, and it was quite unpleasant, and it was only three sided, and the police would walk past with their cameras. It was creepy, it felt really gross, really intrusive, on a personal level. We couldn’t tell whether they were taking pictures, but they would walk past with their cameras. Other times they would be sitting in the bushes taking pictures of people eating, having discussions, in workshops.

The mere presence of mechanisms of state surveillance in such a space may therefore give rise to privacy harms whether or not information is collected: the intrusion of surveillance into a space which is to some extent exclusionary is sufficient to create feelings of discomfort and unease, and potentially to disrupt or alter a person’s behaviour or activity, thus curtailing autonomy. The intrusion of surveillance mechanisms into collective space is, however, also related to informational harms in the sense that it creates opportunities for the collection and recording of information through photography/filming and interrogation. Iona, for example, described the intrusion of police surveillance into a women’s peace camp.

So you’re sitting round the fire, minding your own business, having a cup of tea or something, and all of a sudden a van will pull up and two police officers, because they very rarely came alone, will turn up and walk down towards you and will say ‘hello ladies’ or some stupid kind of opening thing, and will try to engage somebody / anybody / nobody in some inane conversation about the weather or anything, it

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<sup>282</sup> For a discussion of circumstances in which police may gain access to property, see David Mead, ‘When the police came knocking - the case for review of public law trespass and consensual entries onto property’ (2012) 2 CLR 97. Mead argues that framing such issues in terms of privacy and/or autonomy especially against the state rather than private property rights, would provide a clearer and more appropriate mechanism for determining the circumstances in which police entry to property will be lawful.

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really doesn't matter, a bit chilly tonight isn't it, la la la. It can be very strange and a bit passive aggressive as well; sometimes it's all friendly like that, and sometimes it can be a bit more challenging, not in a problematic way particularly, but still inquiring. And be met with silence, which could be quite hard for them, or slightly ridiculous comments. They come with cameras, they video everyone. From quite close, within a few feet, close enough, and they had good cameras. And depending on whether they had managed to engage any conversation or not they would stay and then go.

The intrusion of surveillance may be considered as arising in a concentric fashion: surveillance may intrude upon our person, in a bodily sense; less intimately, it may nonetheless intrude upon our sense of personal space; and more widely, it may also intrude upon conceptions of 'collective' space. In each case, harms arise notwithstanding that the surveillance takes place in the context of protest activity taking place in the 'public' domain. Surveillance harms, in each case, arise both as a result of information collection, and independently of it: privacy harms relating to a loss of physical integrity and autonomy may arise as a direct result of the intrusive nature of the surveillance that takes place, regardless of whether information is actually collected and retained.

### [Surveillance harms : identification and anonymity](#)

This set of harms relates to the identification and the removal of public anonymity. In normal circumstances our encounters with others in public places tend to be impersonal and aloof, involving a reciprocal anonymity: we do not know the identities of those around us, and we do not know theirs. In this sense anonymity, as Larsen has put it, is a 'condition of modern life'.<sup>283</sup> We will often be wary of attempts by strangers to ascertain our name, or other personal details, and will usually consider such approaches as inappropriate, or even threatening; we are likely to be similarly put on edge by the approach of a stranger who appears to know who we are. The removal of public anonymity thus creates conditions of enhanced visibility: we are no longer able to merge into a crowd. Identification enables a person to be 'picked out' and become the target of particular scrutiny; it thus exacerbates individual accountability and curtails autonomy creating, as Slobogin has suggested, conditions of 'subtle coercion'.<sup>284</sup>

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<sup>283</sup> Beatrice von Silva-Tarouca Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Hart 2011) 24

<sup>284</sup> Christopher Slobogin, 'Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity' (2001) 72 Mississippi Law Journal 213, 238

Empirical data demonstrates that identification plays an integral role in the overt police surveillance of protest assemblies, and that it may be systematically used as part of strategic intelligence-gathering processes. Those who gave interviews for this study, including those who reported no prior involvement with the police (such as an arrest), almost invariably reported that they had been addressed by name by surveillance officers, indicating that a prior process of identification had taken place. Some, who had obtained access to their personal data through subject access provisions of the Data Protection Act 1998<sup>285</sup>, also stated following their identification, records were made of occasions at which they were subsequently recognised by surveillance officers at demonstrations. The records showed that in some cases people had been assigned a categorisation of being associated with 'domestic extremism', a classification which would have had implications for future police intervention and surveillance.

This thesis posits that we need to re-envise identification not as an event, but as a process. For our purposes identification may be understood as involving a three-stage process involving i) initial identification; ii) subsequent recognition; and iii) classification or further use. These activities do not necessarily arise together, nor are they necessarily sequential. Not everyone who is identified will be subsequently recognised; nor is it necessarily the case that those who have been recognised in one context will be recognised in another. Nor is it necessarily the case that those who are identified are subject to processes of classification, although some assessment of risk, or association with risk groups, is likely to be made in most cases. One of the difficulties inherent in analysing privacy harms is that there is little transparency around the criteria which determine when or whether a person, once identified, is subject to further surveillance interventions.

The analysis below considers, in relation to these three aspects of identification, the privacy harms that arise. Distinct harms arise during each stage of the process: from the way that personal data is obtained; from its disclosure to others; and from the collation and processing of personal data for the purposes of categorisation. It is suggested, however, that privacy harms related to identification should not be understood only in informational terms: while the collection, processing and dissemination of personal data are key functions in identification processes, it is not necessarily the recording or processing of data *per se* that is the cause of perceived privacy loss: rather it is the process itself of being identified, recognised and classified by state actors.

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<sup>285</sup> Data Protection Act 1998 s.7

### i) Initial identification

The first stage of the process, initial identification, involves the first step in the process by which the police can ‘pick out’ a person from the crowd, and assign to them an ‘identity’ or classification. This stage thus involves the collection of identity data: most commonly this included a photographic image alongside a person’s name, possibly with the addition of other personal data such as a description or an address.

Almost all interviewees reported that in one way or another they had become known by name to police intelligence officers, although few had a clear understanding of the mechanism by which that had come about. Jeremy for example, stated,

When I first lived in London...it was quite easy to attend a fair number of demonstrations and other political events these police would be at. So they very quickly wanted to know who I was. And I’m not sure how they first learned my name, but once they learned it they used it all the time...

They reported however, that identity data was frequently obtained – often involuntarily – during the deployment of commonly used public order tactics such as stop and search, and public order containments (kettles)<sup>286</sup>, by means of questioning, or through the inspection of personal belongings. As Solove has noted, information collection can create privacy harms, even if information is not publicly disclosed, through the use of surveillance (in the sense of scrutiny) and interrogation (questioning).<sup>287</sup> The privacy-intrusiveness of questioning is exacerbated if the questioning is coercive, or if those being questioned feel a degree of compulsion because of the authoritative status of the questioner, or because they feel that a refusal to answer will create the impression they have something to hide.<sup>288</sup> The questioning itself may therefore result in feelings of anxiety or discomfort, regardless of whether information is ultimately disclosed. Harry for instance, recounted,

I knew I wasn’t compelled to give my name, I was secure in that legal knowledge at the time. Whatever arguments or pressure was used, I’m quite strong willed, I don’t cave in easily [but] its intimidating in those situations, no matter how bolshie

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<sup>286</sup> It should be noted that in the case of *Mengesha*, the court held that police powers to detain to prevent a breach of the peace did not allow the police to detain a person for the purpose of photographing or identifying them. *Mengesha v Commissioner of Police for the Metropolis [2013] EWHC 1695 (Admin)*

<sup>287</sup> Daniel Solove, *Understanding Privacy* (HUP 2009), 106

<sup>288</sup> Daniel Solove, *Understanding Privacy* (HUP 2009), 114

you might be, or how indignant you might be, that this unjust thing is happening, and it takes an act of will.

For those who decided not to voluntarily disclose identity data, this was not the end of the issue. Interviewees described a number of ways in which identity data was obtained from them without their consent. Rob, for example, recounted his experience of being stopped and searched at an environmental protest camp:

They looked through my wallet and told me at the time they were looking for razor blades, and I didn't give them any information, but they wrote down on the description area of the stop and search form the name that was on my bank card. I think the next day when I was moving through a line they did something similar, only this time they got me to read out the name on the bank card, to prove it was my bank card and I hadn't stolen it from anyone.

The provision of basic identification data, such as a name and address, has been dismissed by some privacy theorists as 'trivial data' which would not necessarily constitute 'private' information of the kind that requires the protection of privacy rights;<sup>289</sup> this is also a view that judges have appeared to incline towards.<sup>290</sup> Such a view fails to recognise the extent to which such data discloses information about ourselves: it may, for example, communicate information about our social status or profession, or our membership of a class of people (i.e. race, class, ethnicity, gender etc).<sup>291</sup> Ricki's case is illustrative of this point: the requirement to provide identification data during a stop and search resulted in the disclosure of highly sensitive essentially private information relating to Ricki's transgender status.

Getting information off ID is a particular problem for trans people. Because often our ID, we may have different IDs with different names, depending on the particular roles we are living. My bank ID is in one name, my work ID is in a different name...they'll find two id's and they'll put both names down. And they question you about it. So they threaten to arrest you for theft, for stealing this other random person's ID, and they also search you more thoroughly. So everyone

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<sup>289</sup> Nicole Moreham, 'Privacy and the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 LQR 628, 636

<sup>290</sup> See, for example, *R v Chief Constable of South Yorkshire Police ex parte LS and Marper* [2004] UKHL 39 [31]: Lord Steyn expressed the view, with regards to biometric identity data, that 'in respect of retained fingerprints and samples Art.8(1) is not engaged. If I am wrong in this view, I would say any interference is very modest indeed'

<sup>291</sup> Rogers Brubaker and Frederick Cooper, 'Beyond "Identity"' (2000) 29(1) Theory and Society

else is searched by the roadside and it's a pat down, I got taken into a van and groped basically. Because you're outed to them against your will... some of my friends are just so fearful of going on a protest, because they might get outed, or be put into a vulnerable situation. And stop and search is one of the big fears.

Initial identification thus creates overlapping privacy harms which include those relating to physical intrusion (in the case of coercive practices such as stop and search); questioning and surveillance; and the disclosure (or collection) of personal data. The fact that such identification takes place in the public domain does nothing to mitigate such harms, and indeed may exacerbate them through public embarrassment or stigmatisation. The collection of identification data may therefore create privacy harms that arise independently of the *recording and retention* of that data.

### ii) Recognition

This set of activities relate to the propensity of surveillance to recognise and record the presence of, those who had been previously identified in the context of protest assemblies. While privacy harms arising from initial identification relate to intrusion and the collection of data, recognition harms relate to the processing and dissemination of data, the loss of public anonymity and the disruption of autonomy.

Recognition in the public realm is not always problematic; particular problems may arise, however, vis-à-vis the state. We have seen that the state possesses the capabilities and capacities to identify people in the public realm that will not normally be available to the ordinary citizen. The police not only have coercive powers, they have access to extensive technological resources. As a result they have a unique capacity not only to identify an individual from an image, or as a result of their presence at a particular location or event; they also have an exceptional capacity to subsequently recognise such individuals, to flag them up for further surveillance, and to prevent them, in Westin's words, from merging into the situational landscape.<sup>292</sup> Larsen notes,

Like all privacy interests, anonymity takes on a special significance in relation to the State. It acquires greater weight in that context, for scrutiny and judgement by those with official powers are more uncomfortable and create greater pressure to conform. In public, people are readily accessible. If the authorities did not have to respect anonymity, they could harass people at will, and it would be hard to

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<sup>292</sup> Alan Westin, *Privacy and Freedom* (The Bodley Head, 1970)

develop a ‘healthy civic self-assurance’ even if privacy in the home was not at risk<sup>293</sup>

State mechanisms which ‘pick out’ or focus on a particular individual as part of state surveillance area often, as Taylor has termed it, ‘distanciated’<sup>294</sup>: the subject does not know that he has become a particular focus of attention. The experiences of interviewees in this study, however, suggest that surveillance may also involve a process by which individuals are visibly, indeed conspicuously, ‘recognised’ by state actors. Those subject to this strategy are thus well aware that they are the subject of police attention: their autonomy is restricted not by the perceived possibility that they are under surveillance, but by the knowledge, deliberately fostered, that this is surely the case.

Interviewees variously reported being addressed by name by police officers, something one of them described as ‘aggressively saying hello’. Those subject to this strategy usually found it to be uncomfortable, and it was frequently described as intimidating.

When they come up and they greet you, by name, even though you’ve never seen that copper before and you hadn’t been in that town for a year, they are making a point that they’ve had a briefing and seen your face, and you are someone they have been told to watch out for, and they are making a point. It’s the stuff they do just to make it uncomfortable, to make it unpleasant for you. [Magnus]

Surveillance activities involving recognition typically involve some degree of processing and dissemination of personal data, so that a person may be accurately identified at future events and disparate locations. The empirical data illustrates however, that this need not be the case. Alan’s experience of surveillance in the context of political protest was of encountering the same individual surveillance officers on repeated occasions, people who developed a personal knowledge of their subjects.

there was a much more sinister element to it, of having the same person, who knows you: it wasn’t that you were being surveilled by someone who was unknown, you were being surveilled by someone who was *very* known to you. You can’t hide...and the familiar aspect of him was, I think, one of the most pressing things on my mind, the fact that you would go to a demonstration and he’d be there, same FIT [Forward Intelligence Team] team person, and you almost continue

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<sup>293</sup> Beatrice von Silva-Tarouca Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Hart 2011), 115

<sup>294</sup> Nick Taylor, ‘State Surveillance and the Right to Privacy’ (2002) 1(1) *Surveillance & Society* 66

the conversation that you had. He knew exactly what happened previously, so it wasn't just what you did on that day, who you spoke to on that day, it was who you spoke to previously, on the day before or the day before that.

In any case, even if recognition processes indicate that there has been some degree of process of personal data, the testimony of interviewees suggests that privacy harms experienced in this context cannot be fully understood as informational harms. The harms arise from a loss of public anonymity, from the creation of the perception that a personal has been picked out of the crowd, he has been actively identified, and is being watched. Such a loss of anonymity may create feelings of anxiety and may curb autonomy.

...an officer came up to me and started talking to me using my name. And I had no idea who they were. But they had a camera and they were filming me and they were talking to me and using my name. And I thought, well hang on a sec, who on earth are you, and I was amongst thousands of people. So they clearly came up to me, they didn't really have much to say, they just wanted to make sure I knew they knew who I was. Purely intimidation. [Bob]

Further, when done conspicuously recognition may result in stigmatisation. In Jeremy's case, for example, the fact that he had been 'picked out' by the police, and was known to them, was communicated for all to hear.

...every officer on forward intelligence duty, whether a regular or someone who I'd never seen before, who had obviously been shown my photo, would recognise me and approach me by name. Literally every time they would see me. So not just approaching me and asking things, but shouting from vans, the other side of crowds, pointing me out in a way that made it clear that the aim was to make me know I was being watched. (Jeremy)

While recognition processes normally (although not, as we have seen, exclusively) involve the retention, processing and dissemination of data, privacy harms cannot be understood purely as informational harms: in the cases above it is in the loss of public anonymity, the stigmatisation of police attention, and the resultant loss of decisional autonomy, that privacy harms arise.

### iii) Categorisation.

The third stage of identification involves the designation of a class identity: the categorisation or labelling of an individual as being associated with particular

characteristics. This aspect of identification is thus concerned with the imposition of an externally contrived identity, made on the basis of an assessment of perceived or anticipated 'risk'. As Krasmann has noted, risks do not refer to a concrete or real danger, but are 'artificial entity of calculation'.<sup>295</sup> In this context risk is distinct from suspicion. It is not concerned with prosecution or the investigation of tangible offences, rather it is a means of calculating, predicting and forestalling potential instances of crime or disorder: it is thus related to proactive, pre-emptive and 'pre-crime' conceptions of policing. Zedner has commented in this context that the 'possibility of forestalling risks competes with and even takes precedence over responding to wrongs done'.<sup>296</sup>

Risk analysis is associated with surveillance and identification because it involves assigning an 'identity' to people, an identity which has significant implications for how they are likely to be subsequently treated. Identity is, as many theorists have noted, a complex concept, which relates not only to an individual's sense of self, but also to their place in society<sup>297</sup>: it therefore relates both to how we see ourselves (internal identity) and how we are seen by others (external identity).<sup>298</sup> In the context of the policing of protest, risk designations often refer to forms of 'domestic extremism', which has itself categorised in various ways as referring variously to 'extreme left wing'; 'extreme right wing'; 'environmental extremism' and other forms of perceived threat.<sup>299</sup>

A key implication of a risk categorisation is that information obtained about an individual, from the surveillance of protest activity and other sources, may be collated and aggregated into a personal profile, referred to by the Metropolitan Police as a 'nominal' file.<sup>300</sup> Initial

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<sup>295</sup> Susanne Krasmann, 'The Enemy on the Border: Critique of a Programme in Favour of a Preventive State', (2007) 9 (3) *Punishment and Society* 301

<sup>296</sup> Lucia Zedner, 'Pre-Crime and Post Criminality' (2007) 11(2) *Theoretical Criminology* 261, 262.

<sup>297</sup> James Fearon, 'What is identity (as we now use the word)?' (1999) Stanford University. Available at <https://web.stanford.edu/group/fearon-research/cgi-bin/wordpress/wp-content/uploads/2013/10/What-is-Identity-as-we-now-use-the-word-.pdf> accessed 15 Jan 2018

<sup>298</sup> Rogers Brubaker and Frederick Cooper, 'Beyond "Identity"' (2000) 29(1) *Theory and Society*

<sup>299</sup> The terms 'extreme left wing' and 'domestic extremism' have no legal definition. It has historically been the case that designation as 'domestic extremist' has required no evidence or reasonable suspicion of involvement with criminal activity. Baroness Jenny Jones, for example, is known to have been categorised as a domestic extremist as a result of her involvement in environmental protest. See, for example, Matthew Norman, Jenny Jones an Extremist? Nice Work, Met Police. *The Independent*, 17<sup>th</sup> June 2014

<http://www.independent.co.uk/voices/comment/jenny-jones-an-extremist-nice-work-met-police-9543937.html> Accessed 6 Nov 2016

<sup>300</sup> The Metropolitan Police themselves have noted that the designation of an individual as being related to some form of 'extremism' is a 'step change in a person's status' that 'should not be underestimated'. Metropolitan Police, National Domestic Extremism and Disorder Intelligence Unit, Nominal Creation Policy, 2013.

identification, in the sense of ascertaining a person's details is an essential aspect of this process, as it enables the connection between disparate pieces of data and the person 'in the flesh', producing what Solove has called a 'digital dossier' – a detailed portrait of a person's life, or certain aspects of it<sup>301</sup>.

Privacy harms thus arise from the accumulation of personal information by the state; but also from the way in which such information is used. The purpose of risk categorisation is to discriminate between people (those who pose risk, and those who do not) in order to facilitate differentiated policing tactics. Thus the designation of risk carries particular implications in relation to how people are treated in the context of political protest, and potentially beyond that to other aspects of their lives. This is an effect that Lyon has termed 'social sorting',<sup>302</sup> reflecting the capacity of such systems to have a profound (but often unknown) effect on a person's life chances. A risk designation in the context of political protest is likely to have considerable implications in terms of future policing interventions, including the use of further surveillance measures. The presence of those designated as risk are more likely to be noted, for example; they may also be more likely to be subject to stop and search; to be individually photographed; and their movements followed.

Risk designations are particularly problematic because there are no transparent criteria about the circumstances in which such a designation may be made. Empirical data from this study suggests that the designation may be driven by processes of recognition: those people who are identified as having a repeated or recurring association with contentious protests or 'risk' groups. We have seen, for example, that [J] believed that the interest of the police, and his subsequent identification, stemmed simply from the fact that he was frequently seen attending contentious protests. In the experience of Jamie below, who attended protest as a photojournalist, an extremist designation appeared to result from his repeated association with contentious forms of protest, even though he was not directly participating in them.

"They've hit me with this label, XLW [which means] extreme left wing, related to the extreme left wing. But there's nothing anywhere in the file to say how they've made that assumption, other than where they have spotted me on some protest,

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<sup>301</sup> Daniel Solove, *Understanding Privacy* (HUP 2009), 119

<sup>302</sup> Oscar Gandy, 'Coming to Terms with the Panoptic Sort' in Lyon D and Zureik E (eds), *Computers, Surveillance and Privacy* (University of Minnesota Press 1996), 135

but they're not spotting me on other protests. There's hardly any notes there of all the right wing protests I've done."

The evidence supports the view that social sorting may be based on limited, inaccurate or subjectively interpreted data, which reinforces discrimination. Jamie's experiences appear to indicate a degree of confirmation bias, as his 'risk' designation appears to have been at least partly based on the prevalence of recorded sightings of him at *some* demonstrations. Once an initial designation has been made, all future material is viewed through the 'lens' of the past: the risk is that data is then either interpreted as confirming prior conclusions, or it is dismissed if it does not 'fit'.

Privacy harms from categorisation thus clearly relate to the collection, processing and dissemination of personal information by the state, and the potential implications arising from such external identification processes. Jamie, for example, believed that his designation as being involved with the extreme left wing had an effect on how he was treated by the police both in the UK and abroad, leading him to believe the data had been disseminated to other law enforcement bodies.

Getting in to Russia [to cover G8 protests], that was interesting...I was held up on the Russian border and questioned...he sat me down and said, you're going to Russia, are you aware that there is a big security operation going on? And I said yes of course I do, these are my details, here's my letter from Associated Press, I'm going to in to work for AP, and he accepted all of that but started questioning me and several times said, but you are on the side of the protesters aren't you? And I said, of course I'm not, I'm there to report on the protests, that's my job.

As well as informational privacy harms, therefore, categorisation has an impact on autonomy. Unlike the immediate impact that can arise from initial identification and recognition processes, the autonomy harms from categorisation may only arise at a much later time, when realisation or evidence of such a designation materialises. Further, the anticipation and fear of a potential categorisation may also have an effect on autonomy, both on those who participate in protest, and on those who may choose, as a result of such fears, not to do so. Such a restriction on autonomy has not only an impact on individuals, it may also, as we shall discuss in more detail in chapter 4, have a collectively disruptive impact on the organisational strength and capacity of social movement organisations.

Activities associated with identification processes, including initial identification, recognition and external identification or classification, are thus clearly distinct from merely being subject to the observation of others. As we shall see later on, however, judicial recognition of the harms arising in these situations are limited. The locational- or informational-based conceptions of privacy on which the courts have tended to rely do not consistently provide an adequate framework for acknowledging or understanding privacy harms associated with identification. Locational conceptions of privacy may see data taken from the public domain (including identity data) as essentially 'public' information which will largely fall outside the scope of privacy rights. Informational approaches, on the other hand, may recognise potential harms from the collection of data by the state, but may not necessarily provide an adequate framework for the recognition of harms to individual or collective autonomy, particularly if such harms arise in circumstances where there is no evidence that data relating to a particular individual has been recorded and retained.

We have seen so far that a taxonomy of surveillance harms must recognise the harms that arise from aspects of surveillance that are not merely concerned with watching or observing, but involve identification processes or acts of physical intrusion. These harms arising from the actions of the state in these circumstances, it is argued, far exceed any privacy harms arising from simply being seen by others: instead they entail pro-active interventions that harm the physical integrity of the person; disrupt their autonomy; and undermine their ability to control information about themselves.

In the final section below, we turn to the question of privacy harms arising from the use of observational surveillance: state actions in watching, photographing, and filming participants in protest. To what extent do activities such as this differ from 'mere observation'?

#### [Surveillance harms: pervasive and sustained 'watching'.](#)

This set of activities is concerned directly with surveillance, in the sense of watching or monitoring a person's behaviour. It is distinct from general observation however, in that it takes place over a prolonged period of time. Interviewees reported experiencing surveillance as being particularly harmful when it involved focused surveillance (i.e. directed at them personally, or at the group they were part of), and it was encountered either i) frequently and repeatedly, or ii) in a continual manner over a sustained period.

Surveillance which is sustained, or which involves successive episodes over time, inevitably poses a threat to informational aspects of privacy: it enables and facilitates the collection of personal data from different points in time, and distinct geographical locations. It provides not merely a snapshot, but a series of snapshots, from which a story (although often an incomplete one) of an individual's life may be constructed. Indeed, it reinforces that partiality by repeating, and reinforcing certain aspects - here, conduct at protests in public – by excluding all other non-observable/non-recordable aspects. As Gary Marx has observed, and as we have seen in our discussion of identification harms above, organisational memories are extended over time and across space.<sup>303</sup> A detailed picture of an individual may be constructed from various pieces of data, collected from diverse sources. For surveillance to fashion such a portrait of political activity, it must collect and record individual actions, not only their attendance at demonstrations, but other related actions, such as their participation in political meetings.

The sustained and focused nature of the surveillance experienced in this study was not, however, concerned only with data-gathering. In the context of preventive policing and risk-limitation, surveillance has a dual objective: to collect information in order to inform policing at a tactical and strategic level; and to monitor behaviour to deter or disrupt behaviour considered to be 'undesirable'. This is unlikely to be limited to criminal behaviour: in a risk-based system of policing undesirable behaviour may be broadly drawn and may include, for example, behaviour considered to be a pre-cursor to disorder or criminality, or any behaviour which is considered likely to increase the risk of disorder or criminality occurring.

The purpose of surveillance, in this context, is to alter behaviour. Surveillance is intended to inhibit criminal activity by creating a perception that criminal activity will be observed, and thus that a person acting unlawfully will be more likely to be arrested and convicted of any offence. The data demonstrates, however, that surveillance had the effect not only of deterring criminal behaviour, but of curtailing individual decisional autonomy in other respects.

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<sup>303</sup> Gary T Marx 'The New Surveillance' in Tim Newburn (ed) *Policing: Key Readings* (Willan 2005), 763

Autonomy is a much contested term relating to an individual's capacity for self-determination or self-governance.<sup>304</sup> It is used here to simply to indicate the ability of a person to make decisions for themselves about what course of action to pursue, without the interference of a third party – in this case, the state. The use of autonomy in this way is distinguished from the Kantian ideal of moral autonomy, as the self-imposition of objective morality. Moral autonomy is potentially unaffected by surveillance, in that it inherently requires that concerns of self-interest are subjugated to the pursuit of a moral purpose. In reality, however, participants in social movements are not always ideal moral beings prepared to sacrifice their own interests to a higher moral cause. As such the data suggests that although surveillance did not physically or coercively restrict their liberty to act or move freely, it nonetheless constrained the capacity to act autonomously.

The data demonstrated that the capacity of interviewees to make autonomous decisions relating to their protest activity was curtailed by police activities, and that the effect of focused surveillance, sustained over extended periods of time, was also to curtail decisional autonomy in relation to their personal life. For many of those interviewed, experiencing a sustained level of surveillance resulted in feelings of stigmatisation, alienation and emotional distress; it restricted their ability to establish or maintain relationships with others; and it acted as a curb to moral autonomy.

This form of surveillance is evidently materially different from mere public observation. We must, as it has been often noted, expect to be seen, and to some extent heard, by others when we go out into a public place: generally speaking, however, our observation of the public realm is fleeting and transient. We do not expect people to stare, or maintain their gaze on us for long periods: such behaviour alone is recognised as being limiting of autonomy. 'Persistent gawking', Solove notes, 'can create feelings of anxiety and discomfort' and 'lead to self-censorship and inhibition'.<sup>305</sup>

What is experienced by the interviewees below, however, goes beyond being stared at: their continued or repeated subjection to being followed or watched is more reminiscent of stalking, which has been described as repeated conduct involving 'following a person, watching or spying on them'.<sup>306</sup> Rather than being equivalent to mere public observation,

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<sup>304</sup> See for example, John Christman 'Autonomy in Moral and Political Philosophy', in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2018), available on-line <https://plato.stanford.edu/archives/spr2018/entries/autonomy-moral/>.

<sup>305</sup> Daniel Solove, *Understanding Privacy* (HUP 2009), 108

<sup>306</sup> Protection Against Harassment Act 1997 s2A(3)

surveillance of this kind, if carried out by members of the public rather than police officers, is likely to not only be a breach of privacy, but may amount to conduct which is tortious or even criminal.

### i) Repeated and frequent monitoring

Privacy harms became most evident when surveillance became repetitive and frequent: the 'expectation' of surveillance in this sense adding only to feelings of anxiety and the restriction of autonomy. Magnus describes the impact of surveillance on the monthly meetings held to organise 'climate camp'.

There was a [meeting] in a different city every month to organise. Which was usually around 50 people turned up. For the first two years every monthly meeting had cameras outside, video cameras, videoing every single person that turned up...So what was the purpose of that? They want faces for files, for turning up to an organising meeting, or trying to find out more about it. To my mind, that's there to intimidate people. That's saying, if you even want to talk to these people about what they are doing, you're on file. We have four offices taking this down, that's how seriously we are taking this. It's amazing that it takes four police officers to operate a camera. You know, that doesn't come cheap. This is on a Saturday and a Sunday, and they are outside the building all the time.

This impact of this kind of surveillance relates not only to the autonomy of the individual; it has implications for the collective autonomy and organisational integrity of the campaign as a whole. As we shall discuss further in Chapter 4, the overt and targeted surveillance of mobilising processes (such as planning meetings) may stigmatise and de-legitimise social movement organisations, diminish participation, and create difficulties for social movements to access appropriate meeting space. This form of surveillance may thus create harms that extend beyond individual privacy, by 'chilling' the process of assembly mobilisations and amounting to (at least arguably) a restriction of assembly rights.

### ii) Persistent monitoring

In contrast to general observation, the visible and persistent monitoring of people can create feelings of stigmatisation, alienation and emotional distress, and may curtail autonomy by restricting relationships with others. This might be through an activist

deciding not to inflict themselves on others for fear they too will become embroiled, or someone else's decision – putative protester, or possible friend – not to associate with someone who is a surveillance target. While people's movements may be monitored over time in a variety of ways, often without their knowledge, distinct harms arise when the monitoring is overt and conspicuous.

Various interviewees reported being monitored in a focused and sustained way by dedicated uniformed surveillance officers, referred to generally as 'Forward Intelligence Teams' or 'FIT'. Paul, for example, describes what he experienced and observed:

There was definitely like, around the millennium maydays in London there was definitely like, people with their individual FIT teams, there would be some event or demonstration and there would be a copper who would be obviously be assigned to someone, and quite a lot of people would be in that situation, so like if three of those people had a conversation, there would be six cops, you know. Not doing anything, literally just following you around.

Interviewees reported being acutely aware of the stigma that was attached to sustained surveillance that was focused conspicuously on them as individuals. Toby, for example, reported being concerned that the surveillance made them appear 'dodgy' or criminal.

I remember a few times on the tube, with two cops there as well, and you walk down the train to look for a seat, and [the police] would walk down the tube with you, and everyone would go, who the hell are these people, heroin dealers?

The result of which was that surveillance which was both sustained and focused conspicuously on an individual, significantly curtailed their autonomy. Esther's for example, noted.

It was that period when police were following me, personally, around on demonstrations, I would end up on my own being followed by police, because I wouldn't want people to be with me. I remember once I got followed on the tube all the way to Tooting from central London. I was on my own. Because people also don't want to be around you.

The impact of surveillance on autonomy was therefore not contained within the public domain of protest, but extended to the highly private domain of intimate relationships. Joe, who had found himself being followed by intelligence teams at the end of an anti-arms fair demonstration, found his movements were restrained,

You have one or two uniformed police following you, wherever you go, whatever you do, so you can't do anything out of their sight which is um, quite obviously, stops you doing what you want to do, even if you weren't doing anything illegal, even if you were going back to your girlfriend's mums house, you wouldn't want to do that would you? If you've got two coppers in tow? ... they got on the tube with me, and I told them, look I'm going to my girlfriends parents' house and I'm not going to do that if you are still following me. And they did radio in and eventually leave me alone, after not all that long, after around an hour or so.

While various forms of surveillance were reported as eliciting feelings of anxiety, it was this aspect of surveillance, more than any other, which was reported as causing emotional and psychological harm. Ellen, for example, reported suffering significant harm as a result.

It had a huge effect on me personally, in 2002 I ended up in hospital hallucinating cops after drinking a lot. But the drinking and that sort of process had come out of a lot of harassment, and in terms of mental health from policing the impact that level of harassment and intrusion has on you is huge. And they got into my dreams you know, dreaming that you are being followed by cops all the time, that you are being chased by cops all the time and I know it's happened to a lot of people as well. I have a certain predisposition to mental health problems but I'm not alone in having experienced personal problems because of what happened.

Through the examples able we have examined and illustrated the impact on privacy that overt surveillance mechanisms may have. We have seen that what emerges is a matrix in which different surveillance activities create interlinked and overlapping privacy harms. Surveillance may be physically invasive of the person, of personal space, and of 'collective' space; and as a result create a loss of physical integrity. Surveillance may involve identification processes, creating a focus on the individual, removing public anonymity. Both sets of activities may restrict autonomy: but autonomy is most seriously affected when surveillance activities are visible, focused and persistent. Such monitoring over a sustained period is stigmatising and disruptive, resulting in decisional interference, emotional and psychological harm, disruption to human relationships.

The impact of surveillance on individuals is variable: while some interviewees reported significant psychological harm, others reported that it had only a marginal impact on them. To place emphasis on this would be, however, to miss the point. Privacy violations do not require evidence of emotional harms to be privacy violations: the fact that an individual has

emerged from an extended period of surveillance without ill effects, does not mean that their privacy was not violated. Nor can surveillance harms be fully evaluated only by reference to individual privacy: as many theorists have pointed out, privacy has a social value as well as an individual one.<sup>307</sup> Further, as we will discuss further in Chapter 4, surveillance has implications, not just for privacy, but for other fundamental rights.

The protection of individual privacy rights is therefore important not merely for the individual, but for wider society: this is particularly true, it is suggested, when the privacy intrusion is perpetuated by the state against its citizens. This does not mean that state surveillance should be prohibited: merely that it should be subject to limitation. We therefore turn to the final part of our examination: the extent to which there has been judicial recognition of that fuller range of privacy harms arising from overt surveillance practices.

### [Judicial considerations of protest privacy](#)

Whether or not judges in either domestic courts or at Strasbourg consider that there might be surveillance harms to privacy interests through intrusion, through a loss of anonymity by identification, or through pervasive and sustained watching is the focus of this part. Our examination starts with a discussion of the approach taken by the UK courts which, it is suggested, have often placed insufficient emphasis on public privacy or at least one that is not sufficiently nuanced or sufficiently attuned to its depth, contours and complexities.

The general approach of the UK courts has been to emphasise the role of privacy in protecting the 'private' realm: privacy is thus primarily concerned with our ability to withhold aspects of ourselves from public knowledge and scrutiny. On this view, privacy has little function in circumstances when we place ourselves intentionally in the public view - as we are deemed to do in the context of protest.

By thus adopting a largely locational approach to privacy the courts have often concluded that a person who voluntarily places themselves in public view has no 'reasonable expectation of privacy' in relation to police surveillance. Police surveillance is thus largely equated with public observation: and the specific harms that we have identified above, relating to individual autonomy, integrity and anonymity, have had little by way of recognition, and little traction in judicial reasoning.

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<sup>307</sup> See, for example, David Mead, 'A socialised conceptualisation of individual privacy: a theoretical and empirical study of the notion of the 'public in UK MoPI cases' (2017) 9(1) *Journal of Media Law* 100

The ECtHR in contrast, has adopted a broader conception of privacy which extends to the public realm. The Strasbourg courts have recognised that privacy encompasses the protection of individual autonomy, identity and integrity. While the ECtHR also starts from the assumption that overt surveillance is generally equivalent to the general observation of the public realm, the Court has acknowledged the surveillance involving the collection *and retention* of personal data by the state is fundamentally distinct from mere public observation and brings state actions within the scope of privacy rights.<sup>308</sup>

It is suggested, however, that an approach based on informational aspects of privacy is also problematic. The approach taken by the ECtHR, with its emphasis on data retention and processing, may not fully recognise harms which arise at the stage of data collection, or those which arise independently from, or in the absence of the gathering and processing of personal data. Further, privacy harms may not be fully recognised if they are conceptualised purely in informational terms. Distinct privacy harms arise at various stages of the surveillance processes, and a focus on informational harms may mean that other privacy harms – of the type we consider earlier in the chapter, and given testimony by the activists’ evidence – are not acknowledged.

This section proceeds in three parts. It begins with an examination of the approach taken by the UK courts, and the emphasis that has been placed on considerations of a person’s reasonable expectation of privacy. It then considers how the broader conception of privacy adopted by the ECtHR has been applied to considerations of state surveillance of the public realm. Finally, it argues that what is required is a legal framework which places adequate weight, not merely on locational and informational privacy, but privacy harms relating to autonomy, identity and integrity.

### 1. Public Privacy in the UK Courts: A Reasonable Expectation of Privacy.

There have been few occasions in which the courts have been called upon to consider the privacy implications of overt police surveillance of public space; even fewer when such considerations concerned the surveillance of political protest. In these cases the courts

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<sup>308</sup> The UK courts have followed the lead of the ECtHR in recognising the state measures in obtaining and storing personal data are likely to fall within the scope of Article 8, even if they are obtained from the public realm. See, for example, *Catt v Commissioner of Police of the Metropolis* [2015] UKSC 9 ; and in relation to retention regimes *R(RMC and FJ) v Commissioner of Police for the Metropolis* [2012] EWHC 1681 (Admin)

have sought to determine privacy primarily through the application of the ‘reasonable expectation of privacy’ test.

There has been some measure of judicial debate as to the scope and application of the ‘reasonable expectation of privacy’ test. It has been argued judicially that the test is but one of a number of relevant considerations when considering privacy rights<sup>309</sup> and conversely that the test is sufficiently broad in nature to encompass all relevant considerations.<sup>310</sup> Particular doubt arises in relation to the retention of personal data by the state. As we shall discuss further below, it has been firmly established by the ECtHR that the ‘systematic or permanent’ retention of personal data by the state will amount to an interference with privacy regardless of how the data was obtained (i.e. whether it was obtained from the public or private realm).

The Supreme Court in *Catt* clearly approached the issue of data retention as constituting a distinct and separate test, which enabled the applicability of privacy rights in circumstances in which there would not otherwise be a ‘reasonable expectation of privacy’.<sup>311</sup> In other instances, however, the courts have attempted to address issues of data retention within the reasonable expectation of privacy test itself, on the basis that our ‘expectations’ of privacy extend to our expectations of what would happen to our data over the longer term.<sup>312</sup> Lord Hope, for example, noted that even public data, ‘as it recedes into the past’ becomes ‘part of the person’s private life which must be respected’<sup>313</sup>.

The courts appear also divided over whether the test should be objectively or subjectively applied. Subjective assessments of a ‘reasonable expectation of privacy’ appear to arise with some regularity. In the Supreme Court case of *Catt*, for example, Lord Sumption placed weight on the extent to which the complainant would have known (and thus ‘expected’) that specialists police surveillance units would have been present at the demonstrations he attended, would ‘record information about them and those who participate in them’.<sup>314</sup> Lord Clarke similarly noted in *Re JR38* that the claimant should have been able to foresee that images taken by the police during a ‘riot’ would be liable to be

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<sup>309</sup> In the matter of an application by JR38 for Judicial Review [2015] UKSC 42, 56 per Lord Kerr

<sup>310</sup> In the matter of an application by JR38 for Judicial Review [2015] UKSC 42, 98 per Lord Toulson.

<sup>311</sup> See also *R (on the application of AR) v Chief Constable of Greater Manchester Police and another* [2018] UKSC 47

<sup>312</sup> See for example *In re JR 27's Application for Judicial Review* [2010] NIQB 143

<sup>313</sup> *R (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3 [27]

<sup>314</sup> *Catt v Commissioner of Police of the Metropolis* [2015] UKSC 9, 28

published.<sup>315</sup> While it is a more positive ruling from the perspective of privacy rights, the judgment of Laws LJ in *Wood* also placed weight on the extent to which the police surveillance came ‘out of the blue’ and thus could not have reasonably been foreseen.<sup>316</sup>

As we have already noted, a subjective approach to this test, which is concerned with a person’s actual expectations or anticipation of privacy, is highly problematic. Determining the application of privacy rights on the basis of whether privacy is, or is not, foreseeable, risks simply reinforcing current state practices and judicial interpretations of cultural and social norms. Further, and worse, it leaves open the possibility of – in our context – unilateral and one-off police announcements that all of those going on protest marches leave themselves exposed to the possibility of police surveillance at any time in the future. Responding to the inherent circularity of a subjective test, the courts have at various points attempted to provide a more objective framework within which to consider privacy expectations. Lord Kerr, for example, has stressed that the applicability of Article 8 cannot be made on the basis of the subjective expectations of the individual but involves ‘a myriad of other possible factors’ including those relating to consent, the age of the person involved, and circumstances of any publication.<sup>317</sup> Lord Toulson also stressed the need for the reasonable expectation of privacy test to be both objective and broadly applied, ‘taking account of all the circumstances of the case...and having regard to the underlying value or values to be protected.’<sup>318</sup>

The most comprehensive attempt to lay out the factors relevant to the test of a reasonable expectation of privacy occurred in *Murray*. The list appears to draw heavily on Nicole Moreham’s conception of privacy discussed earlier in this work, and is heavily predicated on a strong public/private dichotomy<sup>319</sup>. Although not intended to be inclusive, the court stressed the importance of the following considerations:

‘...the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the

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<sup>315</sup> In the matter of an application by JR38 for Judicial Review [2015] UKSC 42

<sup>316</sup> *Wood v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414

<sup>317</sup> In the matter of an application by JR38 for Judicial Review [2015] UKSC 42, 56 per Lord Kerr

<sup>318</sup> In the matter of an application by JR38 for Judicial Review [2015] UKSC 42, 98 per Lord Toulson.

<sup>319</sup> See discussion of Moreham’s conception of privacy at p80

circumstances in which and the purposes for which the information came into the hands of the publisher.”<sup>320</sup>

On the face of it, these criteria offer an opportunity for the courts to adopt a view of privacy that extends beyond a locational conception of privacy and which recognises non-informational conceptions of privacy. It potentially provides a framework which allows the courts to take into account the manner in which surveillance takes place and the effect this may have on the surveillance subject, factors which, as we have seen, are highly relevant considerations for those who have been subject to police surveillance in the context of protest.

Whether or not the test takes a truly objective approach to public privacy is however, necessarily determined by the way such a test is interpreted and applied. We will thus below examine the approach taken by the courts to the various elements identified in *Murray*: the nature of the location; the nature of the activity; the nature and purpose of the privacy intrusion; and the effect on the claimant. As we shall see, however, by continually over-emphasising locational aspects of privacy, while attaching far less weight to ‘expectations’ of privacy relating to autonomy, integrity and anonymity, the courts have largely used the test in a way which simply reinforces entrenched views of the public/private dichotomy, and fails to acknowledge a wider conception of public privacy.

### **i) The nature of the location**

In the context of the ‘reasonable expectation of privacy’ test, it is clear that the nature of the location will not in itself determine the scope of privacy rights: it will nonetheless carry significant weight. Surveillance will amount to an interference with privacy rights if enables others to hear or see us when we are within our own homes or vehicles, or if it is likely to uncover or disclose confidential or essentially private information.<sup>321</sup> While there may be circumstances in which privacy may extend to the public realm, the default position adopted by the courts, therefore, is that police surveillance of the public realm, to the extent that it involves observing, filming or photographing participants in public protest, will generally fall outside the scope of privacy rights. Lord Hoffman, in *Campbell*, put it in the following terms: ‘[t]he famous and even the not so famous’, he stated, ‘who go out in public must accept that they may be photographed without their consent, just as they may

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<sup>320</sup> *Murray v Express Newspapers plc and another* [2008] EWCA Civ 446, 36

<sup>321</sup> See *Campbell v MGN Ltd* [2004] 2 AC 457

be observed by others without their consent.<sup>322</sup> Lord Dyson also noted in *Weller* (discussed further below) that, '[t]he taking of photographs in a public street must be taken to be one of the ordinary incidents of living in a free community'.<sup>323</sup>

Considered as a whole, the *Murray* criteria make it clear, however, that while location remains a key indicator of the applicability of privacy rights, it is not an absolute one: other considerations such as the nature of the activity in question, will also be determinative. Privacy rights are thus not confined to private locations; nor do activities that take place in private locations necessarily attract privacy protections. In the Australian case of *Lenah Game Meats* Gleeson CJ stressed that,

There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public.<sup>324</sup>

Equally a public location does not necessarily equate to an absence of privacy. In *Campbell*, the courts found that Article 8 was applicable to observations made about the claimant's movements in public places<sup>325</sup>; and in *Murray* that privacy rights were relevant to images taken, at distance, of the claimant and his family walking down a public street.<sup>326</sup> The High Court noted in *Howlett v Holding*;

'it may safely now be said that it is not possible for those who wish to intrude upon the lives of individuals through surveillance, and associated photography, to rely upon a rigid distinction being drawn in their favour between what takes place in private and activities capable of being witnessed in a public place by other people'.<sup>327</sup>

Location, in the sense of whether a particular place is 'private' or 'public' is therefore not necessarily determinative. Furthermore, courts have not always been sufficiently adept at the granular thinking necessary when confronting issues of public v private place, so adding to the conceptual confusion and decisional difficulties. In *Weller*, for example, photos of

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<sup>322</sup> *Campbell v MGN Ltd* [2004] 2 AC 457,73

<sup>323</sup> *Weller and others v Association Newspapers* [2015] EWCA Civ 1176 [18] citing *Hosking v Runting* [2003] 3 NZLR 385, 138

<sup>324</sup> *Lenah Game Meats* [2001] HCA 63

<sup>325</sup> *Campbell v MGN Ltd* [2004] UKHL 22

<sup>326</sup> *Murray v Express Newspapers plc and another* [2008] EWCA Civ 446

<sup>327</sup> *Howlett v Holding* [2006] EWHC 41 (QB) [26]

the singer's young children were taken when they were both "out shopping in the street and relaxing in a café".<sup>328</sup> These are two, quite clearly, different locales, yet the Master of the Rolls simply elides the two and concludes that the "photographs were taken of the claimants and their father in a public place".<sup>329</sup> While it would obviously have been possible for the outcome on privacy to have been the same, the legal analysis that led to that needed to take account of the difference. Not doing so exposes yet further the problems of an approach to privacy predicated largely on questions about locational, from which the courts have not moved very far. The circumstances in which privacy extends to the public realm are, as we shall see below, limited.

### ii) The nature of the activity

The second of the elements of a 'reasonable expectation of privacy' as laid down in the case of *Murray*, concerns the 'nature of the activity'. This aspect of the test is highly problematic in terms of the surveillance of protest assemblies, as it shifts attention from the potential harms arising from surveillance, to the actions of those subject to it. It places emphasis on the extent to which an individual is considered to have 'chosen' to place themselves in the public eye. In this respect certain activities have been designated to be 'public activities'; and in participating in such activities the individual is effectively abandoning claims to privacy.

The designation of protest as a 'public activity' thus appears to imply that, by participating in a protest activity, one must abdicate whatever reasonable expectation of privacy one might otherwise have enjoyed while in a public space. Philosophically speaking, the public sphere has been conceptualised as a 'sphere of visibility'; it is not clear, however why a person should in law, be considered more 'visible' while engaging in protest activity than other forms of activity taking place in the public domain. It appears that the court's reasoning on this point appears to reduce to a mere assertion that a 'public activity' becomes 'public' simply because the state has an interest in observing it. Such reasoning is circular and dangerous: on this basis the 'nature of the activity' test therefore, while it purports to be objective is essentially normative, and dependent upon ideological attitudes of what is 'properly' state business.<sup>330</sup>

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<sup>328</sup> *Weller and others v Association Newspapers* [2015] EWCA Civ 1176 [1].

<sup>329</sup> *Weller and others v Association Newspapers* [2015] EWCA Civ 1176 [60].

<sup>330</sup> Beatrice von Silva-Tarouca Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance*, Hart 2011, 13

‘Public activities’ have been held to include the actions of celebrities who have courted the attention of the press<sup>331</sup>; those who undertake criminal activity<sup>332</sup>; and people who intentionally participate in collective assemblies<sup>333</sup>. In the case of *Countryside Alliance*<sup>334</sup>, for example, the House of Lords rejected the claim that a collective assembly for the purpose of hunting fell within the scope of Article 8. Such an assembly was not a ‘private’ activity, the court concluded but a ‘a much admired public spectacle’<sup>335</sup>, which was ‘carried out in daylight with considerable colour and noise, often attracting the attention of on-lookers attracted by the spectacle’<sup>336</sup>.

Criminal activities, on the other hand, appear to be treated as ‘public’ activities purely because of the legitimacy of state interests. In the case of *Kinloch*, for example the Supreme Court concluded that criminal activity was not ‘an aspect of his private life that [the claimant] was entitled to keep private’.<sup>337</sup> Lord Hope took a particularly subjective view of privacy in this respect suggesting that there could be no ‘expectation of privacy’ in circumstances in which a person ‘knowingly or intentionally involves himself in activities which may be recorded or reported in public’<sup>338</sup>

The issue of the applicability of privacy rights to criminal actions arose again in *In re JR38*<sup>339</sup> (*JR38*). This case concerned a child who had been photographed by police during an episode of public disorder. The police had subsequently disseminated an image of the claimant in order to identify him for the purposes of prosecution. The question in front of the courts was whether the publication of his image was, in the circumstances, a violation of the child’s privacy rights. The Supreme Court was unanimous in considering that the taking and publication of the image was justified, and therefore no violation of Article 8 arose. The court was divided, however, as to whether the nature of the claimant’s actions, in participating in disorder, took the issue outside the scope of Article 8 entirely. Lord Toulson, in the majority, concluded that it did: an individual engaged in a violent

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<sup>331</sup> *John v Associated Newspapers Ltd* [2006] EWHC 1611 (QB)

<sup>332</sup> *Kinloch v HM Advocate* [2012] UKSC 62, *In re JR38* [2015] UKSC 42

<sup>333</sup> *Countryside Alliance v Attorney General* [2007] UKHL 52

<sup>334</sup> *Countryside Alliance v Attorney General* [2007] UKHL 52

<sup>335</sup> *Countryside Alliance v Attorney General* [2007] UKHL 52, 108 per Lord Rodger of Earlsferry

<sup>336</sup> *Countryside Alliance v Attorney General* [2007] UKHL 52, 15 per Lord Bingham

<sup>337</sup> *Kinloch v HM Advocate* [2012] UKSC 62 [21]

<sup>338</sup> *Kinloch v HM Advocate* [2012] UKSC 62, 19

<sup>339</sup> *In the matter of an application by JR38 for Judicial Review* [2015] UKSC 42

disturbance, he stated, cannot have a 'legitimate expectation of protection from the police seeking the help of the public to identify those involved'.<sup>340</sup>

As Purhouse has argued, such an approach involves a value judgement not merely about the nature of the activity in question, but about the legitimacy of state interest.<sup>341</sup> Such an approach is flawed, Purhouse argues, as the legitimacy of the actions of the police should properly be considered as a factor to be balanced against individual privacy interests, rather than a factor in limiting the scope of privacy itself. In other words, it is a matter that should properly go to questions about Article 8(2) not Article 8(1). Purhouse makes a pertinent and forceful point, and the question of whether a person is engaged in criminal activity is clearly relevant to considerations of proportionality of police actions.

It is worth noting, however, that in the case of *Catt* the Supreme Court relied on very similar reasoning to assess the proportionality of police surveillance of a long-term campaigner. The court found (on the limited grounds that it involved systematic retention of personal data) that the surveillance in this case was an interference with Article 8. In considering the proportionality of the interference the court placed particularly weight on the nature of the activity that John Catt had been engaged in. Lord Sumption noted that the activities of John Catt were the 'overt activities in public places of individuals whose main object in attending the events in question was to draw public attention to their support for a cause'<sup>342</sup>

While the activities of the claimant were 'overt' in the sense that they were undertaken in the public domain, not all his activities were necessarily 'public' in nature. Information collected and retained by police on John Catt included the fact that he often travelled to protests with his daughter; and often spent time at protests painting the scenes that he witnessed. It is hard to see those aspects of his activities, even in the context of public protest, as being essentially 'public' in nature. In a similar way, some of the activities of the interviewees above were clearly engaged in what we may instinctively see as 'private' activities even within a protest setting, such as eating, washing, or as in the case of Iona, sitting around a camp-fire with friends.

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<sup>340</sup> In the matter of an application by JR38 for Judicial Review [2015] UKSC 42, 94

<sup>341</sup> Joe Purhouse, 'The Reasonable Expectation of Privacy and the Criminal Suspect' (2016) 79(5) MLR 871

<sup>342</sup> *Catt v Commissioner of Police of the Metropolis* [2015] UKSC 9 [26] per Lord Sumption. The court found there was an interference with John Catt's article 8 rights, this was only in relation to the retention of data.

The courts have recognised that in at least some circumstances an activity can be private even if it takes place in a public locations. In *Murray*, for example, Article 8 was held to be applicable to a family outing to a café,<sup>343</sup> and in *Weller*, to a family shopping trip,<sup>344</sup> while in *Campbell* the model's attendance at a Narcotics Anonymous meeting, although observable from the public domain, attracted the protection of privacy rights.<sup>345</sup> Even here, however, the public/private dichotomy is problematic: it is not clear why, for example (or whether) a 'private' café is deemed to be a 'public' place; or why a family shopping trip is, in essence, more 'private' than a family engaging in, for example, a march or procession. Nevertheless it is worth noting that the courts have taken some small steps at least in moving away from a rigid reliance on public and private locations.

### **iii) The nature and purpose of the intrusion**

We have seen that the courts have placed particular emphasis on the 'nature of the location' and the 'nature of the activity' in determining the applicability of privacy rights. To at least some extent, considerations of the 'nature and purpose of the intrusion' have countered the strongly locational approach taken generally by the courts, particularly in circumstances where the courts have placed emphasis on the protection of identity, integrity and autonomy. The courts have placed most weight however, on considerations of the covertness of surveillance (whether or not the information was collected using surreptitious methods) and of the extent to which surveillance involves the retention or dissemination of personal data.

The courts have placed weight, in considering the nature of a privacy intrusion, on whether surveillance is carried out covertly or overtly. Thus even in relation to the surveillance of public space, the courts have emphasised the particular privacy harms arising from covert surveillance (i.e. the protection of private information), rather than the particular harms arising from surveillance which is overt and visible (i.e. a loss of autonomy). Thus the use of zoom lenses and covert photography have been found to be relevant factors in considerations of whether an intrusion falls within Article 8.<sup>346</sup> Additionally, the use of overt forms of monitoring not usually falling within the scope of Article 8, such as the use of CCTV cameras, may do so if they are covertly used to focus on, or track an identified individual. In the case of *N v The Police* for example, the Investigatory Powers Tribunal

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<sup>343</sup> *Murray v Express Newspapers plc and another* [2008] EWCA Civ 446

<sup>344</sup> *Weller and others v Association Newspapers* [2015] EWCA Civ 1176

<sup>345</sup> *Campbell v MGN Ltd* [2004] 2 AC 457

<sup>346</sup> See, for example, *Murray*, *Campbell* cited above

found that the use of CCTV to monitor the behaviour of an individual even for a brief amount of time, as part of a pre-planned surveillance operation, amounted to covert surveillance and was thus an interference with the complainant's Article 8 rights.<sup>347</sup>

The covert nature of surveillance may not be, however, sufficient to bring an activity within the scope of Article 8: greater weight is likely to be placed on the location in which the surveillance takes place and the nature of the activity being monitored. In *Kinloch* for example, as we have already noted, the Supreme Court considered that the covert tracking of an individual in a public space did not amount to an interference with his Article 8 rights. The 'public' nature of his activities meant that the surveillance was not likely to uncover 'private' information, even by the use of surreptitious means. The court noted,

...There is nothing in the present case to suggest that the appellant could reasonably have had any such expectation of privacy. He engaged in these activities in places where he was open to public view by neighbours, by persons in the street or by anyone else who happened to be watching what was going on. He took the risk of being seen and of his movements being noted down. The criminal nature of what he was doing, if that was what it was found to be, was not an aspect of his private life that he was entitled to keep private. I do not think that there are grounds for holding that the actions of the police amounted to an infringement of his rights under article 8.<sup>348</sup>

The courts have also suggested that the 'overt' nature of surveillance may mitigate against the applicability of privacy rights: state surveillance which is visible and conspicuous may thus be considered less privacy-intrusive than that which is hidden or discrete. The court in *Catt*, for example, placed particular emphasis on the fact that the surveillance involved no intrusive or covert mechanisms, but involved simply the recording of 'what was observed by uniformed police officers in public places'.<sup>349</sup> This is a point that has been made by Moreham: surreptitious observation, she notes, is particularly invasive because 'it prevents people from responding to observation with their usual self-presentation methods'.<sup>350</sup> This argument is, in the current context, unconvincing. If hidden or covert surveillance takes place in public space, however, when (on Moreham's contention) we will normally be, in any case, making use of 'self-presentation methods' the likelihood of additional privacy

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<sup>347</sup> N v Police IPT/07/18/CH 8 February 2010.

<sup>348</sup> *Kinloch v Her Majesty's Advocate* [2012] UKSC 62, 19-21 per Lord Hope

<sup>349</sup> *Catt v Commissioner of Police of the Metropolis* [2015] UKSC 9, 26

<sup>350</sup> Nicole Moreham, 'Privacy in Public Places' (2006) 65(3) Cambridge Law Journal 606, 629

harms arising appear slight. On the other hand, the harms arising from surveillance which is overtly carried are (as we have documented) significant and varied.

There has been some judicial acknowledgement of particular harms arising from overt surveillance. The influence of ECtHR jurisprudence has led to an increased recognition of privacy harms relating to a loss of physical integrity and/or public anonymity, arising from the overt surveillance of public places. In at least some cases, however, this has led to a degree of tension between UK and ECtHR case law; while the UK courts have been prepared to acknowledge the applicability of Article 8 in a wider spectrum of circumstance, they may as a result be likely to consider such an interference to be merely 'minor' or 'modest' in nature.

The courts have, for example, been reluctant to accept that the physical intrusion arising from a stop and search procedure would amount to a breach of Article 8. In the case of *Gillan*,<sup>351</sup> Lord Bingham was clearly of the view that privacy rights would be unlikely to arise as a result of a 'superficial' search of the person; and that privacy rights would arise only in relation to the potential disclosure of 'private' information. Lord Bingham noted that,

The appellants contended that exercise of the section 45 stop and search power necessarily involves an interference with the exercise of the article 8(1) right, and therefore had to be justified under article 8(2). The respondents did not accept that there would necessarily be such interference, but accepted that there might, as where (for instance) an officer in the course of a search perused an address book, or diary, or correspondence. I have no doubt but that the respondents' concession is rightly made. I am, however, doubtful whether an ordinary superficial search of the person can be said to show a lack of respect for private life. It is true that "private life" has been generously construed to embrace wide rights to personal autonomy. But it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms, and I incline to the view that an ordinary superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example, can scarcely be said to reach that level.

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<sup>351</sup> R (Gillan) v Commissioner of Police for the Metropolis [2006] UKHL 12

The case progressed to the ECtHR who adopted a different approach, concluding that the applicability of Article 8 arose directly from the coercive and physically intrusive elements of the search.<sup>352</sup> When the issue arose again in *Roberts* the Supreme Court accepted, following the ECtHR decision in *Gillan*, that being subject to a police stop and search involving a physical search of the person and their belongings, would amount to an interference with Article 8. The degree of interference resulting from such acts was, in these circumstances, considered to be modest. This was a level of interference which was not, as Lady Hale noted, 'at the gravest end of such interferences'.<sup>353</sup>

In *Wood*, the court took a more expansive approach to Article 8, going some way to recognising privacy harms relating to both physical integrity and anonymity. The court concluded that the overt surveillance of the claimant intruded within the claimant's 'personal space' and resulted in a loss of physical integrity, and attached weight to the collection and potential future use of identification data.

Physical intrusion alone was not, in this case, considered to be sufficient to bring the surveillance within the scope of Article 8. While the court acknowledged, following the ECtHR in *Von Hannover*, (discussed below), that in certain circumstances, 'brutal' interventions by a paparazzi-style 'bevy of picture-takers' would engage privacy rights, Laws LJ appears to suggest that this would be the case only where such actions amounted to established torts, involving violent conduct such as 'face-to-face confrontation, pushing, shoving' and trespass 'barging into the affected person's home'.<sup>354</sup>

The evidence of intrusive photography in the case of *Wood* did not go so far as to establish physical harm or even contact. The claimant maintained that he had been repeatedly photographed from close quarters while being followed down the street by uniformed police officers, an experience that left him feeling 'shaken and frightened'.<sup>355</sup> The police photographer, on the other hand, testified that he customarily tried to keep a safe distance from subjects in order not to invade their 'personal space' and for his own safety and the safety of his equipment. Lord Justice Laws concluded that the 'fact that more than one

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<sup>352</sup> *Gillan & Quinton v United Kingdom* (2010) 50 EHRR 45

<sup>353</sup> *R (on the application of Roberts) v Commissioner of Police of the Metropolis and another* [2015] UKSC 79 [3]

<sup>354</sup> *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, 34 per Laws LJ

<sup>355</sup> *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, 2

picture was taken, or that the police followed the Appellant down Duke St' was not, in itself, 'remotely so objectionable' as to amount to an interference with privacy rights.<sup>356</sup>

Taken in conjunction with other aspects of the behaviour of the police however, Laws LJ did concede that the surveillance in *Wood* intruded on the claimant's 'personal space' and 'integrity'. The court clearly attached some weight to the efforts made by the police to identify Mr Wood. Lord Collins noted that he was,

...disturbed by the fact that notwithstanding that the police had no reason to believe that any unlawful activity had taken place, and still less that Mr Wood had taken part in any such activity...he was followed by a police car, and then questioned about his identity by four police officers, two of whom then followed him on foot and tried to obtain the assistance of station staff to ascertain Mr Wood's identity from his travel card<sup>357</sup>.

Further the court placed significant emphasis on the fact that Mr Wood's personal data – specifically his image - was both collected *and retained* by the police for future use. Laws LJ stated that the police actions, seen as a whole and 'unexplained at the time it happened', with the possibility that the images would be kept and used by police at a future date was 'a sufficient intrusion by the State into the individual's own space, his integrity, as to amount to a *prima facie* violation of art 8(1)'<sup>358</sup>

The courts have in other circumstances sought to protect anonymity, albeit through the protection of residual liberties, rather than the positive application of privacy rights. The UK courts have been consistent in their view that there is, apart from in a small number of specific circumstances laid down by statute, no legal obligation on the part of any citizen to answer the questions of a police officer, or to provide their name if asked.<sup>359</sup> This was reaffirmed in *Mengesha*, in which the courts determined that police actions in maintaining a breach of the peace containment (known as a 'kettle') in order to obtain protesters identification details, was unlawful.<sup>360</sup> In *Laporte* it was similarly noted that the failure of a protester to provide a name and address, while 'irritating' to the police, was lawful, and provided no justification for any restriction of Article 10 or 11 rights.<sup>361</sup>

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<sup>356</sup> *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, 34

<sup>357</sup> *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, 94 per Lord Collins

<sup>358</sup> *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 [46]

<sup>359</sup> See, for example, *Rice v Connelly* [1966] 2 QB 414

<sup>360</sup> *Mengesha v Commissioner of Police for the Metropolis* [2013] EWHC 1695

<sup>361</sup> *Laporte v Chief Constable of Gloucestershire* [2006] UKHL 55 [55]

There is an important distinction of course between respect for residual liberties and the protection of positive rights. The courts have not necessarily attached weight to the protection of identity as a feature of Article 8. As we have already noted, the Supreme Court in *JR38* did not consider that police actions in identifying a suspect in disorder through the taking and publication of his photograph fell within the scope of Article 8.

Even in cases in which, following the jurisprudence of the ECtHR, the applicability of Article 8 to the identification procedures has been recognised, there has been a notable tendency for the courts to view such an interference as being merely technical or trivial in nature.

This is the case in *Catt*: the surveillance that John Catt was subject to was not evaluated as an activity which involved his identification, frequent recognition, and subsequent categorisation; rather it was framed as being merely a privacy problem related to the retention of publicly observable data relating to his presence at public events. As a result, surveillance activities which, as we have seen, is capable of resulting in significant privacy harms, are dismissed as causing only a 'modest' or 'minor' interference.<sup>362</sup> Lord Sumption stated,

I am conscious that the Strasbourg court has in the past taken exception to the characterisation of interferences by English courts with private life as being minor (see, notably, *MM*, at para 170), but the word seems to me to be appropriate to describe what happened in this case. The information stored is personal information because it relates to individuals, but it is in no sense intimate or sensitive information like, for example, DNA material or fingerprints. It is information about the overt activities in public places of individuals whose main object in attending the events in question was to draw public attention to their support for a cause.<sup>363</sup>

Similar language has been used in other cases relating to identification and classification: rather than focusing on the harms inherent in state capacity and capability for the removal of public anonymity, the courts have tended to view the taking and retention of identity data as primarily an issue of data protection. The House of Lords case of *Marper*, for example, concerned the taking and retention of identification data in the form of biometrics. Lord Steyn noted that he 'incline[d] to the view that in respect of retained

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<sup>362</sup> Similar language has been used in other cases relating to identification and classification. In the House of Lords case of *Marper* than any interference with Article 8 would be 'very modest indeed'

<sup>363</sup> R (Catt) v Commissioner of Police for the Metropolis [2015] UKSC 9 [26]

fingerprints and samples article 8(1) is not engaged.' If, on the other hand, he was wrong, and the retention of such data did amount to an interference with Article 8, such interference would be 'very modest indeed'.<sup>364</sup> And in *RMC and FJ*, Richards LJ suggested that any interference arising from the retention of custody images would be 'small and is plainly proportionate'.<sup>365</sup>

Ultimately, therefore, while the 'nature and purpose of the intrusion' element of the reasonable expectation provides an opportunity for the courts to examine in detail the nature of surveillance harm arising from identification processes, it is largely an opportunity missed. While harms relating to physical intrusions and identification have been acknowledged, they have tended to be afforded less weight in overall considerations of the reasonable expectation test than other elements. Further, if such harms are recognised at all, this tends to be only to the extent that they entail the collection and retention of personal information. In the absence of any recognition of the immediate or tangible harms arising from information collection and retention, such as those relating to autonomy, integrity or anonymity, there is a resultant danger that any interference with privacy rights will be considered only minor in nature, and easily justified.

**iv) The effect on the claimant.**

While the courts consider the effect of a privacy intrusion on a claimant, this has rarely extended to considerations of the behavioural curbs on individual autonomy relating from police surveillance of the public realm. Considerations of the effect of a privacy intrusion on a claimant have tended to be confined to issues of publication, and have tended to be focused on factors such as age and vulnerability.

The effect on a child on the publication of their image was, for example, a relevant consideration in *Murray*, in which the court held that 'a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child'.<sup>366</sup>

The case stands in direct contrast with *JR38* which, as we have already noted, concerns the taking and publication by the police of a photograph of a child, in the midst of an incident of disorder, in order to identify him for the purposes of prosecution. The court was split on

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<sup>364</sup> R (S & Marper) v Chief Constable of the South Yorkshire Police [2004] UKHL 39

<sup>365</sup> R(RMC and FJ) v Commissioner of Police for the Metropolis [2012] EWHC 1681 (Admin) [61]

<sup>366</sup> Murray v Express Newspapers plc and another [2008] EWCA Civ 446, 57

the extent to which the applicability of Article 8 should be determined by the age of the claimant and the effect on him that publication would have. In the minority, Lord Kerr placed emphasis on the potential stigmatisation of the claimant that would inevitably occur as a result of the publication of his image in this context, as well as the need for the justice system to protect a child's identity 'even (or, perhaps, especially) when he or she has been subject to criminal proceedings'.<sup>367</sup> The view of the majority, however was that while the age of the claimant and the potential effect on him were factors to be taken account of within the 'reasonable expectation of privacy' test, in the circumstances of this case, greater weight should be attached to the 'nature of the activity'.

Emotional impacts resulting from the taking of photographs have tended to be considered relevant only in extreme circumstance.

Detrimental effects of surveillance activities on those subject to them are not, of course, limited to children. The empirical data presented above makes it clear that surveillance has a considerable effect on autonomy, arising from the loss of public anonymity, the stigmatising effect of conspicuous police attention (and the resultant disruption to interpersonal communication and relationships), and the psychological stress and emotional distress resulting from persistent monitoring. Serious consideration of these impacts of surveillance are clearly missing from the police surveillance cases of Catt and Wood.

Arguments relating to the effect of surveillance on Mr Catt's political freedoms and moral autonomy were treated dismissively by Lord Sumption, who disregarded the potential impact of the surveillance itself, and focused exclusively on data retention issues, noting merely that the products of surveillance were not used to discredit people such as Mr Catt, nor was the information used 'for political purposes or for any kind of victimisation of dissidents'.<sup>368</sup> In Wood, while the court noted the 'chilling effect' of the surveillance in general terms, little weight appeared to be placed on the effect the police actions had on the claimant, who, as we have noted above, felt shaken and disturbed by his experiences.

## 2. Public Privacy and the ECtHR

We have seen that the UK courts have consistently emphasised location-based conceptions of privacy when considering the applicability of privacy rights in the concept of surveillance. As a result, privacy has been often conceptualised narrowly as being primarily concerned with the protection of those aspects of ourselves we seek to hide from public view: thus it

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<sup>367</sup> In the matter of an application by JR38 for Judicial Review [2015] UKSC 42, 53 per Lord Kerr

<sup>368</sup> Catt v Commissioner of Police of the Metropolis [2015] UKSC 9 [27]

is concerned with secret or confidential information, with seclusion, and with intimacy. In the public domain, therefore, the threat to privacy from police surveillance has not always been fully acknowledged: rather surveillance has often been viewed as being, in privacy terms, equivalent to ‘general observation’.

The ECtHR, in comparison, has placed far less emphasis on locational considerations. The ECtHR has stated frequently that the concept of “private life” is broad in scope and not susceptible of exhaustive definition. The Court has frequently noted, for example, that privacy rights extend beyond the ‘inner circle’ of a person’s life to include a ‘zone of interaction of a person with others, even in a public context’ within which a person has the ‘right to establish and develop relationships with other human beings and the outside world.’<sup>369</sup> It views the concept of privacy as relating to ‘a sphere within which [the person] can freely pursue the development and fulfilment of his personality’<sup>370</sup> in both public and private places.<sup>371</sup> We can here see more clearly and obviously echoes of the types of privacy harms we considered at the outset of this chapter.

That does not mean that surveillance of the public domain necessarily involves an interference with Article 8 rights. The observation of the public domain, including photography and film, will not itself fall within the scope of Article 8. Privacy rights may become applicable however, if surveillance involves the collection and retention of private information. Importantly, ‘private information’ is not restricted to information taken from the ‘private’ domain: the Court has held that privacy rights may apply when any information about an identified individual is obtained and held on state information systems, even if that information is taken from the public domain.<sup>372</sup>

In the absence of the collection of personal data, overt surveillance of the public realm may be treated as being essentially equivalent to the type of public observation that we all encounter in the public realm. In the case of *Herbecq* for example, the Commission determined that watching a location through CCTV was not materially different from being there in the flesh;

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<sup>369</sup> P.G. and J.H. v. the United Kingdom (2008) 46 EHRR 51 [56]; Peck v. the United Kingdom (2003) 36 EHRR 41 para 57; Perry v. the United Kingdom (2004) 39 EHRR 3 [36]

<sup>370</sup> Sidabras and Džiautas v. Lithuania (2004) 42 EHRR 104

<sup>371</sup> S.A.S. v. France App no. 43835/11 (ECtHR 1 July 2014)

<sup>372</sup> Uzun v Germany App no. 35623/05 (ECtHR 2 September 2010); Segerstedt-Wiberg v Sweden (2007) 44 EHRR 2

....the photographic systems of which the applicant complains are likely to be used in public places or in premises lawfully occupied by the users of such systems in order to monitor those premises for security purposes. Given that nothing is recorded, it is difficult to see how the visual data obtained could be made available to the general public or used for purposes other than to keep a watch on places. The Commission also notes that the data available to a person looking at monitors is identical to that which he or she could have obtained by being on the spot in person. Therefore all that can be observed is essentially, public behaviour.<sup>373</sup>

The ECtHR has repeatedly held, however, that surveillance which involves the storing of information relating to an individual's private life differs from mere 'general observation' on the basis that it makes personal data available for further processing on the part of the state. Measures which involve the collection and retention of data therefore will come within the scope of Article 8.<sup>374</sup> In the case of *Marper*, for example the Court noted,

The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of article 8. The subsequent use of the stored information has no bearing on that finding. However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained.<sup>375</sup>

Private information in this context includes any information which relates to an identified individual, even if it is taken from the public domain. The ECtHR has held that the systematic collection and storing of data by security services on the political interests, views and affiliations of individuals constituted an interference with Article 8 even if that data was collected in a public place<sup>376</sup> or relates exclusively to publicly observable activities.<sup>377</sup> Collection and storage of data concerning a person's movements in the public

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<sup>373</sup> *Herbecq and Another v. Belgium* App nos. 32200/96 and 32201/96, (Commission decision 14 January 1998)

<sup>374</sup> *MM v UK* [2012] ECHR 1906; *Leander v Sweden* [1987] 9 EHRR 433; *Amann v. Switzerland* (2000) 30 EHRR 843; *Rotaru v Romania* App. No. 28341/95 (ECtHR 4 May 2000); *S and Marper v United Kingdom* (2009) 48 EHRR 50

<sup>375</sup> *S and Marper v United Kingdom* (2009) 48 EHRR 50 [66]

<sup>376</sup> *Peck v. the United Kingdom* (2003) 36 EHRR 41

<sup>377</sup> *Rotaru v. Romania* [2000] ECHR 192 [43-44]

sphere has also been found to constitute an interference with private life.<sup>378</sup> The Court has also specifically held that the construction of a ‘police file’ relating to an individual’s political activities will be an interference with Article 8.<sup>379</sup> Additionally, the Court has recognised that identity data obtained and retained in police custody for the purposes of the investigation of criminal offences will also fall within the scope of Article 8.

In *Segerstedt*, for example, the collection and retention of personal data in ‘police files’ was considered to fall firmly within the scope of the notion of private life for the purposes of Article 8(1). The Court noted that the information held by the authorities was, to a large extent, obtained from ‘open’ or public sources, such as police observations of public meetings and demonstrations; newspaper articles, radio recordings and the decisions of public authorities. The Court dealt with the question of applicability in the following way:

The Court, having regard to the scope of the notion of “private life” as interpreted in its case-law, finds that the information about the applicants that was stored on the Security Police register and was released to them clearly constituted data pertaining to their “private life”. Indeed, this embraces even those parts of the information that were public, since the information had been systematically collected and stored in files held by the authorities.

The ECtHR has therefore adopted a primarily informational approach to determining the applicability of privacy rights to surveillance measures. As we have already noted, a rigidly informational approach may result in a failure to fully recognise privacy harms as they arise from police surveillance measures. Surveillance may result in privacy harms in a range of circumstances in which information is not collected, or not retained. Further, even in circumstance involving the collection and retention of data, an approach to privacy which focuses narrowly on informational harms may not provide an adequate mechanism to understand the often complex matrix of overlapping privacy harms that may result from surveillance measures.

The conception of privacy adopted by the ECtHR does not, however, limit the Court to an informational approach. The scope of ‘private’ life is broadly defined is not limited to informational autonomy; amongst the elements recognised as being contained within the right to privacy are those of physical integrity, identity, and decisional autonomy. Along

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<sup>378</sup> Uzun v. Germany App no. 35623/05 (ECtHR, 2nd September 2010) [51-53]

<sup>379</sup> Segerstedt-Wiberg v Sweden (2007) 44 EHRR 2; Shimovolos v Russia App no. 30194/09 (ECtHR 21 June 2011)

with concepts of informational autonomy, these additional elements may provide a more sophisticated and nuanced framework for the judicial recognition of various ways in which overt surveillance measures differ from mere public observation, and the various circumstances in which privacy harms arise.

In this last section therefore we examine the extent to which the ECtHR has made use of these three concepts of integrity, identity and autonomy in the context of surveillance measures and other privacy-intrusive behaviour.

### i) **Physical and psychological integrity**

We have seen that the UK courts have primarily considered surveillance activities to be physically intrusive only if they involve the invasion of 'private' space, such as our homes or vehicles, and are thus able to obtain information which we have sought to exclude from the public realm. The ECtHR has, however, adopted a broader approach to the issue of intrusion. They have found that surveillance activities will fall within the scope of Article 8 if they are physically intrusive not merely of property, but also of the person. The ECtHR has frequently stated that the concept of private life includes a person's physical and psychological integrity<sup>380</sup> which includes the preservation of bodily integrity as well as mental health<sup>381</sup> and well-being<sup>382</sup>; surveillance may be found to infringe upon physical and psychological integrity if it is bodily invasive,<sup>383</sup> and/or involves a course of action which may be considered to amount to harassment or intimidation.<sup>384</sup> Surveillance may also be considered intrusive if, by its presence, it disrupts personal relationships, even in the absence of proprietary interests.<sup>385</sup>

Surveillance which is bodily intrusive will thus necessarily involve an interference with Article 8. The Court has clearly established that the harms arising from stop and search are not only those of coercive detention (and a consequential loss of liberty)<sup>386</sup> but also relate from a loss of physical integrity. The physical location in which the search takes place is thus not determinative of the applicability of privacy rights, although a search taking place

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<sup>380</sup> Király and Dömötör v Hungary [2017] ECHR 40

<sup>381</sup> N.F. v Italy (2002) 35 EHRR 106. See also Odièvre v France [2003] ECHR 86 in which case the Court noted that the 'preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life'

<sup>382</sup> A v. Croatia App no. 55164/08 (ECtHR 14 October 2010)

<sup>383</sup> Gillan & Quinton v UK (2010) 50 EHRR 45

<sup>384</sup> Von Hannover [2005] 40 EHRR 1; Sisojeva and others v Latvia [2005] ECHR 405

<sup>385</sup> Niemietz v Germany (1993) 16 EHRR 97

<sup>386</sup> Foka v. Turkey App no. 28940/95 (ECtHR 24 June 2008)

in public may exacerbate the impact of the intrusion by stigmatising the subject and causing emotional harm. In *Gillan and Quinton*, the Court commented,

the Court considers that the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life. Although the search is undertaken in a public place, this does not mean that Article 8 is inapplicable. Indeed, in the Court's view, the public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment. Items such as bags, wallets, notebooks and diaries may, moreover, contain personal information which the owner may feel uncomfortable about having exposed to the view of his companions or the wider public.<sup>387</sup>

Surveillance which is intrusive of personal space, and which as a result causes emotional or psychological harm, may also fall within the scope of private life, even if takes place in the public realm. While the act of being photographed by others will not normally, in itself, constitute an interference with Article 8, it may do if it is undertaken in such a way as to amount to harassment and thus violate the physical or psychological integrity of the subject. Although the Court in *Von Hannover* was concerned primarily with the publication of images, it also placed weight on the fact that photographs were 'often taken in a climate of continual harassment which may induce in the person concerned a very strong sense of intrusion into their private life or even of persecution'.<sup>388</sup> In other circumstances the Court has also found that being subject to harassment of a nature that it causes disruption to a person's daily life will fall within the scope of Article 8.<sup>389</sup>

While the ECtHR has tended to approach the surveillance issues from the perspective of informational harms, these cases suggest that in at least some circumstances, the Court may recognise privacy harms arising from intrusive forms of surveillance, even in the absence of data collection and retention. It is not clear, of course, whether the Court would go so far as to accept that a loss of physical or psychological integrity will arise in the kind of circumstances we have discussed in this study: whether for example, it would extend to surveillance which involves frequent and repeated photography from close

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<sup>387</sup> *Gillan & Quinton v UK* (2010) 50 EHRR 45

<sup>388</sup> *Von Hannover v Germany* (No. 2) (2012) 55 EHRR 15 para 103

<sup>389</sup> *Đorđević v. Croatia* [2012] ECHR 1640 para 97

quarters (such as that which Evan experienced)<sup>390</sup> or which involves the visible monitoring of an individual for a continuous period (such as that which Esther was subject to).<sup>391</sup>

The testimonies of social movement actors discussed above illustrate that privacy harms arising from such activities are far from being trivial. The Court would have an opportunity, in placing greater emphasis on considerations of whether surveillance involves a loss of physical and psychological integrity, to establish a framework in which such harms could be properly and directly acknowledged, thus developing a more robust legal protection for public privacy.

### **ii) Identification**

The ECtHR has also taken a stronger position on the use of identification processes in the context of surveillance, and has established that identity data (regardless of form) will amount to personal information. The collection and retention of identity data will therefore fall within the scope of Article 8. The collection and retention of identity data is not therefore (as the UK courts have, at times, suggested) a merely 'minor' interference of a technical nature. Instead, the capacity of the state to subsequently identify (or recognise) individuals is considered to be a central element of informational harms, establishing as it does, 'a link to the person in the flesh'.<sup>392</sup>

The ECtHR has repeatedly recognised a person's right to their identity, which it has interpreted broadly to 'embrace multiple aspects of the person's physical and social identity'.<sup>393</sup> This includes a person's name<sup>394</sup>, as well as any biometric data (such as fingerprints, DNA or photographs which 'contain unique information about the individual concerned allowing his or her identification in a wide range of circumstances'.<sup>395</sup> Identity has also been considered to include information about a person's health<sup>396</sup>; information about ethnicity; about gender and sexual orientation<sup>397</sup>; a person's image<sup>398</sup>; and other information, such as biometric data. The ECtHR has also held that a person's personal

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<sup>390</sup> See page 96: Evan reported being repeatedly photographed from close quarters, sometimes with derogatory comments

<sup>391</sup> See page 113: Esther reported that she was followed by uniformed police officers during and after demonstrations, even on her way home

<sup>392</sup> Daniel Solove, *Understanding Privacy* (HUP 2009), [123]

<sup>393</sup> S and Marper v United Kingdom (2009) 48 EHRR 50 [66]

<sup>394</sup> Friedl v Austria (1995) 21 EHRR 83

<sup>395</sup> S and Marper v United Kingdom (2009) 48 EHRR 50 [84]

<sup>396</sup> Z. v. Finland, (1997) 25 EHRR 371 [71]

<sup>397</sup> Bensaid v. the United Kingdom, (2001) 33 EHRR 205 [47]

<sup>398</sup> Sciacca v. Italy (2006) 43 EHRR 20 [29]

identity includes that person's reputation,<sup>399</sup> and the disclosure of a person's identity in circumstances in which this would be distressing or humiliating has been held to be a breach of Article 8.<sup>400</sup> The Court has also explicitly recognised the value of anonymity, which it has stated has 'long been a means of avoiding reprisals or unwanted attention'.<sup>401</sup> Further the Court has recognised that the collection and processing of private information to form a 'personal profile' of the individual, relating to any aspects of their identity (including political views and affiliations) will come within the scope of Article 8.<sup>402</sup>

Obtaining and recording identification data from an individual in the context of political protest is likely to fall within the scope of Article 8. In *Friedl*<sup>403</sup> two issues fell before the Commission: whether Article 8 applied to the taking of video footage and photographs of the demonstration, which included images of the claimant; and whether Article 8 to the police use of coercive powers to require the claimant to provide his name and address, which was then recorded. The Commission concluded that in this context police filming and photography did not amount to an interference with Article 8; in reaching this decision the Commission noted that footage and images were taken for the purposes of generally observing the scene, and kept only for the purposes of 'recording the character of the manifestation and the actual situation at the place in question'. As a result the Commission placed particular weight to the assurances given by the respondent Government that:

'...individual persons on the photographs taken remained anonymous in that no names were noted down, the personal data recorded and photographs taken were not entered into a data processing system, and no action was taken to identify the persons photographed on that occasion by means of data processing.'<sup>404</sup>

The commission also concluded however, that police actions in demanding and recording Mr Friedl's personal details, did fall within the scope of Article 8 (although the interference was justified, in this instance, on the facts). The Commission noted,

The questioning of the applicant on 19 February 1988 in order to establish his identity, and the recording of these personal data, though taking place in the course of the above public incident, was closely related to his private affairs and

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<sup>399</sup> Putistin v Ukraine [2013] ECHR 1286

<sup>400</sup> Peck v. the United Kingdom (2003) 36 EHRR 41

<sup>401</sup> Delfi AS v Estonia App no. 64569/09 (ECtHR 16 June 2015) [147]

<sup>402</sup> Segerstedt-Wiberg v Sweden (2007) 44 EHRR 2

<sup>403</sup> Friedl v Austria (1995) 21 EHRR 83

<sup>404</sup> Friedl v Austria (1995) 21 EHRR 83 [50]

constituted, therefore, an interference with the right guaranteed by Article 8(1) of the Convention. Such interference is in breach of Article 8 of the Convention, unless it is justified under Article 8(2) as being prescribed by law and necessary in a democratic society to achieve one of the aims mentioned therein.<sup>405</sup>

While it is established that the collection and retention of identification data will amount to an interference with Article 8, it is not entirely clear that subsequent use of that data for subsequent identification processes will do so. Other privacy problems may also arise in relation to the subsequent use of identification data. In *Perry*, the taking and use of CCTV images to identify the claimant in a virtual identification parade was found to be an interference with the applicant's privacy rights. The Court placed particular emphasis, however, on the measures used to obtain an image of the claimant for this purpose. The police had adapted the CCTV cameras in a custody suite as to enable the claimant's image to be captured in an appropriate form, and he had therefore not been aware either that the CCTV had been specifically focused on him; or that it would subsequently be processed and used for these purposes.<sup>406</sup>

In *Lupker* on the other hand, the Commission found that the police had not interfered with the applicant's privacy rights by making use of identification data (including a photograph) which had previously been provided voluntarily for the purposes of obtaining a driving license.<sup>407</sup> In this case the relevant identity data had not, as was the case in *Perry*, been surreptitiously obtained in coercive circumstances, but had been voluntarily provided by the claimant, albeit for a somewhat distinct purpose. The Commission placed weight on the fact that the image and associated data was thus obtained in circumstances which did not involve a violation of the individual's privacy.

The reasoning in *Lupker* suggests that if the police have lawfully obtained a person's identity data in circumstances which do not amount to an interference with privacy rights, further use of that data for subsequent identification purposes will not itself amount to an interference. This, it may be said, must surely be the case: if it were not the police would

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<sup>405</sup> Friedl v Austria (1995) 21 EHRR 83 [52,53] On this occasion, the Commission found that such an interference was justified and in accordance with law, as the demonstrators were suspected of having committed administrative offences and Austrian law specifically provided police with powers to obtain identification data in such circumstances.

<sup>406</sup> *Perry v. the United Kingdom* (2004) 39 EHRR 3

<sup>407</sup> *Lupker v. the Netherlands* App no. 18395/91 (Commission decision of 7 December 1992)

not be able to carry out any form of identification check without interfering with privacy rights.

The consequences of this approach are that privacy protections relating to a person's identity will arise only in the context of the *collection and retention* of personal data. In the context of policing however, the collection and retention of personal details is a routine occurrence, and may arise for a number of justifiable purposes. If the taking and retention of identification data in any particular circumstances (including potentially, if the person is a witness or a victim of crime, or for administrative purposes) is considered to be justified and proportionate under Article 8(2), it would appear that the subsequent use of such data for identification purposes will not itself amount to an interference with Article 8 unless further personal data is collected and retained.

Thus it would appear that, if a person is recognised by police in the context of a protest, and a record is made recording the presence of that individual, that activity would amount to an interference with Article 8. On the other hand, if a person is recognised by police in a manner which is designed to make the person aware of this fact (but no data is recorded), it would appear from the ECtHR case law that no interference with privacy rights arises.

This is surely problematic: the privacy harms experienced by Bob, Jeremy and others arise from a loss of public anonymity in those particular circumstances: it was use of their data, rather than the retention of their data, from which harms arose.

A focus on informational privacy may therefore result in the Court being unable to fully recognise and acknowledge the particular privacy harms that arise at each stage of identification processes. As Ricki's experience shows, privacy harms arise may arise from revealing identity data in the context of surveillance, regardless of whether data is formally recorded and retained. While the privacy harms arising from the coercive disclosure of information related to Ricki's transgender status may have been exacerbated by the subsequent storage of that information, significant privacy harms resulted irrespective of whether that data was kept.<sup>408</sup>

Additionally, we have established that being 'recognised' and named by police in a conspicuous and obvious way caused significant privacy harms relating to the removal of public anonymity and the restriction of autonomy, even if no 'new' data was obtained and retained in the process. Further, it is worth noting that the categorisation or designation of

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<sup>408</sup> See page 103: Ricki reported feeling distressed about being 'outed' as transgender during the identification process to those police officers present at the time.

a person as 'risk', while often associated with collection and processing of personal data, does not necessarily require the collection and retention of private information over and above basic identity data.

Thus identification procedures that involve the identification of a person using information in the public realm will also fall within the scope of Article 8 if data is collected and retained or processed.

What would be of more utility, it is suggested, is an explicit right to public anonymity, which restricts the circumstances in which identification processes may be used. This would not, of course, prevent state authorities from using or processing identification data, any more than the current interpretation of Article 8 prevents them from collecting and retaining data. It would, however, create a more effective protection against the privacy harms arising from identification processes, particularly in the context of public assemblies.

The ECtHR has gone some way towards this, in the context of on-line anonymity. In *Delfi AS* the Court noted the importance of on-line anonymity for the maintenance of privacy rights as well as for ensuring freedom of expression.

the Court is mindful of the interest of Internet users in not disclosing their identity. Anonymity has long been a means of avoiding reprisals or unwanted attention. As such, it is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the Internet. At the same time, the Court does not lose sight of the ease, scope and speed of the dissemination of information on the Internet, and the persistence of the information once disclosed, which may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media. It also refers in this connection to a recent judgment of the Court of Justice of the European Union in the case of Google Spain and Google, in which that court, albeit in a different context, dealt with the problem of the availability on the Internet of information seriously interfering with a person's private life over an extended period of time, and found that the individual's fundamental rights, as a rule, overrode the economic interests of the search engine operator and the interests of other Internet users.<sup>409</sup>

In *Benedik* the ECtHR considered the applicability of Article 8 rights to police actions in identifying an internet user by obtaining access to his Internet Service Provider's subscriber

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<sup>409</sup> *Delfi AS v Estonia* App no. 64569/09 (ECtHR 16 June 2015) [147]

data. The Court concluded that the applicant's interest in having his identity protected, with respect to his online activity, fell within the scope of the notion of 'private life' and that Article 8 was therefore applicable. In reaching this conclusion the Court acknowledged 'the importance of online anonymity' and noted that the applicant's expectation of privacy with respect to his online activity, and his expectation that his identity would not be disclosed 'could not be said to be unwarranted or unreasonable.'<sup>410</sup>

If anonymity is important for maintaining privacy and freedom of expression on-line, it must surely have similar importance for maintaining privacy and freedom of expression in a physical environment. An explicit recognition that the right to a private life involves a right to public anonymity would not be a considerable leap from the current position adopted by the ECtHR, but may provide further clarity over the extent to which privacy rights are applicable to state identification processes. At a time when recognition processes are becoming increasingly sophisticated and automated, with the widespread use of Facial Recognition Technology (FRT) by police forces at public events, this may be an important and necessarily area in which to strengthen privacy protections.

iii) **Decisional autonomy.**

We have seen that the ECtHR has taken a consistently broader and more expansive approach to public privacy than we have seen from the UK courts. The ECtHR has been demonstrably more willing to recognise the physical intrusiveness of surveillance activities, and the potential psychological effect of such intrusions; and that they are significantly more likely to acknowledge the applicability of privacy rights to circumstances in which surveillance results in a loss of anonymity, at least where such a loss of anonymity relates to the collection and retention of identity data. In this last section we consider the extent to which the ECtHR has also acknowledged the circumstances in which surveillance activities will also result in a loss of decisional autonomy arising from persistent and sustained surveillance.

We established in our taxonomy that surveillance differs from general observation if it is physically intrusive, involves identification of its subjects, or is persistently focused on an individual over time. The harms arising from these activities are necessarily overlapping: thus privacy harms relating to intrusion may arise from individual instances of physically intrusive surveillance (such as a stop and search), or from a sustained period of intrusive

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<sup>410</sup> Benedik v Slovenia [2018] ECHR 363 [118]

surveillance, such as that experienced by interviewees who reported being followed for long periods by police surveillance officers. Further, privacy harms relating to identification may be exacerbated by continued or repeated surveillance, which enables the authorities to collect and store more extensive information which may then be aggregated in a personal profile. These harms, as we have seen, have been recognised by the ECtHR as falling within the scope of private life, which encompasses physical and psychological integrity, and identity. Thus the ECtHR has held that surveillance which involves physical intrusion or harassment, or which involves the collection and retention of personal data (including identification data), will amount to an interference with Article 8.

As well as harms relating to physical intrusion and public anonymity, however, the empirical data presented above suggests that in certain circumstances, and particular where surveillance is both particularly focused on an identified individual, and sustained over a period of time, privacy harms relating to a loss of personal autonomy may also arise. A loss of autonomy may arise as a result of the emotional or psychological harm impact of the surveillance on the individual concerned; or from the stigmatisation of being visibly subject to police surveillance; or from the disruption caused by surveillance to the ability of a person to establish and maintain relationships with others.

The ECtHR has frequently noted that personal autonomy is an important principle underlying the interpretation of Convention guarantees.<sup>411</sup> It is broadly defined, and often used in ECtHR jurisprudence alongside associated concepts of human dignity and respect. The ECtHR has held that it relates to our ability to decide what happens to our bodies, including the right to make choices as to sexual behaviour<sup>412</sup> and reproductive choices<sup>413</sup>, as well as the right to determine or refuse medical intervention<sup>414</sup>. It relates to our ability to make choices about how we present ourselves to society, including the way we look<sup>415</sup> and what we wear<sup>416</sup>, our ability to determine our name,<sup>417</sup> and our gender<sup>418</sup>.

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<sup>411</sup> Pretty v. the United Kingdom (2002) 35 EHRR 1 [61]

<sup>412</sup> Dudgeon v. the United Kingdom, [1981] 4 EHRR 149

<sup>413</sup> Gas and Dubois v. France [2010] ECHR 444; Dubská and Krejzová v. The Czech Republic App nos. 28859/11 and 28473/12 (ECtHR 11 December 2014)

<sup>414</sup> Pretty v. the United Kingdom (2002) 35 EHRR 1 [61]

<sup>415</sup> Biržietis v. Lithuania [2016] ECHR 511 considered the autonomy of personal appearance, and found prison rules prohibiting beards was an interference with Art 8.

<sup>416</sup> S.A.S. v. France [2014] ECHR 695 found the requirement to refrain from wearing full face veil was an interference with autonomy (but not breach of Art 8)

<sup>417</sup> Odièvre v. France [2003] ECHR 86

<sup>418</sup> Y.Y. v Turkey [2015] ECHR 257

Importantly for our purposes it also concerns our ability to establish and develop relationships with other human beings,<sup>419</sup> and to self-development<sup>420</sup> and the protection of self-confidence and self-worth.<sup>421</sup> Autonomy may, additionally, relate to our need to protect our reputation<sup>422</sup>.

In considering cases relating to surveillance, however, the ECtHR has made little use of the concept of autonomy. While the Court has held that surveillance activities which are persistent and sustained, and involve the tracking of individual movements, or the creation of a climate of harassment (through photography or questioning) would fall within the scope of Article 8, they have focused primarily on the concepts of privacy discussed above: physical and psychological integrity; the collection and retention of personal data.

### Conclusion

The overt surveillance of the public domain cannot, as we have seen, be conceptualised as being necessarily equivalent to ‘general observation’ of public places. The police surveillance of public assemblies takes a variety of forms, some of which are intensely intrusive or disruptive of ‘public privacy’, and give rise to a number of interlinked and overlapping privacy harms relating to physical incursions, a loss of public anonymity, and a loss of autonomy. While it may be true that all of us, when we step into the public domain, must expect to be seen and even photographed by others, there are a number of circumstances in which police surveillance greatly exceeds such expectations.

In assessing whether a person may have a right to privacy in any circumstances, the courts will invariably be required to balance the privacy interest of protesters against other interests. Individual privacy will thus be evaluated against countervailing interests, which in the context of political protest may considerable, involving societal interests in preventing crime and disorder, but also state interests in monitoring dissent and subversion, and often corporate interests in minimising disruption to business operations. It is essential, if such a balance is to be made, that the courts have an appropriate framework in which to recognise and evaluate privacy harms arising from state surveillance activities. In the absence of such a framework, privacy harms will be only partially

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<sup>419</sup> Niemietz v Germany (1993) 16 EHRR 97

<sup>420</sup> Goodwin v. the United Kingdom (2002) 35 EHRR 18

<sup>421</sup> Király and Dömötör v Hungary [2017] ECHR 40

<sup>422</sup> Medžlis Islamske Zajednice Brčko and others v. Bosnia And Herzegovina App no. 17224/11 (ECtHR 27 June 2017)

understood, or not recognised at all, ensuring that any balancing exercise is strongly weighted towards countervailing interests.

The UK courts have retained a strong commitment to locational conceptions of privacy, which have limited application in the ‘public realm’. In particular, privacy is deemed to have very little relevance to ‘public activities’ which includes public protest. The ECtHR has adopted a more expansive conception of privacy which extends to the public realm; however they have tended to delineate privacy interests in the context of public protest by reference to state activities in collecting and retaining personal data. While the approach taken by the ECtHR enables greater recognition of public privacy harms than that taken by domestic courts, it also fails to acknowledge privacy harms arising when surveillance does not involve the collection and recording of ‘new’ information. Surveillance activities which are concerned primarily with the supervision of behaviour, and/or which simply involve the use of information already held, may as a result be considered to pose no ‘new’ privacy harms.

There has been, as Solove notes, a general tendency in the judiciary to take the view that privacy interests do not arise ‘if information is in the public domain, if people are monitored in public, if information is gathered in a public place, if no intimate or embarrassing details are revealed, or if no new data is collected about a person’.<sup>423</sup> This tendency arises, Solove argues, as a result of judicial failures to approach privacy from the perspective of identifying ‘privacy problems’.

The ‘privacy’ problems we have identified here, while they reflect those in Solove’s taxonomy, often take on a more ‘problematic’ nature because of the context in which they arise. Overt surveillance of public assemblies may be a great deal more concentrated than the general surveillance of the population through, for example, CCTV. Protests take place over a contained (although potentially lengthy) period of time, enabling surveillance to be comparatively resource-intensive: overt police surveillance of the public domain does not ‘normally’, for example, involve the deployment of uniformed officers to physically accompany or follow people around for the purposes of supervising their behaviour. Additionally, the surveillance takes place in the midst of public order policing operations, and thus inhabits a coercive environment in which physical interventions such as stop and search may take place.

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<sup>423</sup> Daniel J Solove, ‘A Taxonomy of Privacy’ (2006) 154(3) University of Pennsylvania Law Review 477, 559

Having said that, technological developments are increasingly enabling the kinds of surveillance utilised in the context of protest to also be used for wider more generalised monitoring purposes. Identification processes for example, which have previously required individual police officers to personally know, or be able to recognise, identified individuals, may now take place with the assistance of powerful facial recognition technologies, potentially enabling a greater number of people to be ‘recognised’ by surveillance mechanisms. In the absence of judicial recognition of privacy harms arising from identification procedures, such measures may be considered to raise no privacy issues, as they involve the surveillance of public places, and do not necessarily involve the collection and retention of personal data.

What is required is a more sophisticated and nuanced judicial conception of public privacy, which recognises privacy harms arising directly from physical invasions, identification processes, and sustained monitoring, regardless of the location in which such privacy intrusions take place, and regardless of whether, in any particular circumstances, ‘new’ information is obtained and stored. The concepts of physical integrity, identity and autonomy, already accepted by the ECtHR as being fundamental aspects of privacy, potentially provide a more appropriate framework. The ECtHR has gone some way towards this, in that it has recognised that privacy rights may be applicable in circumstances where surveillance results in a loss of physical integrity (such as a stop and search) which takes place in public and does not necessarily result in the collection and retention of personal data.

Considerations of integrity, identity and autonomy provide a means by which ‘harmful’ surveillance may be distinguished from mere public observation. Rather than considering the question of whether a particular surveillance measure involves the retention of data, the relevant questions should relate to whether the surveillance is physically intrusive; involves a loss of public anonymity; or restricts decisional autonomy in a way that ‘mere’ observation does not. Such an approach does not necessitate the abandonment of a test of ‘reasonable expectation of privacy’; it merely requires that adequate weight is attached to these considerations in assessing both the nature of the surveillance in question, and the effect that it may have on the subject.

Privacy considerations alone, however, may not be sufficient for fully understanding or recognising harms arising from the state surveillance of protest assemblies. In the context of collective activities, a loss of decisional or moral autonomy arising from surveillance

measures may disrupt not only the actions of an individual, but the collective structural and organisational strength of social movement campaigns. In the next chapter, we shall consider the extent to which surveillance may also curtail Article 11 rights to freedom of assembly and association.

## Chapter 4: Surveillance, political protest and Article 11

In the previous chapter we have established that overt surveillance cannot simply be conceptualised as a benign activity which is equivalent to the general observation of the public sphere; rather it is the case that police surveillance of public assemblies takes a variety of forms, some of which are intensely intrusive (physically and psychologically) and disruptive of autonomy. What arises is a complex matrix of harms, some of which may be conceptualised as 'privacy harms'.

It is argued here, however, that there is a further set of surveillance harms that arise specifically in relation to the police surveillance of political protest. In addition to the individual privacy harms we have identified above (to autonomy, identity and anonymity) surveillance may also damage the collective processes and structures that create the conditions for social movement organisations to grow, and for protest to take place. Surveillance may therefore not only limit individual participation in political activities, but may obstruct and disrupt the activities and resources that are necessary preconditions for successful mobilisations. It may therefore act, both directly and indirectly, as a constraint on freedoms of association and assembly.

Once again, the methodology adopted attempts to investigate surveillance harms in a contextual manner, examining the impact of surveillance in relation to the ways that people experience and respond to it. We therefore draw further on the empirical data obtained for the purposes of this study. In contrast with what has gone before, however, we are concerned here not with the impact of surveillance on the person as an individual, but in the way surveillance is experienced as damaging the fabric of organisational structures and processes. To this end, this chapter also draws substantially from social movement literature, and utilises the frameworks developed by theorists in this field in order to build an understanding of the ways in which the structures and processes associated with protest mobilisations may be vulnerable to state actions.

The aim of this chapter is to develop a conceptual framework that provides a basis for identifying the ways in which surveillance may inhibit and restrict collective political freedoms at a structural and relational level. The chapter thus identifies and elaborates on the discrete harms that the shorthand notion of a 'chilling effect' too readily elides. It suggests that surveillance harms collective assemblies in three key ways: firstly, by influencing or altering perceptions of political opportunities, creating the impression of a 'hostile' or intolerant policing environment, and thus curtailing innovation and creativity;

secondly by disrupting organisational activities, either directly through intrusions, or indirectly by limiting access to material resources or social capital; and thirdly by de-legitimising protest and stigmatising protest participants, thus interrupting and disrupting communication both within protest movements, and between protests and general public.

It argues that the existing, dominant judicial framework – viewing surveillance as, at best, raising only privacy concerns – is inappropriate and inadequate as a means of recognising these harms. Instead, a framework is required that is capable of recognising and articulating the particular ‘chilling effects’ of surveillance not on individuals, but on protest itself. While surveillance does not amount to a prohibition of protest, or a direct constraint on participants (in the way that time, place and manner conditions may do), it is nonetheless suggested that police surveillance activities may act as a restriction to the right to freedom of assembly.

This work proceeds in three parts. Firstly, it begins by providing a brief overview of theoretical conceptions of protest and social movements, establishing a concept of protest as a process of mobilisation, rather than as an isolated event. Secondly, it constructs an examination of the impact of surveillance on that mobilisation process, drawing from social movement literature and from the empirical data collected from social movement actors in interviews. This section demonstrates that surveillance harms cannot be conceptualised simply as privacy harms, but instead may disrupt and impede the fabric of social movements and political assembly. The third part of this work turns to examine judicial conceptions of the ‘chilling effect’ of surveillance on political protest, and the extent to which the current legal framework is capable of recognising surveillance as constituting a harm to the right to protest and to assemble peacefully (contained in Article 11) that arises in this context.

### [Theoretical conceptions of protest and social movements.](#)

Protest is often seen as a discrete event: people come together and take part in some form of politically expressive collective activity – and then it ends, and they go home. Protest does not, however, come out of nowhere. Almost all protest exists within the context of on-going organisational or campaigning work in which the meaning or message of the protest is fashioned and developed. The message must not only exist and be known to pre-engaged campaigners, it must be communicated to supporters (or potential supporters) in such a way that it encourages active participation in a protest event. There is then the logistical work of organising protest to be done, the planning of the protest event itself –

what form the protest will take, when and where it will take place, how long it will last – as well as the work of obtaining or gathering necessary resources.

Frequently, the work of establishing mobilisation structures and processes is done within the framework of what may be termed a ‘social movement’. Definitions of what constitute a social movement differ, although all definitions recognise social movements as involving collective efforts for achieving some form of cultural, economic or social change, operating outside institutional structures for political action, such as political parties. Diani, for example, terms a social movement as consisting of a ‘network of informal interactions between a plurality of individuals, groups and/or organizations, engaged in political or cultural conflicts, on the basis of a shared collective identity’.<sup>424</sup> In contrast, Tilly places greater emphasis on the subversive potential of such mobilisations, defining a social movement as involving a ‘sustained challenge to powerholders in the name of a population living under the jurisdiction of those powerholders by means of repeated public displays of that population’s numbers, commitment, unity and worthiness’.<sup>425</sup>

In a similar vein, Della Porta identifies three defining characteristics of a social movement: they are engaged in conflictual collective action; they are linked by dense informal networks; and they share a distinct collective identity. Della Porta uses conflict in this sense to signify an oppositional relationship, such as that which may be said to exist, for example, between organisations opposing climate change and oil companies. That does not mean that social movements necessarily engage in violent or even unlawful activity, although obstructive forms of protest often fall within the protesters repertoire of actions. Tarrow too notes that contentious collective challenges are most often marked by ‘interrupting, obstructing, or rendering uncertain the activities of others’.<sup>426</sup>

For Tarrow, this aspect of social movements – what Tilly termed ‘repertoires of contention’<sup>427</sup> – is not an undesirable trait within some forms of social movements: rather he states that it is fundamental to their nature and their value in society. Tarrow claims that contentious collective action ‘lies at the base of all social movements’ as it is ‘the main, and often the only recourse that most ordinary people possess to demonstrate their claims

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<sup>424</sup> Mario Diani, *The Concept of Social Movement* (1992) 40(1) *Sociological Review* 1, 13

<sup>425</sup> Charles Tilly, *Explaining Social Processes* (Routledge 2016), 155

<sup>426</sup> Sidney G. Tarrow, *Power in Movement: Social Movements and Contentious Politics* (3<sup>rd</sup> edn, CUP 2011), 9

<sup>427</sup> Charles Tilly *From Mobilization to Revolution* (Addison-Wesley, 1978)

against better-equipped opponents or powerful states'.<sup>428</sup> Without the ability to make use of contentious action, social movements could not be maintained as a means by which people could affect change outside the confines of institutionalised politics, and the benefits to society that arise from having a plurality of political actors would be lost.

The links between social movement organisations are also important, according to Della Porta and Diani in defining social movements.<sup>429</sup> Organisations involved in social movements will thus share common goals, but will retain autonomy in determining how they, as discrete bodies, will attempt to realise those goals. Protest assemblies will, however, often provide an opportunity for different groups within a social movement to come together. Successful protest thus both enables and depends upon the informal links that exist within social movements: pre-existing links help to facilitate social movement organisations to undertake collective action in solidarity; collective action also helps to consolidate and reinforce those links, thus strengthening solidarity for further collective action.

Social movements also tend to be concerned with issues of wider concern, rather than with local disputes or the articulation of individual interests (what Bedau calls 'personal hand-washing').<sup>430</sup> They will therefore seek to situate themselves within much larger processes of change. Thus, the anti-capitalist movement in the UK developed links of solidarity with other movements on the global stage, such as the Zapatistas in Chiapas, Mexico. This is what Della Porta terms as establishing a collective identity.

It is these characteristics which make social movements of value in a democratic society. Social movements provide a means of challenging entrenched power relationships or ingrained attitudes which institutionalised political systems may lack the will or capability to do. Mead has noted, for example, that collective action has value in circumstances in which 'traditional' politics is incapable of responding'.<sup>431</sup> It is capable of engaging and potentially empowering those who may feel excluded or alienated from traditional political structures, and thus has a unique ability to shift societal attitudes and create wide-reaching social change.<sup>432</sup>

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<sup>428</sup> Sidney G. Tarrow, *Power in Movement: Social Movements and Contentious Politics* (3rd edn, CUP 2011), 7

<sup>429</sup> Donatella Della Porta and Mario Diani, *Social Movements: An Introduction* (2<sup>nd</sup> edn Blackwell 2006), 21

<sup>430</sup> Hugo Adam Bedau, *Civil Disobedience in Focus* (Routledge 1991), 7

<sup>431</sup> David Mead, *The New Law of Peaceful Protest* (Hart 2010), 58.

<sup>432</sup> James M Jasper, *Protest: A Cultural Introduction to Social Movements* (Polity 2014), 168-183

While social movements are, by definition, contentious, this does not mean, Tarrow notes, that they have nothing else to do but ‘contend’. They also ‘build organisations, elaborate ideologies, and socialize and mobilize constituencies of collectivities.<sup>433</sup> Social movements thus see collective acts of protest not as an end in themselves, or as isolated events, but as merely one (albeit important) element in an ongoing process of achieving social change. ‘We have a social movement dynamic going on’, Della Porta and Diani note, ‘when single episodes of collective action are perceived as components of a longer-lasting action, rather than discrete events.’<sup>434</sup>

In order to understand the impact of surveillance on social movements, we must examine not only the nature of such movements, but the processes and mobilising structures which enable them to create the conditions in which protest takes place. Social movement theorists have identified various factors that determine the ability of social movements to emerge, to grow, and to undertake collective action. The precise nature of these factors has been subject to a considerable degree of discussion and debate in social movement literature.<sup>435</sup> The next section examines the testimony of social movement actors in the light of theoretical conceptions developed in social movement literature. It focuses in particular on the ways in which surveillance acts upon, restricts and disrupts essential mobilisation structures and processes, and thus has a disruptive impact on resultant or prospective assemblies. We adopt here the framework suggested by Doug McAdam, that there are three broad categorisations of the factors that influence social movements. The next section is therefore in three parts: we consider in turn the impact of surveillance on political opportunities; mobilising structures and processes; and framing processes.<sup>436</sup>

### I Political opportunities

Political opportunities relate to the emergence of a particular set of circumstances which provide opportunities for established or entrenched interests to be challenged.<sup>437</sup> In its most narrow sense, the term relates to factors that determine the extent to which cultural

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<sup>433</sup> Sidney G. Tarrow, *Power in Movement: Social Movements and Contentious Politics* (3rd edn, CUP 2011), 8

<sup>434</sup> Donatella Della Porta and Mario Diani, *Social Movements: An Introduction* (2<sup>nd</sup> edn, Blackwell 2013), 23

<sup>435</sup> See for example, Jeff Goodwin and James Jasper, *Rethinking Social Movements: Structure, Meaning and Emotion* (Rowman and Littlefield 2004)

<sup>436</sup> Doug Mc Adam, ‘Revisiting the US Civil Rights Movement: Towards a More Synthetic Understanding of the Origins of Contention’ in J Goodwin and J Jasper (eds) *Rethinking Social Movements* (Rowman and Littlefield 2004) 203-204

<sup>437</sup> Ibid, 203

elites (such as corporate business, governments) are receptive to change, or tolerant to protest activity. Political opportunities may thus be restricted, McAdam argues, 'by any broad social change process that serves to significantly undermine the calculations and assumptions on which the political establishment is structured'.<sup>438</sup> This includes McAdam notes, 'wars, industrialisation, international political realignments, or concerted political pressure from international actors, economic crisis, and widespread demographic shifts'.<sup>439</sup>

Viewed in this way, the theory suggests that the availability of political opportunities is determined by structural factors that are largely outside the control of social movement actors.<sup>440</sup> Other theorists have, however, stressed the role of cultural factors in determining political opportunity, relating to the beliefs, motivations and commitments of social movement actors. Jasper and Goodwin, for example, have argued that social movements are capable of creating opportunities that may not otherwise exist, by making strategic choices that are in turn driven by the determination and emotional intensity of the relevant actors.<sup>441</sup> Other theorists, including Gamson and Meyer, Mario Diani and Della Porta, have suggested that political opportunities may be influenced by perceptions of the utility (or futility) of collective action amongst both social movement actors and the public more widely.<sup>442</sup> For protest to emerge, Della Porta and Diani argue, activists must believe not only that an opportunity exists, but that they also have the power to bring about change.<sup>443</sup>

It is in this sense that the theory of political opportunity is relevant to understanding the effect of surveillance on social movement organisations. Expectations or anticipations of a low threshold of tolerance for protest activity can narrow or foreclose space for collective action and thus reduce the political opportunities available.<sup>444</sup> Protesters who anticipate a hostile state reaction will be less likely to take 'risks' with creative or innovative forms of protest. As the success of a social movement is related to the ways in which potential

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<sup>438</sup> ibid

<sup>439</sup> Ibid

<sup>440</sup> Donatella Della Porta and Mario Diani, *Social Movements: An Introduction* (2nd edn, Blackwell 2013), 16

<sup>441</sup> Jeff Goodwin and James Jasper, 'Caught in a Winding, Snarling Vine', in J Goodwin and J Jasper (eds) *Rethinking Social Movements* (Rowman and Littlefield 2004), 28

<sup>442</sup> William Gamson and David Meyer, 'Framing Political Opportunity' in D McAdam, J.D. McCarthy and M.N. Zald (eds) *Comparative Perspectives on Social Movements* (CUP 1996)

<sup>443</sup> Donatella Della Porta and Mario Diani, *Social Movements: An Introduction* (2nd edn, Blackwell 2013), 18

<sup>444</sup> Amory Starr, Luis A. Fernandez, Randall Amster, Lesley J. Wood, Manuel J Caro, 'The Impacts of State Surveillance on Political Assembly and Association: A Socio-Legal Analysis' (2008) 31 *Qual Sociol* 251

participants perceive and evaluate the possibilities open to them, the restriction of political opportunities through surveillance does not merely amount to a restriction of individual autonomy, but potentially harms movement capabilities in a broader sense.

Surveillance is not of course, in itself, necessarily a hostile act. Interviewees however, tended to perceive it as an indication of a low or reduced threshold of tolerance on the part of the police. The interview data illustrate two outcomes of altered perceptions of political opportunity: first, the increased propensity of protesters to engage in self-policing resulting in a reduction in innovation and creativity in protest and the elimination of minor transgressions; and the weakening of belief in the utility of protest as a means of obtaining social change.

### i) Surveillance and self-policing

Brendan's story illustrates the potential for surveillance to alter individual perceptions of what falls within or outside the threshold of tolerance on the part of state authorities. In the tradition of making use of innovative forms of protest, anti-capitalist Mayday protests in London in 2002 made use of various, decentralised protest actions which included, among other things, a critical mass cycle ride; a 'free breakfast' at a court solidarity protest; and a planned game of 'medieval football' in Oxford Street. The police did not, in the event, intervene to prohibit or disperse these actions;<sup>445</sup> Brendan (and potentially others subject to a similar intensity of surveillance) therefore subjected himself to a degree of self-policing that was in excess of that which the police imposed on others.

But it's still irritating because you'd end up policing yourself, you see what I mean? You know they did the football match? It meant you couldn't get involved as much as you want, because you know if you've got seven cops with you and three have got cameras, you are policing yourself. Because they are waiting for you to step out of line, and at the time you knew that.

Starr et al have also documented the capacity of surveillance to foreclose the availability of political opportunities by indicating a low tolerance for civil disobedience or any form of transgressive action, and thus carrying an implicit threat of coercive action.<sup>446</sup> The self-policing effect of surveillance means that protesters will be less likely to take risks with

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<sup>445</sup> BBC news, 01/05/2002, available at <http://news.bbc.co.uk/1/hi/uk/1963069.stm> accessed 05/09/2017

<sup>446</sup> Amory Starr, Luis A. Fernandez, Randall Amster, Lesley J. Wood, Manuel J Caro, 'The Impacts of State Surveillance on Political Assembly and Association: A Socio-Legal Analysis' (2008) 31 Qual Sociol 251

creative or innovative forms of protest, even if they do not believe them to be criminal. The operation of police discretion is, in a public order environment, not always easy to anticipate or predict; nor is the law in this area always certain or clear. Surveillance therefore 'chills' forms of protest behaviour which, while obstructive and disruptive, would ordinarily fall within state thresholds of tolerance.

ii) **Altering perceptions of opportunity.**

A related impact of surveillance on political opportunities is the extent to which a low threshold of tolerance by the authorities (or the anticipation of such) may dampen motivations and expectations of what protest is able to achieve. This effect was documented by Starr et al, in their 2008 study of social movements in the US, in which it was noted that a low threshold of tolerance discouraged and demotivated even experienced and committed activists.<sup>447</sup>

Jenny's experiences of surveillance at preparatory and organising meetings, illustrates how surveillance activity can alter perceptions of the utility – or futility – of protest. The willingness of police to devote time and money to the surveillance of routine and fairly banal political meetings, suggested to Jenny that the police would also be likely to invest significant efforts into mitigating 'risks' associated with disruptive forms of protest; and that as a result opportunities for any form of civil disobedience would be low.

When they were outside meetings, a lot of what we were working on and talking about was engaging with lots of different issues like detention support and solidarity. But at times if felt like, just having the cops stood there outside the meeting, it was really tedious, and it got you down, because you think, if this is what they're like at a meeting, at a political meeting, what are they going to be like at any political action...the fact that they'll go to those lengths, they will throw so many resources at things, it does erode your belief at being able to do stuff.

Social movement theorists point to an uncertain relationship between policing and political opportunities. It may not be possible to assume that repressive policing will necessarily result in a lessening of available opportunities, still less that surveillance will do so. Social movement literature suggests that the relationship between policing styles and political

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<sup>447</sup> A Starr and others, 'The Impacts of State Surveillance on Political Assembly and Association: A Socio-Legal Analysis' (2008) 31 Qual Sociol 251, 261

opportunities is complex.<sup>448</sup> Social movement literature suggests that repressive policing (i.e. involving the use of coercion or force) may result in the ‘de-mobilisation’ of actors, deterring participation and reducing the size of a movement;<sup>449</sup> it may also (at least in the short term) galvanise activism, increase militancy and propel protest movements to a new level.<sup>450</sup> It is recognised that, in considering the impact of policing on any particular environment, a number of other factors, both cultural and structural are likely to be in play.<sup>451</sup> Nevertheless, the combined impact of public order policing and surveillance has been described by Gillham and Noakes as amounting to ‘strategic incapacitation’ of political protest.<sup>452</sup>

Being subject to surveillance, in the way that Jenny describes, thus carries a threat of hostile action and ‘strategic incapacitation’ which limits perceptions of political opportunity. In this way, as we have explored in Chapter 3, surveillance which is pre-emptive and anticipatory, and which focuses on identified individuals and groups, has an impact on protest which does not arise from generalised, observational surveillance. In the context of protest, this form of surveillance must be evaluated as forming part of public order policing more widely. It communicates to those who are subject to it that they have been designated as posing some form of policing ‘risk’, and may as a result be more likely to experience repressive forms of policing. Thus while surveillance is presented as being distinct from (and as an alternative to) the use of coercion, force, and violence, in practice soft- and hard-line forms of social control coexist and are mutually supportive.<sup>453</sup> Surveillance may therefore mirror the effects of coercive policing strategies (use of force, arrest etc) in its impact on perceptions of political opportunities.

## II. Mobilisation structures and processes

The fact that there is an opportunity to make change is, of course, not sufficient in itself for protest to come about. There must also be a way for people to connect; and having come

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<sup>448</sup> Donatella della Porta, ‘Social Movements and the State: Thoughts on the Policing of Protest’ in D McAdam, JD McCarthy, MN Zald (eds) *Comparative Perspectives on Social Movements* (CUP 1996), 64

<sup>449</sup> Donatella della Porta, ‘Social Movements and the State: Thoughts on the Policing of Protest’ in D McAdam, JD McCarthy, MN Zald (eds) *Comparative Perspectives on Social Movements* (CUP 1996)

<sup>450</sup> Edward J. Escobar, ‘The Dialectics of Repression: The Los Angeles Police Department and the Chicano Movement 1968-1971’ (1993) 79(4) *The Journal of American History* 1483

<sup>451</sup> Michael McCahill and Rachel Finn, *Surveillance, Capital and Resistance: Theorizing the Surveillance Subject* (Routledge 2014)

<sup>452</sup> Patrick F. Gillham , Bob Edwards & John A. Noakes ‘Strategic incapacitation and the policing of Occupy Wall Street protests in New York City, 2011’ (2013) 23(1) *Policing and Society: An International Journal of Research and Policy* 81

<sup>453</sup> Luiz Fernandez, *Policing Dissent* (Rutgers University Press 2009), 15

together, they must also be able to establish organisational structures and processes capable of supporting and sustaining mobilisational tasks. The links between social movement actors are critical both for providing the movement with access to resources and social capital (such as skills, knowledge, and experience) and for developing strategy and tactical innovation. The testimony of interviewees suggests that surveillance may restrict mobilisation processes in at least three key ways: by disrupting social networks; by limiting social capital; by curtailing access to material resources and organisational space.

### i) Social Networks

Social movement theorists have often noted the importance of informal social ties in the mobilisation process. David Snow has emphasised the importance of pre-existing friendships and political ties to provide an 'organisational staging ground', enabling a mobilisation to get off the ground.<sup>454</sup> Informal ties are also important for the on-going functioning and success of a mobilisation. The influence of a social movement, Diani has argued, is dependent on the bonds between movement actors and the 'social milieu in which they operate'. Those links with the communities from which actors originate thus fulfil important roles: they allow information to be disseminated; provide legitimacy for a mobilisation (providing, for example, links to a relevant or affected community); facilitate access to resources and/or influential people; and enable access to support networks.<sup>455</sup>

Mobilisations do not merely depend on informal ties – they actively produce them. Goodwin and Jasper have stressed the importance of 'emergent ties', the ability of a person entering a movement to meet people and establish personal bonds with them.<sup>456</sup> The development of relationships of trust and friendship are considered important in enabling social movement actors to sustain their participation, by providing physical and emotional support. The importance of relationships may be cumulative: van Stekelenburg and Klandermans have argued that 'when trust is built between people they are more willing to engage in cooperative activity through which further trust can be generated'.<sup>457</sup> It is thus the associations between people that generate the resources and social capital necessary for on-going mobilisation and campaigns. Informal relationships also provide

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<sup>454</sup> David Snow and others, 'Social Networks and Social Movements: A Micro-structural Approach to Differential Recruitment' (1980) 45(5) *American Journal of Sociology* 722

<sup>455</sup> Mario Diani, 'Social Movements and Social Capital: A Network Perspective on Movement Outcomes' (1997) 2(2) *Mobilization: An International Journal* 129

<sup>456</sup> Jeff Goodwin and James Jasper (eds), 'Caught in a Winding, Snarling Vine' in *Rethinking Social Movements* (Rowman and Littlefield 2004) 21

<sup>457</sup> Jacquelyn van Stekelenburg and Bert Klandermans, 'The social psychology of protest' (2013) 61(5-6) *Current Sociology*

space to ‘talk politics’: to discuss, debate and develop political ideas. Diani et al have suggested that relationships enable better ‘production, dissemination and diffusion’ of ideas, and that ties of friendship and trust enable the sustenance and growth of social movements, thereby increasing the capacity for mobilisations.<sup>458</sup>

We have previously discussed the operation of privacy in maintaining human relationships in different contexts and noted that legal responses tend to underplay – or even ignore – the capacity surveillance has in that regard.<sup>459</sup> However, a different argument is being posed here: that surveillance harms cannot be understood simply within a privacy framework. On an individual level, surveillance may disrupt interpersonal relationships by alienating surveillance subjects from those around them and inhibiting autonomy. In the context of social movement mobilisations, the impact is experienced by a broader constituency.

Social networks, as we have seen, play a vital role in the growth and development of social movements. Not only are informal friendship networks important for the provision of social capital, and for facilitating access to other resources, they are critical in enhancing creativity and innovation, developing and diffusing ideas, and in providing the emotional support needed to maintain activism. The social connection between ‘old hands’ or experienced campaigners and new and emerging activists may also be critical in bringing on the ‘next generation’ of activists, and maintaining the sustainability of social movement organisations.

Testimony from interviewees illustrates how these important connections may be disrupted by surveillance, which may have the effect of isolating key influencers, restricting their ability to recruit or obtain organisational benefits from those on the periphery of the movement, and weakening micro-mobilisation potential.

Ellen, who was involved in organising protests against the arms trade, reported that surveillance made her disengage from other activists, due to the fear that, as a result of being associated with her, they may themselves become a surveillance target.

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<sup>458</sup> B. Tindall, J Cormier and M Diani, ‘Network social capital as an outcome of social movement mobilization: Using the position generator as an indicator of social network diversity’ (2012) 34(4) *Social Networks* 387

<sup>459</sup> The importance of privacy for maintaining human relationships in different contexts is discussed in Chapter 3. See also, in this context, David Feldman, *Secrecy, Dignity or Autonomy? Views of privacy as a civil liberty.* (1994) 47(2) *Current Legal Problems* 41

I know there have been times when I've been talking to someone and they've been stopped and searched straight after, because the police have wanted to know who they were, because I've been talking to them. Or that's what it felt like, I can't prove that, but that was certainly the impression and it happened quite a few times. And when we ran trainings one of the things we used to say to people was that if you see us on a protest you're welcome to say hello, it's not that we are ignoring you, but if you come and say hello to us, the police will take an interest in you because you have come to say hello, and you've talked us, and to be aware of that. I felt like I had a responsibility to warn other people that that was the consequence of associating with us on a protest. (Ellen)

From the alternative perspective, new activists, or those considering greater involvement, may be deterred from engaging with experienced activists as a result of the stigmatising effects surveillance may produce. Jenny spoke about the alienation she had felt, when new to activism, from people who had been visibly subject to police surveillance; and her own sense of unease on realising later on she too may be perceived by others as possessing a degree of 'dangerousness'.

I can remember people being followed and targeted...and I remember thinking, who are these people, being tracked like that? And slightly naively being a bit scared. And then getting to know them and having to rethink, you know, and then thinking about it coming to you and realising you don't have to have done anything, you don't have to be public enemy number one at all, to be the target of that. But that always stuck with me about putting people off, knowing I had a bit of that reaction myself, thinking wow!...and people thinking sometimes I've got that edgy thing, and just thinking where did you get that from? And I think it is the police attention, because people just assume don't they, people who don't know would assume that it's because you are some like bomb throwing dangerous subversive, and that isn't necessarily the case. (Jenny)

## ii) Social capital

Access to resources is also likely to be a key indicator of social movement success. Tilly has noted that mobilisations are unlikely to succeed if the organising body lacks resources, or if the process of organising an assembly would over-stretch the resources they do have

access to.<sup>460</sup> Social capital – that arising from the expenditure of time, energy, knowledge by movement actors – will be a key asset of social movement organisations who are frequently cash-poor.

Access to social capital may be impeded if a social movement organisation is prevented from engaging new actors, or if existing actors are prevented from undertaking more extensive roles or stepping into leadership positions. The interview data suggests that surveillance may not only disrupt recruitment, preventing social movement organisations from finding ‘new blood’, but may serve to disengage those already active.

It is clear that not everyone is inhibited from engagement by surveillance activities: those with a high level of commitment and/or determination may be undeterred by state actions. From the point of view of movement expansion and growth however, surveillance is harmful because it creates conditions in which the expansion of social movements is limited to those who are prepared to tolerate, or do not mind being subject to state surveillance. This may mean that those who are less certain, or who are on the peripheries of the movement, may be more likely to be dissuaded, as may people who may feel more vulnerable to police attention (such as, for example, those who are not UK citizens) or those more concerned about stigmatisation (such as professionals, or those who depend for their livelihoods on a ‘clean’ police record). Surveillance may therefore not only generally weaken social movements over time, it may also alter their composition. As such, the effect of surveillance may in this respect also mirror the effect of repressive policing styles (referred to above), resulting in the shrinkage of movements, or a reduction in the diversity of its participants.<sup>461</sup>

Alan, who was involved in the organisation of anti-capitalist protests, believed that surveillance had hindered the attempts of his group to increase the breadth of participation and support. Surveillance, he suggested, presented potential participants with a stark choice: to become ‘immersed in the world of police surveillance’ or to play no further part; and while it did not deter the ‘hard core’ of those already committed, it made it difficult to involve or even to communicate with those who were less sure, or were simply curious.

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<sup>460</sup> Charles Tilly, *Studying Collective Action, Studying Social Movements*, working paper, <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/50943/168.pdf> accessed 15 August 2018

<sup>461</sup> Donatella Della Porta, ‘Social Movements and the State: Thoughts on the Policing of Protest’ in D McAdam, JD McCarthy, MN Zald (eds) *Comparative Perspectives on Social Movements* (CUP 1996), 64

I think it had more of an impact, I later learned, at meetings. Because our meetings were public, even on leaflets as well, that was our attempt to gain a lot more people to get involved. I did hear of maybe one or two people who saw, you know, who had gone down a road to a community centre, say in Islington, they saw two police vans outside with cameras. They didn't want to be on film, so they didn't turn up to the meeting. I did hear about stuff like that later. So it did have an impact on some people...because [the police] literally came to, I don't want to say dozens, hundreds of meetings, literally hundreds of meetings they came to. And it was the same people coming to the meetings, the same fifteen, twenty, thirty people coming to the meetings, and they [already] had pictures of them, so in terms of any new intelligence [it was useless]. And because it was so overt it felt as if they were trying to contain it, to put people off. They had no legal power to prevent the meetings, or arrest people for attending them or anything else. But they did have this thing that if you wanted to get involved in an anarchist national movement you have to be fully immersed in this world of police surveillance, overt police surveillance and be very prepared. Some people were fine with it. But out of necessity, other people weren't. So there was definitely a disruptive element to it.

Such an effect did not only arise in the context of organising meetings. Some interviewees suggested that organisers were more likely to be subject to persistent surveillance mechanisms; this not only limited their own autonomy in terms of engaging in organisational activities, it potentially deterred others from taking up that role. Rebecca, who was involved in organising demonstrations against the arms trade, reported that she was regularly followed and photographed by surveillance teams, and believed that this was due to her role as an organiser; while Ellen believed others were deterred from adopting a prominent role in social movements having seen the surveillance (which she described as harassment) that Ellen had been subject to.

[T]hey are following you because you are organising ... there are people [who have done direct action] maybe they would think they might do something like that again. But I've never done anything like that. So they wouldn't have anything to go on, why would I do that and not the next person? But they have seen me going into organising meetings. (Rebecca)

And I know there were people who wouldn't come to meetings, who wouldn't come and do stuff, because of the police harassment. I remember someone coming up to me I didn't know during one of the anti-war protests, and saying, I couldn't do what you do, because I wouldn't want that level of police intrusion, I couldn't handle it. So it was a real deterrent. (Ellen)

It was not possible to ascertain, in the circumstances described by the interviewees, whether surveillance activities were intended to disrupt engagement, or whether such disruption was an unintended consequence of police actions. In either case, the result was the same: surveillance acted as a restriction on participation and engagement, resulting in a reduction in social capital available to the relevant movement.

### iii) Access to organisational spaces

It is not only the structural aspects of social movements, such as their access to resources, and position within wider networks, that are indicative of success. Theorists have also emphasised the importance of process: the way that actors organise will influence their ability to undertake cognitive tasks, such as framing processes (see below), and tactical decision making. Social movement organisations must make choices about the way they interact and organise, and the decision-making processes they wish to adopt: many social movements reject hierarchical structures on principle, and as a result invest considerable time and effort in developing decision-making processes that reflect their commitment to decentralised or horizontal forms organising.<sup>462</sup> In the context of horizontal forms of organisation, organisational meetings take on added importance. They are not merely a means by which decisions made elsewhere are communicated or ratified: they provide the means by which framing processes take place, and key strategic decisions are taken. The opportunity to engage in organisational discussion, and thus to enable innovative and creative strategic development, is critical for social movements. It is how, Ganz states, 'we turn what we have into what we need to get what we want'.<sup>463</sup>

In addition to social capital, material resources are also essential for mobilisation processes and to create the visual spectacle of protest assemblies: promotional material in the form of posters and flyers may be needed; mobilisations will usually require banners, placards

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<sup>462</sup> See, for example, Teivo Teivainen, 'Global democratization without hierarchy or leadership? The World Social Forum in the capitalist world' in Stephen Gill (ed) *Global Crises and the Crisis of Global Leadership* (CUP 2012) 181-198

<sup>463</sup> Marshall Ganz, Why David Sometimes Wins, in J Goodwin and J Jasper (eds) *Rethinking Social Movements* (Rowman and Littlefield 2004) 181

and other visual props. Access to physical space will also be needed for preparatory meetings and discussions, for the storage of materials, and potentially for the accommodation of travelling protesters.

In order to undertake logistic and strategic decision making in an inclusive way, and to enable the production of materials and the provision of essential facilities, social movements need access to space. Interviewees reported, however, surveillance both restricted movements' access to space, and their use of space for organisational activity.

Access to space is an essential but problematic requirement for social movements. Space is frequently an expensive commodity, especially in London and other big cities; yet it is a necessary component of social movement activity. Meetings, discussions, preparatory activities (such as making banners and props), fund-raising activities and support services (such as the provision of food and accommodation) all require the availability of a safe, secure, and appropriate venue. Social movements make frequent use of low-cost spaces, such as community centres and church halls, but have also become creative in obtaining space to support social movement gatherings, protests and events. Some have made use of empty buildings which they turn into squatted temporary 'convergence centres'; others such as climate camp have, as we have seen, made extensive use of large temporary camps often (although not exclusively) sited in rural or semi-rural areas.

The disruption of access to such space will inevitably have a detrimental impact on mobilising structures and processes. Interviewees reported that while the police placed no direct restrictions on their use of such spaces, their ability to gain access and make use of them was constrained by the stigmatising and delegitimising impact of surveillance (discussed further below). Ricki, in organising meetings for 'climate camp', said that problems in securing venues often emerged when police carried out overt surveillance, particularly if it posed a risk of other members of the public also being caught up in police operations.

We held [meetings] in offices of friendly charities, in community venues, in university buildings, occasionally camping, but mostly community halls, church halls that kind of thing. And [the police] would stand outside and take photos of everyone, whether or not they were coming to our meeting. So if we were sharing a building there might be a women's group upstairs, and us downstairs, but everyone who was coming in would get their photo taken. People gave us grief for bringing this down on them. And we were sorry that us being there meant they

were being photographed too. But it was the police that were choosing to indiscriminately and openly surveil other people. But we got criticism and it damaged relationships with the venues. If they were getting complaints sometimes it was hard to persuade them to let us come back again.

Difficulties in accessing venues also inhibited broader mobilisation support functions such as fund-raising. Interview respondents stated that overt surveillance created the expectation or anticipation of a lowered threshold of tolerance for contraventions of license requirements. As a result, surveillance was considered to pose a reputational and/or operational risk for licensees. Mike, who was regularly involved with organising fund-raising events for social movements, said that overt surveillance was a regular feature of fund-raising events.

There was regular cops at benefit gigs, they were all over benefit gigs. To the point that I was going around telling people they shouldn't drink outside because that might compromise the pub's license and that was what they were looking for. And obviously it was designed to intimidate pubs into not hosting our gigs again.

The availability of venues was therefore potentially restricted to those willing to tolerate increased risk or those with sympathetic views. Alan's testimony, for example, suggests that, while the presence of police officers conspicuously filming attendees at meetings and at fund-raising events did not necessarily disrupt the availability of space, this was heavily reliant on the personal attitudes of venue operators.

I think a lot of landlords at the time, I'm not sure how it is now, were really aware of the power of the police to take away their income by their over-obsessive kind of control. Fights were happening in pubs all the time, but a lot of them were quite self-policing, and there was this 'them and us' attitude towards the police ... They were very much onside. Even if they didn't really know what we were about politically, they had this common sense of solidarity. Above and beyond their own need to do that really. They could easily have cancelled our gigs but they never did, ever, even though I think the police would have wanted them to.

Meetings taking place in more conventional settings, such as hired venues or community buildings, were also vulnerable to disruption from the presence of surveillance teams, even if they remained outside the venues. Interviewees described such surveillance as altering the atmosphere of meetings, setting people on edge, and causing anxiety. Ricki said that in

some cases the anxiety caused by surveillance had a noticeable impact on proceedings and inhibited participation.

We had a big problem when new people arrived that they would either be completely intimidated by the surveillance at the door, to the point when they wouldn't come in, or they'd be quite fearful on arrival. At each of our gatherings, there would be uniformed police officers with big cameras stationed outside the door, taking absolutely everyone's picture as they came in. It was impossible to avoid them... people I had chatted to before, who had seemed quite confident and really excited and enthused about getting involved in the movement, would come to a meeting and they'd suddenly shrink, and be less confident and they wouldn't participate. Often they didn't come back.

As well as making people feel uncomfortable, some interviewees reported that it diverted and consumed time, energy and resources, distracting a group's attention from its primary purpose, and therefore disrupting and inhibiting political processes of discussion, planning and strategic developments. This was, Magnus suggested, a particular feature of surveillance at environmental protest camps. Rather than merely tolerating surveillance, protesters here attempted to negotiate its extent and manage its impact. While such an approach enabled positive communication between protesters and police, it also created problems in itself, as surveillance issues came to dominate decision-making processes and forums (thus having significant diversionary effects).

They started off by just having two officers walk round with somebody, and then they wanted three and then they wanted to make it more frequent. They would just turn up with more, they would turn up and say we want to do it now. And if you don't let us check that everything's alright we will have to assume the worst and you won't like it, basically threats to bust on site and close down the camp. And everyone's in the neighbourhood organisational system and we'd have to stop the meetings. Because it wasn't just protest, the climate camps, it was organisational, it was very much like an annual conference. Very organisational, very educational, a lot of teaching each other stuff to do with the politics, to do with the science. And it was a way of disrupting that. We'd have to break and say, do we let them on, do we let them on more? (Magnus)

### III. Framing

Structural aspects of social movement organisation, such as access to resources, and the establishment of organisational and decision-making forums, is only part of the picture.

The cultural elements of social movements – a sense of solidarity, collective identity, and a shared perspective on the world – are of intrinsic importance to the development and sustainability of social movement organisations, and indeed ‘keep social movements alive’.<sup>464</sup> Social movements depend not only on structures and processes, but on their ability to generate and utilise shared beliefs and values and a common understanding of what needs to change, and how what needs to be done to change it.

The process of framing relates to the ability of social movement actors to construct a common understanding of their aims and actions, and to communicate that understanding to population at large. Doug McAdam has defined it as the ‘conscious strategic efforts of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action’.<sup>465</sup>

Framing processes may be considered to be diagnostic, prognostic and motivational, i.e. relating to the work done within social movement organisations to identify and understand the problem(s) they seek to address, the solution(s) they want to see, and the manner in which they intend to go about achieving that solution.<sup>466</sup> Framing is thus related to concepts of solidarity, shared identity and strategy, and supports the internal cohesion and strength of a mobilisation.

The extent to which a social movement may engage in framing processes is related to the strength or weakness of their organisational structures and processes. Framing is discursive in nature, and poses a considerable challenge for large mobilisations reaching out to a geographically dispersed support base, particularly those who place emphasis on ‘grassroots’ or horizontal organisational structures. ‘Climate camp’ mobilisations, for example, as we have already noted, involved regular monthly meetings in different cities.<sup>467</sup>

Surveillance may undermine framing processes, stigmatising and de-legitimising protest and the mobilising processes that lead up to it, thus disrupting the efforts of social movement actors to build a common sense of identity, weakening solidarity, and undermining their ability to construct positive frames for communication between social

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<sup>464</sup> Jeff Goodwin and James Jasper, ‘Caught in a Winding, Snarling Vine’ in Goodwin and James (eds) *Rethinking Social Movements* (Rowman and Littlefield 2004) 28

<sup>465</sup> Doug McAdam, JD McCarthy, MN Zald (eds) *Comparative Perspectives on Social Movements* (CUP 1996), 6

<sup>466</sup> Donna Della Porta and Mario Diani, *Social Movements: An Introduction* (2nd edn, Blackwell 2013) 74-78

<sup>467</sup> See page112: Magnus describes the ‘intimidating’ impact of repeated episodes of surveillance of the monthly planning meetings.

movements and the ‘outside world’. In interview, social movement actors described the stigmatising impact of state surveillance activity, suggesting that it damaged perceptions of legitimacy, and carried an inference of criminality, undesirability and threat. This made it more difficult to communicate with the public, alienated public support and discouraged new activists. It also damaged the internal cohesiveness of groups, creating division and distrust as a result of the external ‘framing’ of particular groups or elements of a social movement as ‘militant’ and ‘radical’.

Esther’s testimony reflected both her personal shock at being publicly labelled and stigmatised in this way, but also the difficulties this poses for social movements who are attempting to communicate with the general public, or align themselves with other activist groups or movements.

I’ve seen them use it at demos, they’re looking at it, looking at the crowd, using it to identify people and then when they’ve identified people, they go up to you and say ‘oh hello Esther’ and then they’re follow you, they’re physically following you. And I saw some people from Nottingham once on this anti-war demo, and they were almost running through the crowd being pursued by cops, and the effect that it has, and I was like, oh! They’re getting it! It’s usually me, I’m not the only one! But also that it looks so dodgy, like who are those dodgy people being pursued by police? When you see the police going after people you think, I don’t know, football fans, when I see cops on the tube now they’re surrounding football fans. So you’ve been marked out, but how that looks to your social environment on a demo? These are the dodgy people. Police outside a pub – dodgy people inside.

(Esther)

Other interviewees commented that the stigmatisation of surveillance also affected internal relationships within or between social movement organisations. Jenny noted that surveillance had the effect of designating certain sectors of a protest as ‘militant’ and that this sector suffered a degree of alienation as a result; Toby similarly reported that surveillance had the effect of forcing a concrete division between the ‘radical’ and the ‘moderate’ elements of a movement, removing the shades of grey in between.

I think sometimes their presence, which is supposedly to monitor and prevent, to prevent things happening, is quite divisive and creates this kind of ‘that’s the militant people over there, with the cameras’, and other people are drawn away

from that, because why would you want to be, it's interesting the effect it can have on a broader group. (Jenny)

Toby suggested that police carried out surveillance not only by watching and photographing protesters, but also by obtaining information through dialogue and questioning. He stated that in this form, surveillance was used as a means by which protesters were categorised. Those with more radical opinions who may be less inclined to engage with inquisitorial police approaches were more likely to be considered 'bad' protesters, and consequently less likely to receive solidarity from those with more mainstream opinions.

...a lot of the surveillance strategy is designed to separate that out. If you're more on the liberal end of things, your tendency is to regard the militants as a disruptive element which is giving the movement a bad name, rather than as a crucial wing of the whole thing. And so, they're not bothered if the militants are being targeted, and people who are wavering or a bit nervous are likely to say, oh well, I'll stay with the liberals on this one ... There's a lot of the whole divide and rule thing in the strategy. (Toby)

### Surveillance harms as a chilling effect on political assemblies and associations.

Social movement literature provides us with a means of understanding the conditions required for protest to take place, and thereby to understand the impact of surveillance, not merely on individuals, but on collective movements and political assemblies. In the section above we have analysed interview testimonies in the context of that literature, and identified a number of ways in which surveillance harms the process of mobilisation for political assemblies. In the following section we will further conceptualise these harms in terms of the extent to which they 'chill' political protest, and subsequently consider whether they amount to a restriction of fundamental political freedoms, most particularly the right to freedom of assembly and association. Having done so, we shall turn to an examination of judicial approaches to the protection of Article 11, to investigate the extent to which the current legal framework provides a means of recognising and responding to collective as well as individual surveillance harms.

What arises from the analysis above is a further layer of complexity in the matrix of surveillance harms, beyond those which we have already identified in relation to individual

privacy harms. The harms we have identified above are comparable to privacy harms, because they arise in many of the same circumstances. Surveillance harms here are also related to physical intrusion, identification (and classification) and a curtailment of individual autonomy. Further, they are arising in the context of risk-based, anticipatory and pre-emptive surveillance: not surveillance which is general, observational or responsive in nature. However, the harms here are also distinct from privacy harms (in the way that they have been conceptualised in this thesis) in that the harms relate not to an individual (or not only to an individual) but to the *activity* in question.

The distinction between the curbing of individual autonomy and the disruption of collective organising processes is an important one. This, Schauer has argued, is a defining feature of a ‘chilling effect’: while we would normally ‘say that *people* are deterred’ he notes, ‘it seems proper to speak of an *activity* as being chilled’.<sup>468</sup> The chilling effect thus reaches beyond individual harms, to the damage done to the activity itself.

The constituency of those who experience collective or ‘chilling’ harms from surveillance activity is therefore both larger and differently constituted from those who experience individual privacy harms. In Magnus’s testimony above, for example, in which surveillance disrupted organisational proceedings, the harm was experienced by those whose meeting was interrupted, even though they were not personally subject to surveillance. Similarly, those struggling to take on the organisational and leadership tasks of a social movement may be harmed by the restriction in social capital resulting from surveillance, even if they themselves are have experienced no loss of autonomy as a result of surveillance: in Alan’s case, for example, while he (and others) were not deterred, or necessarily perturbed by police surveillance actions, they may nevertheless be considered to have experienced harm as a result of their consequentially unsuccessful efforts to engage new people within the social movement organisation.

Surveillance, like many policing practices, is intended to have an influence over behaviour: it may therefore be said to ‘chill’ many activities, quite legitimately. We do not object to the propensity of surveillance to ‘chill’ burglaries or pick-pockets. The term ‘chilling effect’ refers however, to the act of deterring or restricting an activity which is neither proscribed nor socially undesirable, and potentially to activity which has intrinsic value or worth to

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<sup>468</sup> Frederick Schauer, ‘Fear, Risk and the First Amendment: Unraveling the Chilling Effect’ (1978) 58 B.U. L. Rev. 685

society. It refers, Kendrick has noted, to the overdeterrence of benign (or worthy) conduct.<sup>469</sup>

It must be remembered, however, that the type of surveillance we are primarily concerned with here is pre-emptive. This is a distinct form of surveillance, which is concerned with the identification and evaluation of 'risk'. As we have seen, risks do not refer to a concrete or real danger, but are instead an 'artificial entity of calculation'.<sup>470</sup> 'Risk' is distinct in this context from suspicion: it is not concerned with prosecution or the investigation of tangible offences, rather it is a means of calculating, predicting and forestalling *potential* instances of crime or disorder. The process of designating risk tends to be opaque, and the criteria for such a designation are often unclear. Gorringe and Rosie have suggested that risk designations may draw on various factors, including prior police interactions with particular individuals associated with the social movements; attitudes of protest groups towards engagement with authorities; and media representations of the 'dangerousness' of protest groups.<sup>471</sup> Some groups, such as those with anti-capitalist or anarchist ideologies, they suggest, are invariably 'demonised'. Pressure groups have also highlighted that risk designations are more likely to attach to movements concerned with currently contentious issues, such as environmental protest and fracking.<sup>472</sup>

A further feature of the 'chilling effect' is that its effects can only ever be surmised, since they refer to those aspects of mobilisation that do not ultimately occur (and so accurate enumeration or quantification is impossible). As discussed further below, these hidden and future effects pose difficulties for the question of who might be recognized as a 'victim' of a violation of rights, so as to be able to bring forward a claim. Recognition of harms must therefore not be reliant on demonstrable outcomes: rather, it is argued below, the courts must be sensitive to the potential harm inherent in surveillance measures which are liable to disrupt mobilisation processes.

The framework of Article 11 ECHR arguably provides the most appropriate and suitable means by which the courts may review the necessity and proportionality of surveillance

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<sup>469</sup> Leslie Kendrick, 'Speech, Intent, and the Chilling Effect' (2013) 54(5) William and Mary Law Review 1633

<sup>470</sup> Susanne Krasmann, 'The Enemy on the Border: Critique of a Programme in Favour of a Preventive State', (2007) 9 (3) Punishment and Society 301

<sup>471</sup> Michael Rosie and Hugo Gorringe, 'What a Difference a Death Makes: Protest, Policing and the Press at the G20' (2009) 14(5) Sociological Research Online

<sup>472</sup> Netpol, 'Why are counter-terrorism police treating fracking opponents as 'extremists'?' 9 April 2015 <https://netpol.org/2015/04/09/prevent-fracking-extremism/> accessed 29 June 2018

measures in the context of political protest. As we shall discuss further below, the involvement in contentious or transgressive protest does not remove a social movement organisation from the protections of Article 11: restrictions are thus not automatically legitimised by ‘direct action’ forms of protest or by civil disobedience. As a result, Article 11 provides a potentially useful framework for considering the proportionality and necessity of state restrictions. In the next and final section we therefore turn to consider the extent to which the judiciary have made use of this framework in addressing surveillance harms.

#### [\*\*Judicial approaches to surveillance harms within the framework of Article 11.\*\*](#)

Having elaborated upon the nature of the ‘chilling effect’ of surveillance on political protest, this final section turns to an examination of the current legal framework, and the extent to which it recognises surveillance harms as restrictions of the right to freedom of association and peaceful assembly. It is argued that the courts have made inadequate use of the framework of Article 11 as a means of addressing issues of surveillance; and that their reliance on privacy rights has led to a failure to properly acknowledge and evaluate surveillance harms that arise specifically in the context of political protest. In this section, we examine potential obstacles in the application of Article 11, particularly in terms of the threat surveillance poses to the process (rather than the event) of political assembly and association. We consider first the scope of Article 11, and the extent to which it is applicable to social movement organisations and the mobilisation process. Secondly, we consider what constitutes a ‘restriction’ to the right to freedom of assembly, and examine the divergent approach taken in this respect by the UK courts and the ECtHR. It is argued here that an expansive approach, which acknowledges the ability of state measures to infringe potential or prospective future assemblies is critical to the development of a legal framework capable of addressing surveillance harms. Thirdly, we consider the extent to which the courts perceive surveillance as being, not necessarily restrictive, but also beneficial to assembly rights. It is important in this context, this thesis argues, for the courts to have access to a better conceptualisation of the circumstances in which surveillance is restrictive or harmful to individual rights, so that they may better differentiate between protective and restrictive surveillance practices.

The courts have tended to approach questions of surveillance primarily, and almost exclusively, through the framework of privacy. Chapter 3 makes the case that this is inadequate for three key reasons. Firstly, privacy is considered to have only limited applicability to the public sphere; secondly it tends to result in surveillance harms being

interpreted in an individualised manner; and thirdly it provides an inappropriate framework for conceptualising the particular harms that arise from surveillance in relation to the structures and processes of assembly mobilisation. It is the latter that is our concern here.

As already noted, the applicability of privacy to the public domain is problematic, and is particular problematic in relation to public protest. The courts – and in particular the UK courts – consider protest to fall within the bracket of a ‘public activity’: protest not only takes place in public spaces, but is something which we engage in to intentionally and deliberately attract the attention of others to our message or our cause. In relation to such activities, the courts have stated, we have no ‘reasonable expectation of privacy’. If privacy has application at all in this sphere of activity, it arises only in relation to the state collection and retention of our personal data: the act of surveillance itself is largely considered unproblematic.

This thesis has argued that this conception of privacy is misconceived, and that a more nuanced conception of privacy is required: one which reflects the particular harms arising in the context of pre-emptive, risk-based and individualised surveillance, which result in physical or psychological intrusions, a loss of anonymity and a curbing of autonomy.

Further the value of privacy in aiding political plurality, and facilitating the exercise of assembly and association, should be reflected in the legal framework.<sup>473</sup>

It is suggested here, however, that harms arising from the surveillance of protest should not be conceptualised solely as ‘privacy harms’. The examination conducted above demonstrates that a further matrix of complex and diverse surveillance harms – beyond those of individual privacy – arises in the particular context of political protest. Surveillance may obstruct, impede and disrupt assemblies, not only by limiting the autonomy of those participating in protest as an event, but also by restricting the protest as process and damaging the very fabric of protest mobilisation.

This does not negate the relevance of privacy harms in such an arena, or the collective impact of such harms on political protest. Aspects of surveillance which we have identified as harmful to individual privacy rights – physical intrusion, identification and/or persistent monitoring – are likely to have a ‘chilling effect’ on protest as a whole, if the totality of protest participants (or a significant proportion) are subjected to them. In such a case, the ‘chilling effect’ may be viewed as consisting of the amalgamated and combined effect of

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<sup>473</sup> David Mead, A socialised conceptualisation of individual privacy: a theoretical and empirical study of the notion of the ‘public’ in UK MoPI cases (2017) 9(1) Journal of Media Law 100

multiple curbs on individual autonomy. In these circumstances, while the ‘chilling effect’ may affect a protest as a whole, it can reasonably be considered to be related to, and arise from, an interference with (or a cumulative series of interferences with) individual privacy. It is in these circumstances, as we shall discuss further below, that there has been some (albeit limited) recognition that surveillance may ‘chill’ and therefore restrict not only privacy, but rights of assembly.

It has been argued above that this is an inadequate conceptualisation of the impact of surveillance on assembly rights. The ‘whole’ of the impact of surveillance in this context is very much more than the sum of its parts. Surveillance, as we have seen, does not amount merely to a restriction of individual autonomy; it poses a threat to the very fabric of protest mobilisation itself, obstructing and disrupting the processes by which protest comes about, curtailing autonomy both directly (in relation to current activity) and indirectly (by restricting potential future activity).

The adequacy of the legal framework in addressing these harms will therefore depend, at least in part, on judicial interpretations of what constitutes an assembly for the purposes of Article 11, and of what amounts to a restriction with the right to freedom of assembly and association.<sup>474</sup> Both must be interpreted in a way that enables the courts to respond to surveillance as a threat to protest as a process, not merely an event.

The protections of Article 11 must extend not only to the ‘end result’ but more broadly to the organisational process. Further, the courts must recognise that surveillance harms do not only arise directly to an instant assembly, but indirectly to potential *future* assemblies. Thus the definition of a restriction must encompass not merely time, manner and place conditions, or the prohibition of protest events, but also state actions which may disrupt collective expressive or organisational activities or weaken the capacity (or cohesion) of social movement organisations over the longer term.

Additionally, of course, there is the question of the circumstances in which surveillance amounts to a restriction of assembly rights, rather than a means of facilitating or supporting those rights. Surveillance has been judicially recognised as being an important means by which state actors facilitate assemblies by ensuring the safety of participants,

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<sup>474</sup> For further discussion of this point, see Helen Fenwick and Gavin Phillipson, ‘Direct Action, Convention Values and the Human Rights Act’ (2001) 21 Legal Studies 535

and keeping order. This may be of particular importance in circumstances in which protesters may face hostility or potential violence from counter-demonstrators. It is essential in this respect, it is argued below, that the courts have access to an appropriate and adequate framework for understanding surveillance harms, in order to balance competing interests and to be able to differentiate circumstances in which surveillance may be restrictive or protective of fundamental freedoms.

### [\*\*The Scope of Article 11 and its application to Social Movement Processes.\*\*](#)

Before going further in establishing the circumstances in which the courts recognise – or fail to recognise – surveillance harms, it is worth considering briefly the scope of Article 11 and the extent to which it is applicable to all aspects of social movement mobilisations, rather than simply the ‘end result’ of those processes: the protest assembly itself.

Article 11 provides the following guarantees for the freedom of assembly and association

- 1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State

There are two potential points of contention in relation to the applicability of Article 11 to social movement organisations. The first relates to whether Article 11 extends to the mobilisation process, in its entirety, as undertaken by social movement organisations; and the second relates to the protection afforded to groups engaged in ‘direct action’ protests.

This examination of Article 11 rights starts from the premise that protection for the right to peaceful assembly, in order to be meaningful, must necessarily extend to protection for the *process* of mobilising for peaceful assemblies. The conceptualisation of protest as a process of mobilisation is critical for the recognition of surveillance harms arising in the context of protest. It is therefore important that rights protections arise not merely in relation to the ‘end product’ or a protest event, but in relation to all mobilisation activities. In this regard, for example, the planning and publicising of an assembly are integral parts of

the exercise of the rights to freedom of speech and assembly. As such, the right of assembly organizers to publicize the holding of an assembly ahead of time, both offline and online, must be recognized.<sup>475</sup>

Further, protection must necessarily extend to the process of mobilising for *repeated* protest assemblies, as part of an on-going campaign for social change. If public assemblies are valued in part because they enable the collective expression of a view, the right ought to extend to the continued expression of that view to enable efforts to persuade others of its merit. In other words, it cannot be sufficient to allow protesters to 'have their say' if they are then prevented from maintaining their protest or mounting an enduring campaign. What must be protected then, is not merely assemblies *per se*, but the associational networks that underpin them.

Furthermore, as we have seen, in addition to meetings in which protests and/or campaigns are discussed, and strategies agreed, social movement actors undertake various other gatherings for a range of preparatory or other purposes related directly or indirectly to protest mobilisation. These may include support structures (accommodation, food, information etc) or with raising funds. Some such gatherings will be formal meetings, others may be less formal, quasi-social get-togethers at which political discussion or fund-raising activity takes place in a social setting. This, then, is to argue for a greater appreciation of the interdependence of freedom of assembly and freedom of association (in the same way that the interdependence of assembly and expression is generally accepted and recognized by courts). In this regard, interviewees described the surveillance of these gatherings as being intensely disruptive of the mobilisation process. It was at pre-protest meetings, Rebecca maintained, that she was identified as an organiser and subsequently subject to persistent, focused surveillance;<sup>476</sup> Mike reported that surveillance

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<sup>475</sup> Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom (13 April 2016) states at para 3.3: 'Individuals are free to use Internet platforms, such as social media and other ICTs in order to organise themselves for purposes of peaceful assembly.' The UN Human Rights Committee has also stated that the circulation of publicity for an upcoming assembly cannot legitimately be penalized in the absence of a 'specific indication of what dangers would have been created by the early distribution of the information.' (Human Rights Committee, Communication No. 1838/2008: views adopted by the Committee at its 103rd session, 17 October to 4 November 2011) See also, *Kalda v Estonia* App no. 17429/10 (ECtHR 19 Jan 2016) [52] where the Court explicitly recognized the importance of the Internet for the enjoyment of a range of human rights, and *Jankovskis v. Lithuania* App no. 21575/08 (ECtHR 17 Jan 2017) [62].

<sup>476</sup> See Rebecca's testimony p161: she states that surveillance teams followed her because she was identified as an organiser of protest

was disruptive to fund-raising gigs<sup>477</sup>; and Ricki stated that surveillance restricted access to meeting space.<sup>478</sup>

The UK courts have cast some doubt as to whether preparatory meetings or social (or quasi-social) gatherings undertaken in the context of social movement mobilisations will fall within the scope of Article 11. In *Countryside Alliance* the Supreme Court concluded that an assembly taking place ‘purely for sporting or recreational activities’ (as was judged to be the case in relation to assemblies relating to fox-hunting) would not fall within the scope of Article 11.<sup>479</sup> Lord Hope stated that the principle of the right to assembly has evolved largely ‘in the context of political demonstrations’, and that the aim of Article 11 was to ‘provide protection for persons who...assemble for the purposes of a demonstration on a matter of public interest.’<sup>480</sup> The right to freedom of assembly, he said, was concerned only with ‘the kind of assembly whose protection is fundamental to the proper functioning of a modern democracy.’<sup>481</sup> More recently, in the case of *Metropolitan Police Commissioner v Thorpe* the High Court decisively excluded sporting crowds from the scope of Article 11. A football crowd, the court held, ‘if it is an assembly in the sense used in Article 11 at all, is not an assembly for a purpose which attracts protection under that Article.’<sup>482</sup>

The position elucidated by Lord Hope in *Countryside Alliance*, however, is problematic, in that it does not recognise Article 11 as a distinct and independent right. The right to freedom of peaceful assembly is not merely a constituent part, or necessarily a *lex specialis* of the right to freedom of expression, but has an autonomous existence.<sup>483</sup> One of the particular strengths of a stand-alone right of assembly, as Bhagwat has argued, is that it ‘rejects the pernicious idea that groups deserve protection only to the extent that they are expressive’.<sup>484</sup> The value of assembly to a democratic society may be said to lie in the freedom of citizens to be able to come together, associate and assemble for a broad range of cultural, societal and communal purposes which do not need to be political in nature.

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<sup>477</sup> See Mike’s testimony p164: He states the surveillance teams were ‘all over’ benefit gigs

<sup>478</sup> See Ricki’s testimony p163 : Ricki states that surveillance caused difficulties in obtaining meeting space

<sup>479</sup> R (on the application of Countryside Alliance) v Attorney General [2007] UKHL 52

<sup>480</sup> R (on the application of Countryside Alliance) v Attorney General [2007] UKHL 52 [56]

<sup>481</sup> R (on the application of Countryside Alliance) v Attorney General [2007] UKHL 52 [58]

<sup>482</sup> Metropolitan Police Commissioner v Thorpe [2015] EWHC 3339 (Admin)

<sup>483</sup> Kudrevičius and Others v Lithuania App no 37553/05 (ECtHR 15 October 2015) [86]

<sup>484</sup> Ashutosh Bhagwat, ‘Assembly Resurrected’ (2012) 91 Texas Law Review 351, 364

It is also an approach which now appears out of kilter with the jurisprudence of the ECtHR. The Court has emphasised the importance of Article 11 as operating as part of a cluster of rights that together provide protections for political and religious beliefs and expression, and ‘to secure a forum for public debate and the open expression of protest’.<sup>485</sup> In this regard, the Court has further recognised what has been termed a ‘functional synergy’<sup>486</sup> between the right to freedom of assembly, and the right to freedom of expression, and has held that Article 11 may be interpreted as a *lex specialis* or *lex generalis* in relation to Article 10.<sup>487</sup> The Court has, however, stressed that freedom of assembly under Article 11 has an autonomous existence.<sup>488</sup>

The Commission in *Anderson and nine others* had suggested that Article 11 would not be applicable to ‘purely’ social gatherings, noting that the freedom of assembly was not ‘intended to guarantee a right to pass and re-pass in public places, or to assemble for purely social purposes anywhere one wishes’.<sup>489</sup> However, in *Djavit An v Turkey* the ECtHR held that social and cultural gatherings undertaken to enhance relationships between Greek and Turkish Cypriots were encompassed within the scope of Article 11.<sup>490</sup> Subsequently, in *Friend*, (which arose out of the decision of the House of Lords in *Countryside Alliance*) the Court stated that it would be an ‘unacceptably narrow’ interpretation of Article 11 to confine it to demonstrations, and that ‘the Court is therefore prepared to assume that Article 11 may extend to the protection of an assembly of an essentially social character’.<sup>491</sup> Further in *Huseynov* the Court held that a meeting in a private café also fell within the scope of Article 11, reiterating the Court’s statement in *Friend*.<sup>492</sup> The Council of Europe has stressed that, in relation to the applicability of Article 11, no limit has been imposed on the purpose of an assembly, which may be for political, religious or spiritual, social or another purpose’.<sup>493</sup>

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<sup>485</sup> Kudrevičius and Others v Lithuania (2016) 62 EHRR 34 [86]

<sup>486</sup> David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Era* (Hart 2010) 63

<sup>487</sup> See, for example, Kudrevičius and Others v Lithuania App no 37553/05 (ECtHR 15 October 2015)

<sup>488</sup> Kudrevičius and Others v Lithuania (2016) 62 EHRR 34 [86]; Ezelin v France (1992) 14 EHRR 362 [37]

<sup>489</sup> Anderson and Nine Others v United Kingdom, App No 33689/96 (Commission decision on admissibility, 27 October 1997)

<sup>490</sup> Djavit An v Turkey (2005) 40 EHRR 45 [60]

<sup>491</sup> Friend v United Kingdom App nos 16072/06 and 27809/08 (ECtHR 24 November 2009)

<sup>492</sup> Huseynov v Azerbaijan (2018) 67 EHRR 16

<sup>493</sup> Council of Europe website available at <https://www.coe.int/en/web/echr-toolkit/la-liberte-de-reunion-et-dassociation> Accessed 20 June 2018

A further potential difficulty for social movement organisations, relates to the use of contentious and potentially transgressive tactics.<sup>494</sup> The ECtHR has held that Article 11 is applicable to obstructive and disruptive ‘direct action’ protests, and does not conflate *unlawful* protest with *non-peaceful* protest. The Court has asserted that, ‘where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance’. As such, Article 11 has been held to cover a wide range of protest activities, including pickets,<sup>495</sup> processions,<sup>496</sup> rallies,<sup>497</sup> sit-ins,<sup>498</sup> roadblocks,<sup>499</sup> occupations of buildings,<sup>500</sup> and the public reading of press statements.<sup>501</sup> Forms of ‘direct action’ protest considered to fall within the scope of Article 11 have included the obstruction of a public road in order to disrupt access to a naval base;<sup>502</sup> the creation of a rolling barricade of vehicles across several lanes of the motorway in order to slow down traffic behind<sup>503</sup>; and a mass demonstration which obstructed a major highway for a period of 48 hours.<sup>504</sup>

As Article 11 protects the right to *peaceful* assembly, this excludes acts of violence. However, the fact that violence occurs (or is expected to occur) at a demonstration does not mean that the protest necessarily falls outside the scope of Article 11 or that participants or organisers inevitably lose its protection. A threat to public safety arising from protest does not constitute violence. In *Kudrevicius* farmers protesting a lack of agricultural subsidies were charged with incitement to riot for blocking three major roads for around 48 hours. While the Court acknowledged that these acts were potentially dangerous, it stated that ‘Nevertheless, the Court does not consider that the impugned

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<sup>494</sup> For a 2010 summary of the various provisions in UK law governing forms of non-violent action, see David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Era* (Hart 2010) chapter 6. On the legitimacy of (certain) forms of direct action, see Helen Fenwick and Gavin Phillipson, ‘Direct Action, Convention Values and the Human Rights Act’ (2001) 21 Legal Studies 535 offering a “theorised stance...[setting] out a framework of principle which would apply whatever the political complexion of protestors, but which would enable a differentiated legal response to be

adopted depending upon the methods of direct action used, the aims of the protestors and the nature of the bodies subject to the particular protest in question” (p.538), in short a typology.

<sup>495</sup> *Shmushkovych v Ukraine* App no. 3276/10 (ECtHR 14 November 2013)

<sup>496</sup> Christians against Racism and Fascism v the United Kingdom (1980) 21 DR 138

<sup>497</sup> *Kasparov v. Russia* (2018) 66 EHRR 21

<sup>498</sup> *Çiloğlu and others v Turkey* App no. 73333/01 (ECtHR 6 March 2007)

<sup>499</sup> *Kudrevičius and Others v. Lithuania* (2016) 62 EHRR 34

<sup>500</sup> *Cissé v. France* App no. 51346/99 (ECtHR 9 April 2002)

<sup>501</sup> *Oya Ataman v. Turkey*, App no. 74552/01 (ECtHR 5 December 2006)

<sup>502</sup> *Lucas v. the United Kingdom*, App No. 39013/02 (ECtHR Decision on Admissibility, 18 March 2003)

<sup>503</sup> *Barraco v France*, App No. 31684/05 (ECtHR 5 March 2009)

<sup>504</sup> *Kudrevičius and Others v Lithuania* (2016) 62 EHRR 34

conduct of the demonstrations for which the applicants were held responsible was of such a nature and degree as to remove their participation in the demonstration from the scope of protection of the right to freedom of peaceful assembly under Article 11 of the Convention ...'<sup>505</sup>

Even if there are instances of violence at a demonstration, a person 'does not cease to enjoy the right to freedom of peaceful assembly due to sporadic acts of violence or other wrongdoing committed by others'<sup>506</sup> as long as 'the individual in question remains peaceful in his or her own intentions or behaviour'.<sup>507</sup> The Court has stated that, 'the possibility of persons with violent intentions, not members of the organising association, joining the demonstration cannot as such take away that right. Even if there is a real risk that a public demonstration might result in disorder as a result of developments outside the control of those organising it, such a demonstration does not as such fall outside the scope of Article 11 § 1, and any restriction placed thereon must be in conformity with the terms of paragraph 2 of that provision.'<sup>508</sup>

The protections of Article 11 will not apply to organisers or participants who have violent intentions, incite violence 'or otherwise reject the foundations of a democratic society'.<sup>509</sup> There must be evidence, however, of such intention. In *Schwabe v Germany*, the German police claimed that anti-G8 protests intended to incite 'very violent' anti-globalisation activists with banners calling for the freeing of prisoners, and that one of the applicants had assaulted a police officer during an identification check. This was not sufficient, however, to take any of the applicants outside the scope of Article 11.<sup>510</sup> Assemblies will also remain within the scope of Article 11 if actual violence results from disproportionate state interventions.<sup>511</sup> In *Nurettin Aldemir v Turkey* the Court was content to extend the protection of Article 11 to circumstances in which a disruptive but peaceful protest became violent after state interventions which consisted of 'considerable force' and which caused 'tensions to rise, followed by clashes'.<sup>512</sup>

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<sup>505</sup> Ibid [98]

<sup>506</sup> Mesut Yildiz and others v Turkey App No. 08157/10 (ECtHR July 18 2017), 27

<sup>507</sup> Ezelin v France App No 11800/85 (ECtHR 26 April 1991) [34]

<sup>508</sup> Kudrevičius and Others v Lithuania [94]

<sup>509</sup> Sergey Kuznetsov v. Russia App no. 10877/04 (ECtHR 23 October 2008) [45]

<sup>510</sup> In this case the Court found that there had been a violation of Article 11 as state actions had a chilling effect on expression and were not necessary as less intrusive measures had been available.

<sup>511</sup> Primov and others v Russia App No. 17391/06 (ECtHR 12 June 2014)

<sup>512</sup> Nurettin Aldemir v Turkey [2007] ECHR 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02 (ECtHR 18 December 2007) [45]

Further (and importantly) the identification or classification of a group as posing a ‘risk’ of disorder does not – without more – take them outside the scope of Article 11 (although such a designation may be relevant for any consideration of the proportionality of any restriction to assembly rights). The mere risk or anticipation that violence will occur at a demonstration is not sufficient to take an assembly outside the scope of Article 11, if the intention of the assembly is not violent. The Court has stated that, ‘even if there is a real risk of a public procession resulting in disorder by developments outside the control of those organising it, such procession does not for this reason alone fall outside the scope of Article 11(1) of the Convention.’<sup>513</sup>

The UK courts have also recognised that some forms of direct action will fall within the scope of Article 11, even if it involves criminal activity. In *Powlesland*,<sup>514</sup> Article 11 rights were found to be applicable to a ‘critical mass’ procession of cycles; and in the *Tabernacle* case<sup>515</sup>, the right to freedom of assembly could be invoked by women holding a peace camp outside Aldermaston Weapons Establishment. Similarly, the Court of Appeal in *Samede* was happy that a long term protest camp was within the scope of Article 11<sup>516</sup>, and the High Court in Dutton conceded that the protesters desire to express their views against oil drilling and fracking ‘in the form of ... a relatively long term occupation with tents, placards and postings on social media, all fall within the scope of Articles 10 and 11.’<sup>517</sup> This was also the case, in *Sheffield City Council v Fairhall*<sup>518</sup> for a form of direct action which involved the intrusion of protesters against tree felling into safety exclusion zones (thus halting felling operations).

### Defining interference

Case law relating to the right to freedom of assembly is most commonly concerned with the prohibition of protest, or with the imposition of time, place or manner constraints on protest events. In such cases there is no uncertainty as to whether such measures will amount to an interference with assembly freedoms: they constitute a concrete and tangible constraint on what protesters may do. Police actions may also coercively restrict the freedom of demonstrators by using force or violence to disperse a demonstration, or by placing participants under arrest. There can be no doubt in such circumstances that the

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<sup>513</sup> Christians against Racism and Fascism v the United Kingdom (1980) 21 DR 138

<sup>514</sup> Powlesland v Director of Public Prosecutions [2013] EWHC 3846 (Admin)

<sup>515</sup> Tabernacle v Secretary of State for the Home Department [2009] LFWCA Civ 23

<sup>516</sup> City of London Corp v Samede and others [2012] EWCA Civ 160

<sup>517</sup> Dutton and others v Persons unknown and others - [2015] All ER (D) 302 (Nov)

<sup>518</sup> Sheffield City Council v Fairhall and others [2017] EWHC 2121 (QB)

autonomy, and potentially the liberty, of protest participants is constrained, and their ability to exercise their right to expression and assembly is curtailed.

Surveillance does not, however, amount to such a blatant interference with assembly freedoms; harms that arise in this context are more insidious and less obvious, and furthermore, the harms that arise may be neither direct nor immediate. As we have seen, surveillance may not merely have an impact on the instant assembly: it may have a cumulative impact on assembly mobilisation processes, which limit the capacity, strength and sustainability of social movement organisations, and thus curtail the processes of mobilisation and potential *future* collective assemblies.

In the following section we consider the approach taken by the UK courts and the ECtHR to the question of what constitutes an interference with the right to freedom of assembly. The UK courts, it is argued, have tended to view the concept of a restriction on Article 11 in narrow terms, as one relating primarily to time, place and manner constraints.<sup>519</sup> While the courts have recognised that police measures may have a ‘chilling effect’, the potential impact of such measures on future assemblies has not been considered sufficient to amount to a restriction interference with assembly rights. Specifically, the courts have not recognised the potential for police surveillance measures to amount to such an interference.

The ECtHR, however, has taken a more expansive approach, in that they have recognised the potential ‘chilling effect’ of state measures on prospective future protests; further they have recognised that state measures which de-legitimise protest may amount to an interference with Article 11, even in the absence of enforced prohibition or conditions. Additionally, there has been an explicit recognition that surveillance measures may also amount to a restriction of assembly rights.<sup>520</sup>

The UK courts have tended to take a narrow view of what constitutes a restriction of the right to freedom of assembly which does not recognise the impact of police measures (whether surveillance or other public order tactic) on future protests. In the case of *Austin*,

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<sup>519</sup> The complaint that the domestic courts have failed to proper and full protection to the right to protest, for example by failing to see even the expressionist elements, aside from any other aspects, has a long pedigree: see Helen Fenwick and Gavin Phillipson, “Public protest, the Human Rights Act and judicial responses to political expression” [2000] PL 627, where, almost twenty years ago, they concluded that “the impact of the HRA on public protest will be principally determined not by the mechanics of the Act nor the Strasbourg jurisprudence it introduces, but by the prevailing and established judicial attitude to public protest” (p.650).

<sup>520</sup> See *Segerstedt-Wiberg and others v Sweden* App no. 62332/00 (ECtHR, 6 June 2006)

for example, the High Court considered that the use of a police containment or 'kettle', which prevented the claimants from leaving Oxford Street for seven hours, did not amount to a restriction in their Article 11 rights.<sup>521</sup> The claimants consisted of a demonstrator and a passer-by, who had been inadvertently caught up in the 'kettle'. Mr Justice Tugendhat was dismissive of the argument that the policing measure had restricted their right to freedom of assembly: as the policing action had contained rather than dispersed the demonstration, the court held that the first claimant had not been denied the ability to demonstrate, whereas the second claimant had not, in any case, purported to exercise such a right. His discussion of this issue is worth setting out in full:

In any event, on the facts I have found, Ms Austin did not herself suffer any interference with her Art 10 and 11 rights. She joined the crowd that was at the World Bank office in Haymarket, and went with it to Oxford Circus. Between 2pm and 3.30pm she made speeches through a megaphone on political topics. She did not say that there was anything that she wanted to do in that period which she was prevented from doing. She had then planned to go to collect her baby and take no further part in any demonstration. So she in fact enjoyed all the opportunities which she wanted to enjoy to exercise her rights of freedom of speech and assembly. She was not prevented in any way from exercising those rights as she had wished.

After she was refused permission to leave Oxford Circus, Ms Austin continued to exercise those rights. She made speeches through her megaphone giving advice and comfort to the crowd around her.

Ms Austin's real concern under this head had been not that her own rights had been interfered with, but that the rights of others were infringed. As she had said in her witness statement, but did not pursue at trial, "I believe the tactics of the police were designed to prevent legitimate protest."

On the unusual facts of this case, I find that rights of freedom of speech and of assembly have not in fact been interfered with.<sup>522</sup>

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<sup>521</sup> Austin & Saxby v Commissioner of Police for the Metropolis, [2005] EWHC 480 (QB). For further discussion of the case see Helen Fenwick, "Marginalising human rights: breach of the peace, 'kettling', the Human Rights Act and public protest" [2009] PL 737 or David Mead, The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Era (Hart 2010), 349-361

<sup>522</sup> Austin & Saxby v Commissioner of Police for the Metropolis, [2005] EWHC 480 (QB) [601-604]

The court did not accept that the policing strategy, which involved the coercive detention of protesters for a long period without access to toilets, food or water, may have amounted to a restriction of Article 11 on the basis that it may have 'chilled' future protests, by deterring the claimants (or others) from participating in them. The issue of Article 11 arose in the UK courts only at first instance: the case was subsequently considered in the higher courts only in relation to the question of whether kettling amounted to a deprivation of liberty under Article 5 of the Convention. It is therefore not known whether such a stance would have found favour on appeal.

The Court of Appeal noted the potential 'chilling effect' of police surveillance in the case of *Wood*.<sup>523</sup> Andrew Wood, as we have previously seen, was an anti-arms trade campaigner, who was subject to being photographed and questioned by police while walking down a public street. One of the reasons for the photography, the police stated in court, was to enable them to identify people participating in a forthcoming anti-arms trade protest. As well as claiming an interference with privacy rights, Mr Wood also claimed that the taking of photographs for use in this way was an interference with his right to freedom of assembly. Lord Justice Laws dismissed this claim as 'fanciful'. 'Apart from anything else', he remarked, 'he was not purporting to exercise [such a] right on the occasion in question'.<sup>524</sup>

Andrew Wood submitted that he had found the actions of the police to be 'extremely upsetting', and that they had left him feeling 'shaken and frightened as a result';<sup>525</sup> Lord Collins also noted that he was 'struck by the chilling effect on the exercise of lawful rights such a deployment would have'.<sup>526</sup> The court rejected the contention however, that the potential for police surveillance of this kind to deter Mr Wood from attending future political protest or campaigning events, amounted to a restriction of his Article 11 rights. The court did find that the police actions amounted to a violation of Mr Wood's privacy rights; and the 'chilling effect' of the surveillance was considered relevant to the courts consideration of proportionality. The judgement suggests, however, that in order to amount to a restriction of Article 11 rights, police actions must entail a tangible restriction of an instant assembly: their possible impact on future assemblies is insufficient.

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<sup>523</sup> *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414

<sup>524</sup> *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 [61]

<sup>525</sup> *Wood v Commissioner of Police for the Metropolis*, [2009] EWCA Civ 414, 2

<sup>526</sup> *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 [92]

The ECtHR, in contrast, has taken a more expansive view of what constitutes a restriction of Article 11<sup>527</sup>; and has found that surveillance measures may amount to restriction of the right to freedom of assembly. The Court has recognised that Article 11 may be applicable to circumstances in which there is a likelihood that people will be ‘put off’ or discouraged from participation in future protest activity. In *Ezelin*<sup>528</sup> for example, a disciplinary sanction applied to a barrister, as a result of him having taken part in a demonstration at which criminal activities took place was considered to be an infringement of M. Ezelin’s Article 11 rights.<sup>529</sup> In reaching this decision the Court attached weight not only to the punitive effects of the sanction on M. Ezelin, but to its potential to deter M. Ezelin from participating in future demonstrations.<sup>530</sup> The court noted that the penalty imposed had little detrimental impact on M. Ezelin, and did not prevent him from practising. Nevertheless, the freedom to take part in a peaceful assembly, the Court held, ‘is of such importance that it cannot be restricted in any way, even for an *advocat*’.<sup>531</sup>

The Court has, in a number of cases, rejected arguments made by respondent governments, that by making arrests *after* an unauthorised demonstration, the applicants had not been prevented from exercising their Article 11 rights. In *Navalnyy* the Court emphasised the likelihood that punitive sanctions would have a detrimental impact on future demonstrations. They noted that the ‘dispersal of the perceived march, the arrest and the ensuing administrative conviction of the applicants could not but have the effect of discouraging them from participating in protest rallies or indeed from engaging actively in opposition politics’.<sup>532</sup> Similarly in *Balçik*, the use of force to disperse an assembly constituted to be an interference with Article 11 rights both because there was a direct physical interference (because the demonstration was halted) and because state actions ‘could have had a chilling effect and discouraged the applicants from taking part in similar meetings’.<sup>533</sup>

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<sup>527</sup> See generally, David Mead on the Strasbourg interpretation of assembly rights: David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart 2010) 63-76

<sup>528</sup> *Ezelin v France* (1992) 14 EHRR 362

<sup>529</sup> *Ezelin v France* (1992) 14 EHRR 362 [53] It is perhaps interesting to note here that M. Ezelin’s attendance at the demonstration was known because his name and the extent of his involvement was observed, noted and recorded in intelligence logs by police officers present.

<sup>530</sup> There were, however, dissenting opinions. Judge Pettiti stated that ‘it is not clear that the minimal sanction imposed after the event, a purely moral sanction, had an effect such as to place an obstacle in the way of freedom to demonstrate’.

<sup>531</sup> *Ezelin v France* (1992) 14 EHRR 362 [53]

<sup>532</sup> *Navalnyy and another v Russia* (App. No. 76204/11), 73

<sup>533</sup> *Balçik and others v Turkey*, App no. 25/02 (ECtHR, 29 November 2007), 41

The Court has also placed emphasis on the effect of state actions on the framing of protest actions. In the case of *Bączkowski*, the state had refused permission for a march; the organisers had however, gone ahead with holding a procession, which had been, in the event, tolerated by the authorities. The respondent state argued that, as the demonstration had, in fact taken place, and was not prevented from doing so by state authorities, there had been no restriction of assembly rights. The Court disagreed: the fact that the demonstration was held ‘without a presumption of legality’ denied the protest ‘a vital aspect of effective and unhindered exercise of freedom of assembly and freedom of expression.’<sup>534</sup>

Notably, the Court has also found that surveillance may also amount to a restriction of Article 11. In the case of *Segerstedt* the surveillance in question concerned the retention of personal information relating to the claimants’ political activities in police files.<sup>535</sup> The case was primarily concerned with the application of privacy rights. Having found that there had been, however, a violation of Article 8, the Court went on to conclude that, in these circumstances, state actions would also amount to an interference with assembly rights. It stated that, ‘the storage of personal data related to political opinion, affiliations and activities that is deemed unjustified for the purposes of Article 8 § 2 *ipso facto* constitutes an unjustified interference with the rights protected by Articles 10 and 11.’<sup>536</sup>

In other cases involving state surveillance in the context of political protest, however, the Court has not made a similar observation. In the case of *Shimovolos*,<sup>537</sup> for example, details of the claimant (who was the leader of a human rights organisation) had been entered onto a state surveillance database which had been compiled to include the details of persons allegedly involved in ‘extremist activities’. The consequence of such an entry was that, whenever a person mentioned in the database purchased a train or plane ticket, the authorities received an automatic notification. In the instant case the claimant was detained while travelling to participate in a political rally. The Court found that the systematic collection and storing of data by security services was a violation of Article 8, but made no comment on whether *ipso facto* there was a corresponding restriction of his Article 11 rights.

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<sup>534</sup> *Bączkowski v Poland*, App no. 1543/06 (ECtHR 3 May 2007), 67

<sup>535</sup> *Segerstedt-Wiberg and others v Sweden* App no. 62332/00 (ECtHR, 6 June 2006)

<sup>536</sup> *Segerstedt-Wiberg and others v Sweden* App no. 62332/00 (ECtHR, 6 June 2006), 107

<sup>537</sup> *Shimovolos v Russia* (2014) 58 EHRR 26

What, then, are the implications of these divergent approaches for social movement actors? The UK courts appear to take a narrow approach to what constitutes a restriction of Article 11 rights, one which requires there to be factual evidence that a deterrent effect has, in a given instance, taken place. The mere potential for surveillance to disrupt assemblies and assembly organising, or the possibility that people may be deterred, is unlikely to be sufficient for the courts to find that state actions constitute an interference with Article 11. Such a requirement is problematic: as we have established, the harms arising from the surveillance of protest are not always direct and immediate: surveillance poses an insidious threat of cumulative harm to assembly mobilisation processes that may not be immediately evident, nor easily evidenced.

The threat posed by surveillance to assembly mobilisations cannot be understood as a simple causal relationship between state action and the restriction of autonomy (individual or collective). It is evidently the case that being subject to surveillance activities does not necessarily result in a cessation or limitation of political or protest activities – most of the participants in this study, for example, did not halt political activity *per se* as a direct result of the surveillance they were subject to, though there is evidence that some changes tactics, or the type of activity or indeed the scale. The reasons why people become and remain involved in political activity are complex and varied, and are not determined solely by state actions.

Taking a narrow view of the applicability of Article 11 to surveillance issues, as the UK courts have done, necessarily raises difficulties in terms of who can be identified as a victim of harm, and at what point they become so. Following *Wood*, the mere possibility that an individual may experience a restriction in their autonomy as a result of surveillance is insufficient to amount to a restriction of Article 11. If that individual does not end up being deterred from participation, but continues to take part in public assemblies, there is no evidence of a restriction. If, however, that individual does decide, as a result of the surveillance, not to take part in any future public protests, the problem then arises as to whether they are, at that time, purporting to exercise their Article 11 rights at all. The logic of *Wood* suggests that in neither case can a claim under Article 11 succeed.

A more expansive view, taken by the ECtHR, removes at least some of these difficulties. Measures which result in deterring participation in future assemblies have been held to be within the scope of Article 11. Further, the Court has recognised that state surveillance of

political activities will, *ipso facto*, restrict assembly rights, thus removing the necessity for claimants to provide evidence of the ways in which their rights were infringed.

However, the Court's considerations appear to relate specifically to individual autonomy; there has been no explicit recognition of the less direct, collective harms that may restrict the organisation and mobilisation of assemblies. Further, the recognition that surveillance may restrict individual autonomy appears to be contingent on the surveillance also amounting to a restriction of Article 8 rights.

### Surveillance as protection or restriction

While there are clearly risks to assemblies from police surveillance activities, it is evident that police surveillance is also a useful tool for law enforcement, for the prevention of disorder and for the protection of public safety. Surveillance and intelligence gathering may also be considered helpful for the facilitation of protest, to identify and prevent risk to assembly participants, and to manage police resources effectively and proportionately.

Although the essential object of Article 11 is to protect those participating in assemblies from arbitrary interference by public authorities, there is also a positive obligation to secure the effective enjoyment of those rights, by taking steps to facilitate peaceful assemblies and protect them from the violence of others.<sup>538</sup> The authorities thus have a duty to take appropriate measures with regard to demonstrations in order to ensure their peaceful conduct and the safety of all citizens,<sup>539</sup> including an obligation to take preventive operational measures to protect individuals at risk of serious harm from the criminal acts of other individuals<sup>540</sup>

The duty to prevent and detect crime, and to prevent violence and disorder, may therefore arise in relation to a positive duty to protect assembly freedoms under Article 11(1) as well as in relation to the proportionality and necessity of state actions under Article 11(2). The stage at which the courts evaluate state actions is clearly pivotal. While state actions which constitute an interference with assembly rights require justification under Article 11(2), the same will not necessarily be true for state actions taken under the positive duty to protect rights under Article 11(1). Much will depend, therefore, on whether the courts interpret surveillance as a measure for protecting assembly rights, or a measure which constitutes an interference with those rights.

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<sup>538</sup> Djavit An v Turkey (2005) 40 EHRR 45 [57]

<sup>539</sup> Kudrevičius and others v Lithuania (Application no. 37553/05) 15 October 2015 [159]

<sup>540</sup> Austin v United Kingdom (2012) 55 EHRR 14

We have seen, however, that the courts (Strasbourg or UK) have been very reluctant to recognise that surveillance may be harmful to assembly rights in isolation. In most cases, surveillance is considered as a potential harm only to privacy rights. In those limited circumstances in which surveillance has been held to amount to a restriction of Article 11, this appears to be contingent on their also being an interference with Article 8. In the absence of privacy harms, therefore, the courts are likely to conclude that there is no harm to assembly rights arising from surveillance activities. As a consequence, surveillance is most likely to be considered as a positive means of supporting assembly rights (which clearly, is not required to be justified as necessary or proportionate).

There are a number of instances in which the courts have appeared to work on the assumption that overt forms of surveillance (which do not contravene Article 8) are innately *a good thing*, the proportionality of which does not need to be examined. In *Kudrevičius*, for example, the Court noted the importance of taking preventive security measures, and that the authorities should be granted 'wide discretion in the choice of the means to be used' to ensure the peaceful conduct and the safety of all citizens.<sup>541</sup> The Court in *Austin v UK* noted the value of 'information and intelligence' in relation to the policing of protest, and commented on the need for innovation and 'new policing techniques' to deal with scenarios in which 'advances in communications technology had made it possible to mobilise protesters rapidly and covertly on a hitherto unknown scale'.<sup>542</sup> It is perhaps useful to note that the use of 'information and intelligence' in this case included surveillance measures designed to identify 'groups and/or individuals who were suspected of organising May Day 2001' (although there was no evidence of violent intent), and the 'use of overt intelligence gathering, for example at openly publicised protestors' meetings or meetings of sympathetic organisations' for the purpose of 'preventing disorder'.<sup>543</sup> *Austin* was not directly concerned with surveillance, but it is notable that such actions were noted approvingly by Mr Justice Tugendhat at first instance, and attracted no judicial criticism at any later stage of the proceedings.

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<sup>541</sup> *Kudrevičius and others v Lithuania* (Application no. 37553/05) 15 October 2015 [159]

<sup>542</sup> *Austin v United Kingdom* (2012) 55 EHRR 14

<sup>543</sup> *Austin and another v Commissioner of Police for the Metropolis* [2005] EWHC 480 (QB). At [198] Justice Tugendhat listed all the surveillance measures that were utilised at the protest in question. This included covert and overt surveillance, as well as a number of deliberately disruptive police actions, which included attempts to: prevent the printing of flyers promoting the protest; discourage companies from hiring audio equipment to the protest organisers; and the eviction of squatted buildings used for protest-related activities including accommodation.

In *Catt*, however, the Supreme Court was directly concerned with a consideration of harms arising from surveillance. Here the court found that the surveillance in question had amounted to an interference with Article 8 (1); therefore the court was required to assess the necessity and proportionality under Article 8(2). However, as the court appeared to work on the assumption that surveillance was inherently beneficial to peaceful protest, and resulted only in a ‘minor’ interference with Article 8 rights, little in the way of justification was necessary. Lord Sumption noted,

The proper performance of these functions is important not only in order to assist the prevention and detection of crime associated with public demonstrations, but to enable the great majority of public demonstrations which are peaceful and lawful to take place without incident and without an overbearing police presence.<sup>544</sup>

The fundamental flaw in this argument is, of course, that the effect of surveillance on the freedom of peaceful protest as guaranteed under Article 11, is not necessarily positive. In the absence of a suitable framework for understanding surveillance harms, and consequently for acknowledging the restrictive impact of surveillance on assembly rights, judicial reasoning will be skewed. Overt police surveillance is likely to be perceived as a positive measure for protecting assemblies, and not as a potential interference and restriction of fundamental rights that requires justification.

### Conclusion

In the absence of an appropriate framework for recognising assembly harms, the courts cannot properly carry out the balancing of opposing interests that is invariably involved in claims relating to assembly rights. Nor can the courts properly formulate a view on the conditions in which surveillance may be beneficial for the assembly rights: for example when used to protect protesters from harm (i.e. from counter-protesters or others hostile to their cause). What is required is a more sophisticated framework for understanding surveillance harms, that provides a more effective gauge of harms arising both to public privacy, and to public protest. The conceptions presented here, and in Chapter 3 are intended to provide a potential basis for such a framework. Underlying both, however, is the necessity to distinguish between surveillance which is generalised and responsive and transient, rather than individualised, pre-emptive and sustained.

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<sup>544</sup> *Catt v Commissioner of Police of the Metropolis* [2015] UKSC 9 [30]

The taxonomy of surveillance harms, set out above, demonstrates the complexity and range of harms that may arise from overt police surveillance practices in the context of political protest. These harms arise, as we have noted, from a particular type of surveillance: that is not generalised, but focused on identified individuals or groups; that is not responsive but pre-emptive and pro-active; and which is concerned not with preventing crime, but with mitigating risk.

In the context of political assemblies, this type of surveillance may create significant structural and relational harms to assembly mobilisations, constraining protest actions and undermining mobilising processes. Surveillance can make the process of creating protest more difficult, not merely by limiting individual autonomy, but by constraining and inhibiting those aspects of social movements that are critical to its development and growth, thus suppressing the capacity (real and perceived) of the social movement to have influence on policy-makers and society more broadly. Surveillance undermines solidarity, enhances divisions, and constrains communication (both internal and external); restricts access to resources; and ultimately represses belief in the utility of protest as a means of attaining social change.

This does not mean, of course, that the effect of surveillance is necessarily cataclysmic: social movements have proved adept at resisting surveillance measures and mitigating their effects.<sup>545</sup> Such measures are likely only to have limited success, however, and social movements struggle with the trade-off that often arises between protecting privacy, while maintaining openness and accessibility.<sup>546</sup> The risk to political freedoms from surveillance should not be underestimated: this study demonstrates that surveillance may interfere with, disrupt and inhibit all of the key elements of social movement mobilisation. It is not possible, in this context, to measure harm as outcomes: it is not possible to tell, in any one case, whether a movement declines as a result of police intervention, or as a result of the normal cyclic pattern of social movement activity. What we can identify, however, is the extent to which surveillance is used in a manner which impedes structural, relational and organisational activities.

To this end, a judicial reliance on the framework of privacy for resolving questions about surveillance harms in the context of protest is neither sufficient nor appropriate.

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<sup>545</sup> Torin Monahan, 'Counter-Surveillance as Political Intervention?' (2006) 16(4) *Social Semiotics* 515

<sup>546</sup> Peter Ullrich, and Philipp Knopp, (2018) 16(2) 'Protesters' Reactions to Video Surveillance of Demonstrations: Counter-Moves, Security Cultures, and the Spiral of Surveillance and Counter-Surveillance. *Surveillance & Society* 183

Surveillance is a powerful influence; and may be capable of restricting assemblies as effectively as more ‘traditional’ forms of policing practice. The failure to recognise this potentially renders human rights ineffective as a means of protecting assembly rights in the modern surveillance age.

## Thesis Conclusion

This thesis has set out to critically examine the legal framework in relation to state surveillance (specifically 'overt' surveillance) of public protest and political assemblies. It has taken a socio-legal approach, drawing upon academic literature from the fields of privacy, surveillance, and social movement studies, and contrasting legislative and judicial approaches to surveillance with the experiences of those who are subject to it.

What emerges most strongly from the doctrinal analysis undertaken here, evaluated in the light of empirical data, is the inadequacy of the current legal framework at recognising the complex matrix of harms that may arise from surveillance activities, notwithstanding that they take place 'visibly' and in the public domain. There is a tendency amongst the judiciary (and legislature) to take an over-simplistic approach to overt surveillance, and to see it merely as a form of 'public observation', a passive activity concerned only with observing and recording information already within the public realm.

On this conception, overt surveillance is 'harmless': it involves only the police watching, and possibly recording, that which can be watched or recorded by any member of the public. It therefore requires no specific or clearly defined police power; nor does it intrude either on privacy or freedom of assembly. Such reasoning is based on the assumption that protesters have, by the very nature of their activity, sought to place themselves in the public sphere, and have deliberately and sought public attention, they can have no reasonable complaint when the state does indeed, pay attention. Only those who have 'something to hide' will have reason to worry.

This conception of overt surveillance, in the context of its use in public protest, is fundamentally misconceived. It disregards the capacity of such surveillance to shape and influence the activity it monitors (and thus, to interfere with individual agency). It also fails to recognise that individual mechanisms of surveillance, such as cameras, do not exist in isolation, but within a broader assemblage of surveillance measures which includes covert tactics and police infiltration. It is also takes place within a coercive public order environment, as part of a 'repertoire of control' – a milieu of operational policing strategies that includes the implicit (and sometimes explicit) threat of the use of force. That reluctance to view overt surveillance in relation to its role in pre-emptive and preventive police actions, seeing it simply as a 'minor' interference with privacy rights, means, as Steiker has recognised, judicial consideration of police preventive strategies 'often fail to

place the issue within the larger framework of preventive policing and thereby underestimate the harm to individuals that can result<sup>547</sup>.

This thesis posits an alternative framework for the judicial evaluation of surveillance harms. It suggests a pluralistic approach which is capable of recognising the complex matrix of surveillance practices and resultant harms that arise, and is therefore able to acknowledge the impact that surveillance may have on both individual privacy and collective assembly rights. In adopting a methodology proposed by Daniel Solove, this thesis addresses surveillance harms (including but not confined to privacy harms) from the 'bottom up', seeking not to develop a universal conceptualisation of surveillance or privacy, but to examine problems of surveillance and privacy from a particular perspective: that of political protest and assembly.

Central to the analysis of surveillance in this thesis is the concept of *risk*. Interviewees for this study were selected on the basis that they were involved in social movements or protest groups that were assessed as posing a form of 'risk'; it was their association with 'risk' groups that determined the type and intensity of surveillance they were subjected to. Risk is not identical with danger or threat: unlike the judicial concept of suspicion, there is no requirement for the police to establish 'reasonable grounds' for the designation of 'risk' status; and unlike the concept of danger or threat, there is no necessity for 'risk' to be connected to a tangible act or intent. Risk shifts the focus of police action, as Krasmann has noted, from an identified concrete or real danger to an anticipated prevention or pre-emption, in which risk is identified through probabilistic means, or through an association with a pre-defined 'risk' group.<sup>548</sup>

Risk evaluation is a form of what Lyon has termed 'social sorting'.<sup>549</sup> Surveillance as social sorting does not merely watch, but actively 'sorts', manipulating data to 'plan, predict, and prevent' through the construction of profiles and classifications. The consequences for an individual of being subject to 'social sorting', Lyon notes, may be profound, and may 'directly and indirectly affect the choices and chances of data subjects'.<sup>550</sup> Social sorting often involves the use of advanced information technologies: the processes of institutional

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<sup>547</sup> Carol S. Steiker, 'The Limits of the Preventive State' (1998) 88 *J. Crim. L. & Criminology* 771

<sup>548</sup> Susanne Krasmann, 'The enemy on the border: Critique of a programme in favour of a preventive state' (2007) 9(3) *Punishment and Society* 301

<sup>549</sup> David Lyon, 'Surveillance as social sorting: Computer codes and mobile bodies' in *Surveillance as Social Sorting: Privacy, risk and discrimination* (ed) (2003 Routledge),

<sup>550</sup> David Lyon, 'Surveillance as social sorting: Computer codes and mobile bodies' in *Surveillance as Social Sorting: Privacy, risk and discrimination* (ed) (2003 Routledge), 13

'sorting' have, as Lyon has noted, 'received a major boost from modernity, with its analytical, rationalising thrust'.<sup>551</sup> It is important to remember, however, that classification and 'social sorting' may not always be technologically or data-based. Categories of 'dangerousness' may be applied for subjective, political or policy reasons.<sup>552</sup> protesters who challenge government policy, or disrupt private interests, may find themselves assigned with a categorisation of 'domestic extremism' that is not reflective of their propensity for violence or criminality.<sup>553</sup>

In this context, surveillance is not concerned only with generalised watching, but with active differentiation. Surveillance is not merely a mechanism or an 'act' of observation, but an iterative process which involves the identification of 'risk populations' as well as their management and control. In the sphere of public order policing, a key consequence of a 'risk' designation is being subject to an altered policing environment. A categorisation of 'risk' attached either to an individual, group, or a protest event, carries implications for the way that individual or group, or a protest event is policed. Policing of a 'risk event' may become more 'robust': conditions and restrictions may be imposed; increased police resources may be deployed; tolerance for transgressive behaviours may be reduced.

A 'risk' designation in the context of political protest is likely to result in the relevant individual or group being subject to different types and intensities of surveillance. The aim is not merely to 'watch' or to obtain information (which in turn may be utilised for further 'risk' evaluation); rather, surveillance fulfils the function of rendering the subject more *visible* that those that surround them, and thus subject to an intensity of scrutiny that does not attach to 'non-risk' actors. Further, when it is overtly carried out, surveillance has the effect of enhancing the visibility of the subject, not merely to the state, but to all observers including other protesters and the general public. In such circumstances it is not merely the subject who is rendered visible, but their categorisation of 'risk'.

As Foucault has convincingly established, it is through its visibility that surveillance derives its disciplinary effect. Surveillance does not result merely in a person being 'seen', but also that a person is individualised and differentiated from those around them.

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<sup>551</sup> David Lyon, 'Surveillance as social sorting: Computer codes and mobile bodies' in *Surveillance as Social Sorting: Privacy, risk and discrimination* (ed) (2003 Routledge) p21

<sup>552</sup> della Porta D, 'Social Movements and the State: Thoughts on the Policing of Protest' in D McAdam, JD McCarthy, MN Zald (eds) *Comparative Perspectives on Social Movements* (CUP 1996)

<sup>553</sup> Rob Evans, Paul Lewis and Matthew Taylor, 'How police rebranded lawful protest as 'domestic extremism'' *The Guardian* 25 Oct 2009

By the effect of backlighting, one can observe from the tower, standing out precisely against the light, the small captive shadows in the cells of the periphery. They are like so many cages, so many small theatres, in which each actor is alone, perfectly individualised and constantly visible.<sup>554</sup>

Visibility, as Brighenti has argued, ‘lies at the intersection of the two domains of aesthetics (relations of *perception*) and politics (relations of *power*)’.<sup>555</sup> Visibility, as a means of power, functions in various ways in the public sphere. It is visibility which provides actors in the public sphere with the power to make change, by enabling collective action in word and deed.<sup>556</sup> The public sphere is thus a sphere of visibility: protest does not take place in secret, behind closed doors, but in the glare of public attention. It is for this reason that it is often concluded that surveillance cannot be harmful: it renders visible only that which is already visible.

This is, however, putting the matter too simply. Brighenti draws attention to different thresholds of visibility: below a threshold that Brighenti calls the threshold of ‘fair visibility’, people are unnoticed, unremarked upon and thus largely invisible. On the other end of the spectrum, Brighenti notes, is a zone of ‘supra-visibility, or super-visibility, where everything you do becomes gigantic to the point that it paralyses you.’<sup>557</sup> The zone of ‘super-visibility’ is a counter-point to Goffman’s conception of civil inattention: surveillance functions not merely as a means of general observation, but a means of enhancing and exaggerating visibility. The overt surveillance measures to which the interviewees in this study were subject – whether an ‘in-your-face’ camera or being addressed by name – resulted in a heightened and individualised visibility by which they were ‘picked out’ of the crowd and rendered more susceptible to the disciplinary effects of surveillance.

Visibility is thus asymmetric. Visibility, as Brighenti notes, involves a relational quality, in which seeing and being seen are intimately connected, but not necessarily equal or reciprocated. He notes,

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<sup>554</sup> Michel Foucault, *Discipline and Punish* (Alan Sheridan tr, Penguin 1991) 200

<sup>555</sup> Andrea Brighenti, ‘Visibility: A Category for the Social Sciences’ (2007) 55(3) *Current Sociology* 323, 324

<sup>556</sup> Hannah Arendt, *The Human Condition* (2nd edn University of Chicago Press 1998)

<sup>557</sup> Andrea Brighenti, ‘Visibility: A Category for the Social Sciences’ (2007) 55(3) *Current Sociology* 323, 324

‘In an ideal setting, the rule is that if I can see you, you can see me. But things are not that simple: the relation of visibility is often asymmetric; the concept of intervisibility, of reciprocity of vision, is always imperfect and limited’.<sup>558</sup>

While those who are subject to surveillance are rendered ‘super-visible’, the regime of surveillance itself recedes into opacity. While the mechanism of surveillance – the camera, the notebook, or even the human eye – may be visible, the power of surveillance to differentiate and to discipline resides in what lies behind that mechanism. The positioning of surveillance, not only within the broader assemblage of surveillance, but within the overall ‘repertoires of control’ that are deployed in a public order scenario, is critical to its function, but is normally concealed, opaque and uncertain.

The conception of surveillance as a ‘harmless’ presence in the public sphere relies on a reciprocal visibility; overt surveillance may be considered to pose no real harm because it monitors the visible realm by means which are themselves visible. The regime of surveillance is, however, at best only partially visible: it is a looming iceberg, the larger part of which remains out of view. Those subject overt surveillance know they are being photographed and filmed; they are often, as we have seen, informed that they are being, or have been identified; they are accompanied conspicuously by uniformed police officers. The mechanisms by which they arrived at this point: the criteria employed for the designation of risk; and the relationship between that designation and the decision-making and command structure of public order policing, is far from evident. Nor are those subject to surveillance intended to know how their visible monitoring interacts with covert, hidden measures also in play.

Surveillance subjects, as we have seen, do not always experience surveillance as harmless. Surveillance may in fact result in a complex matrix of harms arising not from ‘being watched’ *per se*, but from physical intrusions, identification processes, and persistent monitoring. In this study social movement actors were stopped and searched; coercive measures were used to obtain their identity; they were photographed not from a discreet distance, but close-up and individually; they were questioned; they were recognised and addressed by name by police officers they did not know; their movements, associations and behaviours were not simply seen in passing, but were subject to sustained and individual scrutiny that persisted over time and across different geographical locations; and

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<sup>558</sup> Andrea Brighenti, ‘Visibility: A Category for the Social Sciences’ (2007) 55(3) Current Sociology 323, 326

they were individually followed and accompanied by uniformed police officers during demonstrations and beyond. They described these measures as intimidating, as ‘harassment’ and as ‘bullying’; and some experienced as a result significant emotional and psychological harm.

A primary function of surveillance is its disciplinary effect; the measures that interviewees were subject to were intended to heighten and maximise that effect. This is the very essence of the Panopticon, as formulated by Bentham: its capacity to encourage and sustain self-discipline and self-restraint, making the application of force unnecessary.<sup>559</sup> From a utilitarian perspective, surveillance ticks all the boxes: maximising the disciplinary effect of state actions, while minimising resources and the use of force.<sup>560</sup> Foucault notes,

[s]o it is not necessary to use force to constrain the convict to good behaviour, the madman to calm, the worker to work, the schoolboy to application, the patient to the observation of the regulations ... He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.<sup>561</sup>

Surveillance thus impedes autonomy. Exposed to visible surveillance, the social movement actor, unsure of the coercive nature of their environment, of the operation of legal norms, or of the exercise of police discretion, may take fewer risks, and may impose on themselves a level of constraint that may be greater than would otherwise be enforced. This is an effect we have seen in Brenden’s case, for example: the impact of being personally and individually followed by police intelligence officers and cameras was that he felt unable to participate in acts of civil disobedience which were (in that instance) tolerated by police.

The disciplinary effect arises both from the potential or actual discipline of the state (through intrusive practices) and by the internalisation of discipline through the encouragement of self-discipline and self-policing. As Foucault has noted, however, the disciplinary effect of surveillance arises not merely from our ability to internalise state

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<sup>559</sup> Ivan Manakho, (2018) 16(2) ‘Surveillance, Panopticism, and Self-Discipline in the Digital Age. Surveillance & Society’ 219

<sup>560</sup> Jeremy Bentham The Panopticon Writings (Verso 1995). See also John Howard, The State of the Prisons in England and Wales: With Preliminary Observations ... (1777, Warrington), 72

<sup>561</sup> Michel Foucault, *Discipline and Punish* (Alan Sheridan tr Penguin 1991) 202,203

discipline and impose it on ourselves, but also from our capacity to channel, reproduce and impose this discipline on those around us.

‘for although surveillance rests on the individuals, its functioning is that of a network of relations from top to bottom, but also to a certain extent from bottom to top and laterally; this network ‘holds’ the whole together and traverses it in its entirety with effects of power that derive from one another: supervisors perpetually supervised.’<sup>562</sup>

As a result of its visibility, surveillance impedes both individual and collective autonomy. Surveillance which is evident and conspicuous attracts negative attention, not only from state actors, but from other protest participants, and from the broader public. As a result, surveillance stigmatises and alienates, distracts and disrupts, fosters division and undermines solidarity. It frames social movement actors as troublemakers or ‘dodgy people’<sup>563</sup> thus disrupting various essential aspects of social movement mobilisations, including communication and frame-alignment, capacity for collective action and access to resources. Surveillance, in its propensity to individualise and alienate, is fundamentally disruptive of collective behaviours. Those confronted with surveillance are, as Toby’s testimony has illustrated, forced to make a choice: to align with those who are presented as ‘militant’ or even ‘criminal’ and thus be similarly labelled and categorised; or to engage in self-censorship by constraining their behaviour and limiting their associations.<sup>564</sup>

The current legal framework appears unable to recognise the way in which surveillance enhances visibility, and the harms that thereby result. By viewing overt surveillance as being merely equivalent to public observation, the courts have tended to conclude *a priori* that the visible surveillance of the public realm by state actors will not, in itself, cause harm.

This tendency is most evident in the failure to provide a clear basis for overt surveillance in statute or common law. The police and courts have uncritically assumed or asserted a legal basis for such surveillance in the common law, with little examination or explanation either of its development or the scope of discretion available to state actors. It is not clear whether the police are relying on a residual liberty to do that which is not forbidden; or a positive common law power. If the latter, it is very far from clear what that power consists

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<sup>562</sup> Michel Foucault, *Discipline and Punish* (Alan Sheridan tr Penguin 1991) 175

<sup>563</sup> See Esther’s testimony p167: she reports that surveillance made them look like ‘dodgy’ people being pursued by police.

<sup>564</sup> See Toby’s testimony p113: he described surveillance as divisive, exacerbating differences by forcing a dichotomy between ‘liberals’ and ‘militants’

of, or how much discretion the police have in determining its use. The general assumption of the courts appears to be that overt surveillance is simply something the police have always done, and which forms a central plank of their duty (and power) to prevent crime.

The reasoning is explicable only on the basis that they have reduced the concept of overt surveillance to the use of visual observation and record keeping. As chapter 2 illustrates, there are undoubtedly aspects of what we may term 'surveillance' that are integrally embedded in policing practice as it has emerged since the 13<sup>th</sup> Century. The 'original' constable 'set the watch' so that he may be alerted to emerging threats or dangers, or respond to incidents of criminality or disorder. The early uniformed police officer also 'worked his beat' keeping watch over public places, to deter criminals, or respond to incidents. Police forces have always made use of bureaucracy and record-keeping, making and keeping notes of allegations, incidents, investigations, prosecutions and convictions.

A common law power to keep watch and keep records, however, cannot equate to a common law power to engage in risk-driven pre-emptive surveillance, of the kind that results in the kinds of harm documented in this study. The failure to develop the common law so that it defines the scope of police powers for overt surveillance has resulted in a largely unconstrained discretion on the part of the police, to determine how, when, and against whom, overt surveillance measures are deployed.

Given the broad common law legal basis of overt surveillance, it falls to the application of the human rights framework to constrain police discretion in the use of overt surveillance. Here too, however, potential claimants come up against the difficulty of establishing harm. In considering the application of privacy to the surveillance of public space, both UK courts and ECtHR have adopted the same starting position: simply being observed by others (whether state actors or members of the public) in a public place will not, in itself, be considered to amount to an interference with privacy rights.

The UK courts have adopted a narrow, (largely) locational approach to privacy, which recognises only a narrow spectrum of 'privacy harm'. The domestic courts have placed emphasis, in determining the applicability of privacy rights, on whether a person has, in all the circumstances, 'a reasonable expectation of privacy'. In applying this test, they have attached particular weight to the location of the activity and the nature of the subject's activities. In determining the harm arising from state surveillance activities therefore, the focus has been on whether the surveillance activity intrudes into the 'inner circle' of a person's life (such as their home) or is capable of obtaining sensitive, confidential or other

essentially 'private' information. The surveillance of public protest, as a public activity, is unlikely in itself to engage privacy rights.

The ECtHR has adopted a more expansive approach to privacy, which is less constrained by the public/private dichotomy. Having acknowledged the relevance and value of privacy rights in the public realm, the Court has attempted to find a means of delineating and differentiating mere public observation from state surveillance activities which may present a threat to human rights. It has held that simply being filmed or photographed by state actors, in a public place or during a public protest will not interfere with privacy rights; privacy rights may become applicable however, if the surveillance results in the collection and retention, in state information systems, of personal data.

From the perspective of the protester, this is a more helpful approach, not least because it places the focus (in determining the applicability of privacy rights) on the actions of the state, rather than the subject. It is, in the conception of privacy adopted by the ECtHR, the act of collecting data that determines privacy harms, and its consequences, not the location or activity of the subject.

However, even this conception fails to fully capture the sorting and disciplining effects of surveillance regimes. It is undeniably the case that data collection and retention play a central role in surveillance regimes, including the overt surveillance of public protest.

Although social sorting does not necessitate the collection and retention of personal data, it is clear that the collection and processing of such data is an integral aspect of 'risk' designation, thus steering, facilitating and enabling the deployment of overt surveillance mechanisms.

The empirical data illustrates that a focus on where the surveillance occurs, whether or not there is a reasonable expectation, or indeed on data retention itself, offers insufficient recognition of the range of privacy harms that arise in this context. An initial difficulty, from a practical and evidential perspective, is that of demonstrating that data has been both collected and retained in police information systems. This aspect of surveillance is, at best, only partially accessible or visible to surveillance subjects. Further, it is not entirely clear what constitutes *retention*: there is a considerable difference between the collection and retention of personal data in a police notebook, and the systematic retention of personal data in a searchable police database, potentially shared between different police units and state agencies.

There is, however, a more fundamental problem with an approach which elevates the retention of data as the primary (if not the only) means of distinguishing ‘harmful’ surveillance from ‘harmless’ or normal public observation. Surveillance is best understood not merely as a collection or retention of data but as a chain or cycle of linked activities.<sup>565</sup> It is not simply that the isolated parts of the surveillance process – collection, retention, analysis, dissemination or use – poses potential for harm, but the accentuating power of those factors in combination. Again, the atomised approach taken by the judiciary fails properly to capture the full harm. The association between data retention, risk designation and pre-emptive surveillance is neither straightforward nor linear. Surveillance does not, as we have seen, necessarily involve data collection, much less data retention. Similarly the designation of a person as ‘risk’ is not necessarily made on the basis of the analysis of personal data, but may arise simply because that person is involved in a demonstration or protest designated as ‘risk’, or has been associated with a ‘risk’ individual. Risk designations are not necessarily made on an individual level, but may also attach to an event, groups, or potentially an entire social movement. A person may therefore be operationally treated as ‘risk’, and consequently subject to pre-emptive and individualised surveillance simply because they have attended a particular event, even if there has been no collection, retention or analysis of their personal data. While ‘harmful’ overt surveillance is related to data retention, the harmfulness of a particular surveillance mechanism is not determined by whether or not it involves the collection and retention of data, but by the preceding categorization of risk and the subsequent actions undertaken by the State.

The taxonomy of protest-privacy harms, developed in this thesis, provides a basis for the development of an alternative framework for the recognition and acknowledgement of harms arising from overt surveillance. The framework builds upon Solove’s taxonomy, which conceptualises four types of privacy problem: information collection, information processing, information dissemination, and invasion. It is this final category, which focuses on non-informational harms relating to invasions, that this thesis has expanded and elaborated. Solove here suggests two sub-categories: intrusion and decisional interference. This thesis has, however, provided an alternative sub-categorisation, relating to intrusions, identification, and persistent monitoring.

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<sup>565</sup> P Gill and M Phythian, *Intelligence in an Insecure World* (Polity Press, 2012) 10

The first of these, intrusion, relates to the unwanted physical proximity or presence of state actors. The concept that privacy is lost through the unwanted proximity of others is not new; intrusion is however, something that may be considered relevant to the private rather than the public domain. It is uncontentious that the unwanted intrusion of others into our homes or other 'private' areas will amount to an interference with privacy. The experiences of interviewees demonstrated however that a loss of privacy was experienced when state authorities used either coercive powers or their authoritative status to gain a level of proximity which was a) bodily invasive (i.e. involving physical contact or the bodily search); b) uncomfortably close such that it was perceived as threatening or intimidating; or c) involve the intrusion of state actors into space that was used collectively for 'private' purposes such as eating, sleeping, or social interaction.

The data suggests that in considering privacy harms arising from intrusions, relevant considerations include not only the extent of the intrusion, or the location in which it takes place, but also the identity of those who instigate the intrusion. State actors in this respect are unlike members of the public, because they have a monopoly on the legal use of force and unique access to coercive powers. Even if coercive powers are not expressly used, the police have a level of authority that derives from their coercive status, and which is distinct from ordinary citizens.

The second of the three harms, identification, has long been recognised as an important feature of individual privacy. Identification is clearly distinct from general observation: it removes from us the protection of public anonymity that, as Larsen has noted, is a 'condition of modern life'.<sup>566</sup> Identification, in the context of the surveillance of political protest, is a process by which identity data (a name) is obtained through various means (including questioning, searching, or some means of research) and retained, usually along with a photographic image. The subsequent dissemination of this data enables police to recognise 'risk' individuals at different events, at different times, and different geographic locations. Identification is also an essential element of 'risk' designation, as Solove has noted, as it is through the application of identity that disparate pieces of personal data may be collated, aggregated, and 're-attached' to the person in the flesh.<sup>567</sup> Solove thus categorised identification as a harm arising primarily from the processing of information.

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<sup>566</sup> Beatrice von Silva-Tarouca Larsen, *Setting the Watch: Privacy and the Ethics of CCTV Surveillance* (Hart 2011) 24

<sup>567</sup> Daniel Solove, *Understanding Privacy* (HUP 2009)

Identification harms may arise however, in circumstances in which data is not retained or disseminated: in Ricki's case, for example, privacy harms arose from the disclosure of identity data, revealing Ricki's transgender status, regardless of whether the disclosed data was subsequently retained.

Identification harms are considered separately here from informational harms, because the harm involved cannot be adequately conceptualised as informational. Being recognised, and addressed by name, by a police officer they did not know, was the surveillance activity that was most consistently and frequently flagged by interviewees. It was not simply the fact that the police had obtained and retained their details that interviewees objected to; rather it was the way this information was used to communicate to them, in a noticeable and often a conspicuously public manner, that they were the subject of police attention. Although the privacy harms arising were related to informational autonomy harms, harm primarily arose through the use of identification as a means of enhancing visibility: a way of making sure the surveillance subject knew they were being watched, and had no recourse to public anonymity.

The third of the three harms, persistent and sustained 'watching' fell into two categories: the consistent monitoring of certain types of activity, such as mobilisation planning meetings; and the sustained monitoring of an individual during (and often after) a political assembly or demonstration. This form of surveillance, like those above, was related to information collection; the collection of data over time provides a means of constructing a personal profile and contributes to classification and categorisation. Once again, however, it is important to note that the privacy harms experienced often arose independently from and in the absence of data collection.

The persistent and visible supervision of an individual by uniformed police officers, during and after demonstrations, acted as a significant restriction on individual autonomy. Interviewees described feeling isolated and alienated by this practice, compelled or obligated to distance themselves from others both because of stigmatisation, and the fear of compromising the privacy or autonomy of fellow activists. The use of 'forward intelligence teams' in this way was considered to amount to harassment, and was said to have been the cause of significant emotional and psychological harm.

Persistent monitoring, while it relates to perceptions of intrusion, is considered to form a distinct category as particular harms arose as a result of the duration of the surveillance, or its frequency and regularity. Once again privacy harms cannot be adequately

conceptualised as being informational: it was not merely the capacity for collecting information that made this form of surveillance particularly harmful, but the extent to which (and the period of time over which) this form of surveillance magnified and enhanced the subjects' *visibility*.

This taxonomy of what may be termed protest-privacy harms provides a possible basis for a legal framework of privacy which extends beyond the public-private dichotomy and an over-reliance on information harms, and which is capable of recognising a broader range of privacy harms. The pluralistic conception of privacy that has been adopted by the ECtHR provides a potential mechanism of doing this. While the ECtHR has considered surveillance-related privacy claims primarily in terms of data collection and retention, it has also shown signs of a willingness to apply other conceptions of privacy: in *Gillan*, for example, it recognised privacy harms arising in the context of a stop and search, in the absence of data collection or retention.<sup>568</sup> In general terms, (although not always in the context of surveillance), the ECtHR has also recognised privacy rights as incorporating not merely informational autonomy, but a right to autonomy, physical and psychological integrity, identity and (tentatively) anonymity.

These aspects of privacy provide an alternative means of distinguishing between 'normal' public observation and 'harmful' surveillance, in those circumstances where a framework constructed around informational autonomy is inappropriate or unsuitable. Such a framework would recognise the capacity of overt surveillance to create a regime of, in Brighenti's words, 'super-visibility' which is capable both of restricting autonomy and curbing political freedoms.

It may be the case however, that the privacy framework alone is insufficient for fully recognising surveillance harms. The impact of surveillance on assemblies, in particular its effect on mobilisation processes, is such that the harms arising from surveillance cannot simply be conceptualised as privacy harms. In addition to a taxonomy of privacy harms, this study also presents an alternative taxonomy of harms arising in the context of assemblies.

Surveillance is often recognised as having a potential 'chilling effect' on political protest. While privacy has been the subject of considerable academic investigation, far less attention has been paid, in socio-legal literature, to the task of 'unpacking' and

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<sup>568</sup> *Gillan & Quinton v United Kingdom* (2010) 50 EHRR 45

investigating the ways in which surveillance ‘chills’ public assemblies. While the ‘chilling effect’ has had some judicial recognition, it has not been considered to be, in any substantial sense, distinct from privacy harms; rather, although it has not been fully articulated, there appears to be an assumption that the chilling effect consists of the aggregation of privacy harms, experienced in a collective setting. In *Segerstedt*, for example, the ECtHR suggests that surveillance which violates individual privacy rights may also amount to an interference with assembly freedoms.<sup>569</sup> On this basis, harms arising to assemblies from state surveillance are contingent on those harms being recognised as violations of individual *privacy*.

This approach, it is argued, is over-simplistic: surveillance harms arising in the context of political protests arise both directly and indirectly. While the individual privacy harms may have a collective impact on assemblies (through, for example, the curbing of autonomy), the empirical data presented in this study suggests that surveillance may have a broader, longer-lasting, and potentially more cataclysmic impact on the structure, processes, and cultural dimensions of protest mobilisation. The harms exponentially

Stigmatisation and alienation arising from surveillance was shown to weaken the social and communicative networks on which assembly mobilisations depend, reducing not only participation, but access to social capital and material resources. Surveillance, particularly when both focused and sustained over time, had a limiting effect on participants’ perceptions of political opportunity, undermining essential emotional and cultural elements of surveillance relating to commitment, determination, optimism and hope. Surveillance also disrupted and impeded political processes, including internal organisation and mobilisational tasks, and internal frame development and external frame-alignment. Surveillance thus disrupted mobilisation processes in a direct manner (by distracting attention and diverting energy), but also disrupted protesters efforts to present or ‘frame’ themselves in a positive light, both to themselves and other activists, but to the public more generally. Thus surveillance compromised networks of support, and inhibited solidarity.

These harms may be both cumulative and diffuse – accumulating over time and affecting a larger audience or differently constituted audience than those who were directly subject to surveillance. As a result, the framework of privacy may be an inappropriate framework with which to address these kinds of surveillance harms. A person who is dissuaded or

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<sup>569</sup> *Segerstedt-Wiberg v Sweden* (2007) 44 EHRR 2

deterred from participating in protest (or in a social movement mobilisation) as a result of witnessing the surveillance of others, has not experienced a loss of privacy; they have, however, experienced a restriction of their autonomy, and (at least arguably) a curb on their freedom of assembly.

In a pluralistic, democratic society, the impact on public protest from surveillance measures should not be lightly dismissed. Gillham and Noakes have suggested that surveillance amounts to a measure of 'strategic incapacitation';<sup>570</sup> while Starr et al have commented that surveillance constitutes 'an alarming threat to mobilizations...and social movement organizations'.<sup>571</sup>

The need for a better framework with which to recognise and address surveillance harms is thus not merely conceptual or theoretical, but immediate and urgent. More work needs to be done in this area if we are to develop a conception of surveillance, and surveillance harms, that will allow the courts to properly balance competing interests, and provide appropriate protections for fundamental freedoms – and this thesis is not intended to be the final word. The taxonomies proffered in this thesis nonetheless provide a tentative empirical and conceptual basis for an improved legal framework.

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<sup>570</sup> P Gillham, B Edwards & J Noakes, 'Strategic incapacitation and the policing of Occupy Wall Street protests in New York City, 2011' (2013) 23(1) *Policing and Society: An International Journal of Research and Policy* 81

<sup>571</sup> Amory Starr and others, 'The Impacts of State Surveillance on Political Assembly and Association: A Socio-Legal Analysis' (2008) 31 *Qual Sociol* 251

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