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Policing Protest in a Pandemic

David Mead*

INTRODUCTION

According to the *Daily Mail*, just before the move to a much fuller national lockdown in early November, and re-introduction of bans on outside gatherings of more than two, the Home Secretary Priti Patel ‘briefed chief constables over the weekend to tell officers to enforce the rules’.¹ That is hard to square with longstanding notions of constabulary independence, most notably the well-known dicta in *Blackburn*.² It illustrates well the rather strange, uncharted constitutional waters that we have been in these past six or so months when we consider the topic of protest and the way it is policed.

This paper seeks to sketch out some of the terrain—if waters can have a terrain?—and to offer a few insights. It is in three main parts: an outline of the legal restrictions on ‘gatherings’—covering large-scale, staged protest events such as marches, rallies, demos, sit-ins and occupations—in the various Coronavirus Regulations, then a critique of those rules, followed by a discussion about some of the key policing aspects. This raises the immediate observation of a misplaced focus: ‘Protest as socio-political activity requires an appreciation and comprehension of the small-scale and everyday, a reclaiming of protest from below, to paraphrase E.P. Thompson’.³ Nonetheless, let us consider how the law has treated mass protests this year.⁴

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¹ I Nikolic, ‘Home Secretary Priti Patel will order police to stop protests involving more than TWO people during lockdown’ *Daily Mail* 3rd November 2020 <https://www.dailymail.co.uk/news/article-8907783/Home-Secretary-Priti-Patel-order-police-stop-protests-involving-TWO-people.html> (access on 4th December 2020).

² *R v Commissioner of Police for the Metropolis ex p Blackburn* [1968] 2 QB 118.

³ D Mead, ‘A Seven (or so) Year Hitch: How Has The Coalition’s Pledge To Restore The Right To Non-Violent Protest Fared?’ (2018) 29 *Kings LJ* 242, 244.

⁴ 2020 threw up several other matters worthy of much longer discussion: the Government suggesting that XR should be classified as an organised crime group, a formal report by the Northern Ireland Policing Board that was very critical of the PSNI’s handling of BLM protests <https://www.nipolicingboard.org.uk/sites/nipb/files/publications/report-on-the-thematic-review-of-the-policing-responder-to-covid-19.PDF>, and threats to journalists covering protests under the guise of the Regulations.

'GATHERING': THE EBB AND FLOW

The sheer number of, and frequency in change of, the various lockdown Regulations has posed significant problems, in terms of transparency and certainty.⁵ This raises questions under the HRA: whenever restrictions are imposed on rights the interference must be prescribed by law, as required by Article 11(2). The path of the development of the law on gatherings across England up to the start of December has been in six stages:-⁶

- From 23rd March—2nd July, Reg. 7 banned gatherings of two or more in public places, with certain exceptions.⁷
- From 3rd July—13th September, Reg. 5 banned participation in a gathering of 30 or more in a private dwelling or in certain public outdoor places, with certain exceptions.⁸
- From 28th August, those who held or were involved in holding certain unlawful gatherings of more than 30 have faced fines of up to £10,000.⁹
- From 14th September—4th November, amended Reg. 5 banned participation in either indoor or outdoor gatherings of more than six (unless they were 'linked'), the so-called 'rule of six', with certain exceptions.¹⁰
- From 5th November—2nd December, England reverted to lockdown, albeit at a lower level than in March, with the reintroduction in Regs. 8–9 of the ban on participating in outdoor gatherings of more than two and indoors on gathering with any other person, with certain exceptions. The ban on holding or being involved in the holding of certain gatherings of more than thirty, first seen on 28th August, remained, in Reg.10.¹¹

In each case, the ban was backed up by the creation of an offence of contravening the restriction without reasonable excuse, and enforced by a system of fixed penalty notices (FPNs), originally £60 for a first offence but £200 by November, doubling for each subsequent offence up to £6400. Some of the other important specifics of the Regulations over time include:

- 5 There has been one challenge to the vires of the Regulations: *R v Secretary of State for Health and Social Care ex parte Dolan* [2020] EWCA Civ 1605.
- 6 This article does not consider any difference across the four nations—its focus is England—and nor does it consider more restrictive regional differences in say North-west England. From 2nd December, England was in three tiers: The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (2020/SI 1374).
- 7 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, (2020/SI 350).
- 8 The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (2020/SI 684).
- 9 The Health Protection (Coronavirus) (Restrictions on Holding of Gatherings and Amendment) (England) Regulations 2020 (2020/SI 907).
- 10 The Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020 (2020/SI 986).
- 11 The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 (2020/SI 1200).

- ‘Gathering’ was only defined after three and a half months, in the July Regulations: two or more people present together in the same place in order to engage in any form of social interaction with each other, or to undertake any other activity with each other.
- Various of the Regulations distinguish between different sorts of places—indoors/outdoors or private/public. A key determinant for some of the restrictions on gatherings in public outdoor places—from July if more than thirty, the rule of six from September, and the November provisions on holding or being involved in holding gatherings of more than thirty—is whether or not it has been organised by *inter alia* a political body.¹² If so, the organiser must have carried out a risk assessment and taken all reasonable measures to limit the risk of transmission of the coronavirus, taking into account that risk assessment (and since September also taken account of any government guidance). A ‘political body’ is either a political party registered under Part 2 of the Political Parties, Elections and Referendums Act 2000, or a political campaigning organisation within the meaning of regulation 2 of the Health and Social Care (Financial Assistance) Regulations 2009.¹³
- From September to November, the Regulations specifically exempted gatherings of six or more if the gathering was for the purposes of protest and (i) had been organised by *inter alia* a political body, and (ii) the organiser had, again, undertaken a risk assessment and taken reasonable measures to limit the risk of transmission taking account of both that risk assessment and government guidance. The protest exception was removed from the November ‘lockdown’ Regulations but has been reinstated in those operating from early December.

SOME OBSERVATIONS ON ‘GATHERINGS’

Most readers might now feel a might confused. It could not have been easy in those nine months from March to Christmas to know what sort of (political) gatherings were and were not permitted. Twitter was full during the summer of exasperated lawyers with many years’ experience either struggling to get to grips with the Regulations or patently demonstrating they had not understood them—what chance an 18 year-old climate activist? If that were not problematic enough, on at least one occasion the changes were introduced so late as to make it almost impossible to digest them before they became operative. At 23:48 on 13th September my own search of <http://legislation.gov.uk> did not produce any evidence of the new ‘rule of six’ Regulations, due to have come into force 13 minutes later.

¹² Or a business, a charitable, benevolent or philanthropic institution, or a public body.

¹³ An organisation to promote, or oppose, changes in any law applicable in the United Kingdom or elsewhere, or any policy of a governmental or public authority ... or which could reasonably be regarded as intended to affect public support for a political party, or to influence voters in relation to any election or referendum.

Space precludes an overly long critique of the scope of the Regulations on gatherings, but perhaps four points might illustrate the problems. First, for many months there was no definition of 'gathering'. When one did appear, it did not address the main concern of spatial distance. That is compounded by the second: the disproportionate nature of the £10,000 fine for those who hold or are involved in the holding of an unlawful gathering. The third is that only for the two-month period 14th September—4th November was there any formal recognition of the need to carve out an exemption for those engaged in protest. A specific protest exemption has been included under the latest Regulations.¹⁴ The last is that the restriction on gathering has caused/forced activists to be innovative in the types of protest they carry out. Let us take those in turn, briefly.

When the lockdown restrictions were first introduced in March, we all had to confront what 'to gather' meant as a legal term, specifically how close could A and B be before they constituted a single gathering? Since the Regulations were intended to protect public health—the parent Act from which they (and all subsequent Regulations) derived their authority was s.45 of the Public Health (Control of Disease) Act 1984—and were not about maintaining public order, a reasonable conclusion to draw was that as a matter of legislative construction, if A and B remained 2 m apart, they could not in law be a 'gathering'.¹⁵ That would mean that for any large group of protesters, as long as everyone remained 2 m from anyone else, no one would be committing an offence under the various. Interesting questions might have arisen—of the sort beloved of LLB examiners—if one of the group ventured too close to another protester. Would it only be A who had committed a wrong ... or B too who was now unintentionally nearer than 2 m to someone else ... or if B moved away, nearer to C, what was C's liability? Moreover, and likelier, it would have risked the gathering itself being construed by the police as 'unlawful'—that is, in breach of the Regulations—something the courts have long been at pains to point out is not a concept known to English or European Convention case law. I put it this way, many years ago: 'the determining factor in interfering with or restricting that right is the protest's peaceful [not lawful] quality ...'¹⁶

July brought a welcome indication of what a gathering was: two or more people present together in the same place in order to engage in any form of social interaction with each other, or to undertake any other activity with each other—but does this get us around that earlier problem? It simply substituted a different unresolved question: what is meant by 'in the same place' ... what geo-legal concept is that seeking to convey? In fact, the Regulations disguise the underlying 'true' question which still remains: how close together must A and B be to be considered a gathering? If two environmental

¹⁴ Exception 14 in the various Schedules for each tier, above n6.

¹⁵ My evidence to the Joint Committee for Human Rights explains this in greater detail: <https://committees.parliament.uk/writtenevidence/2881/html>

¹⁶ D Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart, 2010) 416.

campaigners, protesting 10 m apart at the entrance and exit to a petrol station, both with placards, they are in one sense both in the same place but on a purposive health-protection/risk-prevention construction, they are not.¹⁷ Nonetheless, this shows the age-old problem of protest policing in sharp relief: overly broad or uncertain laws imbuing officers with power (or powers being arrogated), ending a demonstration pre-emptively, leaving protesters only with ex post challenges, many months perhaps after the urgency has passed. I suggested, perhaps rather bullishly and idealistically, a decade ago how we might start to address this power imbalance, and I maintain now that it remains one of the most pressing structural problems in the area.¹⁸ We should not have to go to court some months later for a determination on our rights: what is their true scope and what might be proper restrictions?

The fact that it is only those who hold or who are involved¹⁹ in the holding of some protests/gatherings of thirty or more (two or more if held since 5th November)—those in public outdoor places where there has been no risk assessment or not been held by a political party or campaigning organisation—are exposed to the risk of a fixed penalty notice of £10,000 does not obviate the fact that there are questions of proportionality under Art 11 and discriminatory incidence. There is no doubt that only the very wealthy would be able to withstand a £10,000 ‘hit’ and while it would be trite to suggest that the fine is in effect a tax on protesting, there would surely be some room to dispute the fine on human rights grounds, if only because of the likely chill it brings about. In fact, for a few days in November, police forces suspended imposition of the maximum since so many had appealed and had fines reduced by courts to reflect what they could afford. The suspension was lifted only after forces agreed to explain that people could fight it in court.²⁰ That does not obviate the problem. We shall see soon: Piers Corbyn is challenging the legality of the £10,000 fine imposed on him, after he organised an anti-lockdown rally at the end of August.²¹

¹⁷ The phrase ‘undertake any activity together’ affords no protection. A and B would be hard pressed to assert that they were not engaged in protest together, given (we might assume) that weight of numbers, even if only two, is part of the means by which they plan to make their political point.

¹⁸ I suggested that a much speedier system for resolving police-protest disputes was needed. Freedom of expression and privacy are considered of sufficient importance to warrant out-of-hours emergency adjudication by a High Court judge. I was not suggesting something so expansive, merely an ‘on the spot’ ACAS! Mead above n16, 424.

¹⁹ What is the term seeking to convey that is not captured by ‘organise’? Presumably, it takes account of looser, less hierarchical forms of activism—a student occupation?—ones that eschew formal leadership and top-down organising?

²⁰ V Dodd, ‘Police can resume issuing instant £10,000 Covid fines’ *The Guardian* 17th November 2020 <https://www.theguardian.com/world/2020/nov/17/police-chiefs-tell-officers-stop-issuing-instant-10000-covid-fines> (access on 4th December 2020).

²¹ D Gayle, ‘Piers Corbyn fined £10,000 for organising anti-lockdown rally’ *The Guardian* 30th August 2020 <https://www.theguardian.com/world/2020/aug/30/piers-corbyn-fined-10000-for-organising-anti-lockdown-rally> (access on 4th December 2020). He was also charged in June with two counts of breaching the regulations at an anti-5G protest in Hyde Park on 16 May and found guilty of one on 2nd December: O Bowcott, ‘Piers Corbyn found guilty of breaching regulations at lockdown protest’ *The Guardian*

The omission or lack of a specific protest exemption—save for the period 14th September to 4th November—might be thought less troubling.²² A court would, if a case were brought, inevitably read the Regulations as subject to the right in Article 11, the right peacefully to assemble, creating in effect a collateral defence: either utilising a Convention-compatible interpretation under s.3 of the HRA, by reading the ‘reasonable excuse’ defences expansively, or and more drastically (since the legal position is governed solely by Regulations in statutory instruments) arguing that they cannot withstand attack from Article 11 contained in primary legislation.²³

This is only a partial solution, appearing only when a case is brought to court, that is after someone is arrested, and removed from the protest site.²⁴ The more tangible harm is that those who wish to organise or take part in protests, unless significantly wealthy or with access to funds, would likely be dissuaded from doing so because they would see no protection for protest on the face of the Regulations. They would have to know (or know to seek advice) that in all likelihood, such protection would be read in. That does not vouchsafe the protection of rights; it renders them more fragile and indeed, rendered yet more fragile, as we shall see, by the ways in which the police communicate with the public on social media. The fact that protection is offered only to those gatherings held by political bodies, albeit reasonably well defined, is also problematic. It suggests a preference for formal, hierarchical political activism—either through parties or campaigning organisations—over looser, less structured or even one-off protests.²⁵ We might note the dissonance here between ‘organisation’ as part of the definition of a political body and the use of ‘hold’ not organise (see n19) as the key trigger for the fine. For former government lawyer Carl Gardner, the exigencies of the pandemic militate in favour of protecting only those large groups that are able to take proper steps to limit transmission.²⁶ That seems to ignore that fact that a risk assessment is required—why do we further need to restrict protests to those undertaken by *organised* groups?

Last, and perhaps as a reaction to the Regulations, the past few months has seen innovation in forms of protest. Again, this is not especially new.²⁷ Most often this

2nd December 2020 <https://www.theguardian.com/world/2020/dec/02/piers-corbyn-found-guilty-of-breaching-regulations-with-lockdown-protest> (access on 4th December 2020).

22 The term ‘protest’ brings with new definitional problems, given the law’s historic focus on public order not on protest: see Mead above n16, 58–59 for a dated attempt to proffer a working definition.

23 On this, see *Dolan* above n5, [103]–[106].

24 Similar questions were raised by the policing response to the protests at the 2011 Royal Wedding—that it was pre-emptive, deliberately disruptive policing: see Mead above n2, 253.

25 Here, the Regulations adopt the definition of political in ss.321(3) of the Communications Act 2003, the ban on political advertising. While this has been open to criticism on the grounds that it captures too much activity that would not ordinarily be thought of as political—see e.g. *R (oao London Christian Radio) v Radio Advertising Clearance Centre* [2013] EWCA Civ 1495—here, that over inclusivity benefits activists.

26 <https://twitter.com/carlgardner/status/130020688928908034?s=20>

27 See the inclusion of specific protection of and reference to the right to assemble on-line in UN General Comment 37, July 2020.

took the shape of maintaining distance—such as the marchers in Brighton in June²⁸ or the ‘400 socially distanced musicians [who] play[ed] outside the House of Parliament in a powerful music protest’.²⁹ Others have taken the form of ersatz protests, with virtual representations and/or non-human presence.³⁰ In Hove in July, 44,802 numbered pebbles were left on the promenade lawns, that being the number of recorded COVID deaths at the time.³¹ In October, the constituency offices of many Conservative MPs featured piles of plates, symbolising the free school meals they had denied others over half term.³² Many others moved on-line or largely so, with only a limited physical presence at a venue, livestreamed. Manchester University students at the Fallowfield campus on 12th November moved their planned protest about student fees on-line following a call from the police ‘threatening arrests and fines’ for those attending it.³³ This was also certainly so of many BLM protests in early June, such as the one in Norwich where I live but my personal household experienced one of the issues said to be problematic for on-line activism: logistical difficulties and/or distortion of access on technical grounds or because of internet capacity.³⁴

PROTEST POLICING

Doubts about which gatherings—if any—were permitted in any one week or on any one day leads to this next observation: the police in any event relied on longstanding public order powers. For example, on 8th November, Greater Manchester Police decided to deal with a large gathering in Piccadilly Gardens using dispersal powers in s.34–35 of the Anti-social Behaviour, Crime and Policing Act 2014 rather than powers under any of the Regulations, and specifically those that came into force on 5th November: the rule of two. The events at Piccadilly Gardens would inevitably have been captured by, and thus fallen foul of, the ban on outdoor gatherings of more than two. Indeed, GMP’s own Twitter feed made that very point, ‘remind[ing] members of the public that, under the national Covid-19 restrictions, gatherings of more than two people are unlawful’.

This is not to say that those powers have not been used to control, break up or limit protests—as we shall soon see. Rather the point is why are those powers not being used?

28 <https://twitter.com/DackBlog/status/1271778274914512897?s=20>

29 <https://twitter.com/ClassicFM/status/1313509168221913088?s=20>

30 Much is lost when people do not physically assemble, movement-building, solidarity-enhancing being just two.

31 <https://twitter.com/Drys/status/1281510096145711111?s=20>

32 <https://twitter.com/TheNewEuropean/status/1321790963686252544?s=20>

33 P Bilderbeck, ‘Inside the Manchester protests: Everything that happened at Owen’s Park last night’ *The Manchester Tab* (undated) <https://thetab.com/uk/manchester/2020/11/13/inside-the-manchester-protests-everything-that-happened-at-owens-park-last-night-49899> (access on 4th December 2020).

34 While on-line protests have many affordances, there are also drawbacks: third parties are less likely to become involved serendipitously together with greater capacity for non-state regulation through commercial power.

Something here warrants further investigation. Nor is it a new phenomenon. Rachel Vorspan identified something similar in her study of early twentieth century doctrine: 'The reliability, elasticity and seeming neutrality of the law of highway obstruction permitted interferences with civil liberties in periods of domestic crisis in a manner that more finely tuned public order doctrines could not'.³⁵

Might the police have questions about the lawfulness of the Regulations, or worries that the Regulations do not provide any clawbacks, any exclusions for those exercising Convention rights such as peacefully protesting, such that arrests and prosecutions might not hold up? There have been challenges to the vires of some of the earlier Regulations, albeit by November these had been resolved.³⁶ Is it possible that Gold Commanders also took the view that socially distant protest—everyone, say, 2 m apart—given the underlying public health context of the Regulations might make prosecutions or enforcement all the harder? Alternatively, might these vagaries simply be down to the usual heady brew: the legal doctrine of constabulary independence throughout 43 separate territorial forces, infused with socio-legal notions of discretion?³⁷ It might also have something to do with officer intransigence—'this is what we've always used'—sub-cultural norms, perhaps, as I have floated before, an influx of senior recruits from elsewhere or even more simply, someone having attended a training session on new legislation.³⁸

More worrying was the intertwining by the Metropolitan Police of Public Order Act 1986, s.14 powers and the Regulations for an XR protest on 9th September in Parliament Square. One of the conditions imposed by the Met was in the following terms: the assembly 'must not exceed the number of persons which that area can hold while complying with any risk assessment for the event carried out on behalf of the organisers, including any imperative to comply with government social distancing guidelines'.³⁹

An immediate and obvious problem facing the Met, were they to seek to enforce the s.14 notice, is that not only is the maximum number not specified, it is unknowable save by very few. It is identified by reference to something almost all of the participants

³⁵ R Vorspan, "'Freedom of Assembly" and the Right of Passage in Modern English Legal History' (1997) 34 *San Diego Law Review* 921, 925. I am very grateful to Katrina Navickas for making me aware of this piece.

³⁶ *Dolan* above n5.

³⁷ On which see most recently G Pearson and M Rowe *Police Street Powers and Criminal Justice: Regulation and Discretion in a Time of Change* (Hart, 2020) and especially their notions of vertical fragmentation (changes in policy [or law] as it cascades down through the ranks) and horizontal fragmentation (differences in policy [or legal] interpretations across the ranks): at p.141.

³⁸ I have long held the view that much more work is needed on understanding these uses of powers. FoI data showed of all cases before the magistrates in 2002 for aggravated trespass, one-third occurred in Suffolk, and of all watching and besetting cases (s.241 TULRCA 1992) just under 80% occurred in Surrey: Mead above n16, 416.

³⁹ Metropolitan Police press release 8th September 2020 <https://news.met.police.uk/documents/xr-conditions-9-september-99731> and see too conditions on the XR protests on 3rd September: <https://news.met.police.uk/documents/conditions-imposed-on-an-assembly-by-extinction-rebellion-3-september-2020-99589>

would not have had sight of, the risk assessment undertaken for the organisers. It is also presumably not a fixed number—the risks presented by XR is to some degree a function of the number of other non-XR protesters also present. Various arguments present themselves to XR activists: the condition might be void for uncertainty;⁴⁰ the condition constitutes a restriction on the exercise of rights under Article 11 that is not prescribed by law; or the defence in s.14(5) POA 1986: I cannot take part in an assembly and knowingly fail to comply with a condition if I do not know, and cannot (easily) find out what the condition is. Alternatively, they could attack its vires. That condition, based as it is on the Regulations, ‘speaks’ to the protection of public health/prevention of infection not to any of the three triggers in s.14: serious public disorder, serious damage to property, or serious disruption to the life of the community. In including it, the Assistant Commissioner has misdirected herself in law as to her powers.⁴¹ All of that supposes a willingness to litigate or to raise such defences collaterally if charges are brought. As likely an outcome of publishing that condition might well be to dissuade, to chill many or some or several: ‘we don’t know how many will be too many—we will be in trouble if we exceed the number—let’s be safe and not go’. The reality of protest is often at odds with its legality.

What might account for the Met’s approach here? Is it a simple belt and braces, or something else? Wrapping up, or seeking at least to wrap up, enforcement of the Regulations within the shroud of s.14—albeit that actually doing so will probably be its downfall—might belie more. There has been considerable public and political disquiet at the imposition of onerous restrictions on everyday life and business. At the height of the first lockdown, from March to July, there were several (social) media reports of egregious policing: Cambridgeshire police suggesting they were checking supermarkets for the purchase of non-essential items; South Yorkshire officers warning people that they were not allowed even into their own garden.⁴² The police response to this was to create an exculpatory narrative—divesting themselves of agency or at least seeking to play themselves as neutral enforcers of legislative enactments, actively rejecting the role of fall guys, identified by Doreen McBarnet forty years ago.⁴³ The driver might be the invocation of greater legitimacy if enforcing long-held general public order powers, rather than being seen as aligned to what Lord Sumption described as ‘the greatest interference with personal liberty in our history’.⁴⁴

Which protests, and why, will be permitted by the police has proven to be very unpredictable. That XR protest did go ahead, under conditions. On 13th June, more

40 With the unlawful conditions simply severed if possible: *DPP v Jones* [2002] EWHC 110.

41 In similar fashion, see *R (oao Baroness Jones) v Commissioner of Police for the Metropolis* [2019] EWHC 2957 Admin.

42 D Chipakupaku, ‘Coronavirus: Cambridge Police checks no one is in non-essential aisles at supermarket’ *Sky News* 10th April 2020 <https://news.sky.com/story/coronavirus-cambridge-police-checks-no-one-is-in-non-essential-aisles-at-supermarket-11971517> (access on 4th December 2020).

43 D McBarnet, *Conviction: Law, the State and the Construction of Justice* (MacMillan, 1981) 156.

44 <https://www.dailymail.co.uk/debate/article-8281007/Former-Supreme-Court-judge-LORD-SUMPTION-gives-withering-critique-Governments-lockdown.html>

than 10,000 were able to march through Brighton.⁴⁵ A week or so earlier on 4th June, a massive Black Lives Matter protest—at which actor John Boyega spoke—went ahead in central London, as well as in many other large UK cities.⁴⁶ An estimated 155,000 people took part in nearly 200 gatherings over a two-week period in early June across the UK.⁴⁷ In early September, ‘Flag-waving extremists and white nationalists’ protesting migrants crossing the Channel block the roads in and out of Dover.⁴⁸ On 24th October, an anti-lockdown protest in central London took place over several hours, though parts of it were broken up and arrests, under Coronavirus Regulations, were made when it became clear to the police that the ‘organisers had not taken reasonable steps to keep protesters safe and had therefore voided the risk assessment’, and officers ‘became increasingly concerned that those in the crowd were not maintaining social distancing’.⁴⁹

Others did not fare so well, and it is hard to discern why. Nearly 200 were arrested at the Million Mask March in London in early November, on the first day of the new ‘lockdown’.⁵⁰ An anti-HS2 protest at Euston in early May was broken up despite, as the video of the event shows, the protesters standing at least 2 m apart and wearing masks.⁵¹ Notably, the officer makes clear that it is the Coronavirus Regulations that provide him with authority despite, as the video also shows, one protester (at least) sitting in the road and obstructing a truck from entering the site. This is not to say that s.137 of the Highways Act 1980 should be used in such circumstances but in the mind of the police, the Coronavirus Regulations provide an easier and probably surer route to disrupt the protest. That this does not sit easily with my earlier point perhaps just illuminates yet more the confusion, and the extent of the enabling discretion within the Regulations and the ‘ordinary’ law. Even those peaceful protesters standing with banners are told they must stop, something almost certainly inconceivable as an exercise of a lawful policing power absent the Coronavirus Regulations. A group planning to protest on 26th October outside the Polish Embassy in central

⁴⁵ <https://twitter.com/BtonHovePolice/status/1272837908920229888?s=20>

⁴⁶ ‘Thousands attend Black Lives Matter protests across UK as public warned against mass gatherings’ *ITV News*, 6th June 2020 <https://www.itv.com/news/2020-06-06/thousands-expected-to-attend-black-lives-matter-protests-across-uk-as-public-warned-against-mass-gatherings>

⁴⁷ D Sabbagh and V Dodd, ‘BLM organisers call off London event to avoid clashes with far right’ *The Guardian*, 11th June 2020 <https://www.theguardian.com/uk-news/2020/jun/11/blm-organisers-call-off-london-event-to-prevent-clashes-with-far-right>

⁴⁸ M Townsend, ‘Port of Dover is brought to a standstill by far-right groups’ *The Guardian*, 5th September 2020 <https://www.theguardian.com/world/2020/sep/05/port-of-dover-is-brought-to-a-standstill-by-far-right-groups>

⁴⁹ ‘Coronavirus: Arrests as police officers injured at anti-lockdown protests in central London’ *Yahoo News*, 24th October 2020 <https://uk.news.yahoo.com/coronavirus-arrests-police-officers-injured-180800894.html>

⁵⁰ <https://twitter.com/netpol/status/1324762030042173448?s=20>

⁵¹ https://www.youtube.com/watch?v=YLuCI855_Ew&feature=youtu.be, linked to from this valuable resource, Policing The Coronavirus State <https://policing-the-corona-state.blog/2020/05/07/5-6-may-update/> Why for example were people seemingly able to gather in order to conga in the streets on VE Day, in early May: <https://twitter.com/Ibrahismummy/status/1258867301119602694?s=20?>

London (about the recent ruling that almost entirely banned the right to abortion) felt they needed to cancel after (according to a tweet by one of the organisers) ‘Met Police + Westminster Council did not give us permission’.⁵² The protest it seems did in fact go ahead albeit with far smaller numbers.⁵³ The TransRights Collective also announced that a protest planned for 5th September in London was cancelled the day before. It had held a protest previously, in early July in Parliament Square, attended by about 1000 people, with masks and at appropriate distance. The Met’s later decision is now the subject of an application for judicial review brought by Liberty on behalf of the group, arguing that as a political body, it should have been allowed to hold a 30+ person protest provided risk assessments were carried out, and adhered to.⁵⁴

My last point is this. The pandemic has highlighted the critical nature of police-public communications, something that over the past few years has become a discrete subject within policing studies.⁵⁵ There are several observable instances of false claim-making by the Metropolitan Police on Twitter: asserting powers they do not have or about the legal position that is wrong. Section 14 conditions were imposed on an XR procession and assembly due to take place on 3rd September. The accompanying Met Police press release the day before asserted that anyone who took part in ‘tomorrow’s assembly or processions’ and who breached the conditions was liable to arrest. As Jules Carey, solicitor at Bindmans, pointed out ‘the implications of this would have been the banning of multiple public protests across London, including on private premises’,⁵⁶ something the High Court ruled unlawful in the *Baroness Jenny Jones* judicial review.⁵⁷ Bindmans sent a pre-action protocol letter to the Commissioner; the Met responded by admitting that their publication had been confusing and might have led to concerns and misunderstandings of people intending to take part in the protest. That this confusion was—or might have been—cleared up does not detract from the general point that such miscommunications (and no claim is being made here that these are done intentionally) are very capable of chilling the exercise of the right to protest. On 31st October, in relation to a planned protest outside the French Embassy, the Met tweeted a warning that you ‘must submit a risk assessment where applicable’⁵⁸; the Regulations do not require it to be submitted—they simply require one to be carried out (Reg. 5G). Last, on 26th November, the Met Twitter feed asserted that ‘gathering in groups is not permitted under the current regulations’.⁵⁹ That is not

52 <https://twitter.com/MarzenaZukowska/status/1320711790343368704?s=20>

53 <https://twitter.com/BBCkasiaMadera/status/1320799650862026756?s=20>

54 <https://twitter.com/libertyhq/status/1326568317319000064?s=20>

55 A good starting point would be C Schneider *Policing and Social Media: Social Control in an Era of New Media* (Lexington Books, 2016).

56 J Carey, ‘Met backtrack and admit misleading Extinction Rebels on protest ban’ Bindmans blog, 3rd September 2020 <https://www.bindmans.com/insight/blog/met-backtrack-and-admit-misleading-extinction-rebels-on-protest-ban>

57 *Jones* above n40.

58 <https://twitter.com/MetPoliceEvents/status/1322534094845128707?s=20>

59 <https://twitter.com/MetPoliceEvents/status/1332350169455742976?s=20> and see too its press statement: <https://news.met.police.uk/news/statement-ahead-of-proposed-protest-in-central-london-416064>

the case. Not all gatherings are prohibited; there are exceptions such as work. Furthermore, it assumes that a socially distant group of protesters comprise in law a 'gathering', which this paper contends is arguable, and also assumes (again contentiously) that Article 11 protection would not be read in, at least as to allow protest gatherings where participants remain 2 m apart as a proportionate measure to comply with Art 11(2). The fact that holding or being involved in the holding of one is specifically permitted, under Reg 10(6) would support such a reading in. Jules Carey put it starkly: 'it would be bonkers to be able to arrange a protest but have no protesters'.⁶⁰ The letter in turn led to two civil liberties groups urging writing to the Met's Gold Commander for the weekend, seeking a correction.⁶¹ In short, we need to think much more about the police audience(s) about the interactive dynamics between police and protesters, and about the claims to legitimacy that the police's social media feed might be making.⁶²

So what does all this tell us about policing of protest during coronavirus? Probably very little that is new. The police have discretion and may choose to allow some marches and not allow others. What has been added by the Regulations is an alternative route for officers to request and seek compliance, and to effect disruption, partly I would suggest because of the perceived simplicity of the Regulations—not quite strict liability but fewer obvious get-outs on their face—and partly because the assumed moral imperative of collective safety and public health makes calls for desistance harder to ignore. It is clear, as many have observed before of policing—and we could go back to Robert Reiner's glorious phrase of *The Ways and Means Act*⁶³—that increasing the legal armoury of the police increases exponentially the armoury to hand, by affording them even greater opportunities to effect bargains in the shadow of the law.⁶⁴

CONCLUSION

One policing response was the Police Federation's call for a ban on protests during a pandemic.⁶⁵ The Federation represents officers from the rank of constable to inspector, and was responding to a week of violent protest in London in mid-June, a backlash from the far-right against Black Lives Matter the previous week, including taking down the statue of Edward Colston, the slave trader, in Bristol. Of course, living in and through a pandemic is not easy and policing it is considerably harder. John

⁶⁰ https://twitter.com/Jules_Carey/status/1332698477164421122?s=20

⁶¹ <https://twitter.com/BigBrotherWatch/status/1332666964305715201?s=20>

⁶² See D Rosenbaum et al, 'Understanding Community Policing and Legitimacy-Seeking Behavior in Virtual Reality: A National Study of Municipal Police Websites' (2011) 14 *Police Quarterly* 25.

⁶³ R Reiner, 'Policing the police' in M Maguire et al (eds), *The Oxford Handbook of Criminology* (2nd edn, OUP, 1997) 1002.

⁶⁴ R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale LJ* 950.

⁶⁵ 'Coronavirus: Police call for ban on protest during pandemic' *BBC News* 15th June 2020 <https://www.bbc.co.uk/news/uk-53051570>

Apter, chair of the Federation, rightly called it as a health issue for officers, putting themselves at risk. That said, a democratic society deciding to ban protest would be a momentous and, I would suggest, regressive step; we do not after all ban driving even though vehicle accidents cause tens of thousands of hospital admissions every year.⁶⁶ Not only that, it might well backfire. As former police superintendent and Gold Commander Owen West put it: ‘disappointing to see this level of response from the Fed. Banning achieves nothing, strokes resentment, places officers at even greater risk of violence’.⁶⁷ That certainly fits with the social psychology literature, and the work of Steve Reicher, Clifford Stott and John Drury on the elaborated social identity model, ESIM. This predicts how people might respond to (perceived) external threats, and in the case of protest policing, there is good evidence to suggest that this would catalyse hitherto atomised individuals to fuse into a collective.⁶⁸ It was also the view of Bristol police, who decided non-intervention was the better policy when the statue of slave trader Edward Colston was pulled down in June.⁶⁹ This led to what was described as a ‘dressing down’ for the Chief Constable from the Home Secretary, Priti Patel.

Nonetheless, that plea has not fallen on entirely deaf ears, ears that have been attuned by events over a longer and wider timeframe. In early October, Patel asked HMIC to conduct a review of XR and BLM protests.⁷⁰ More recently, at the tail end of November, it was reported that a fuller scale government review of public order law and policing was in the crosshairs, with a view to legislation being presented to Parliament in 2021.⁷¹ It is clear that over the coming year or two the question of how far we can express our discontent, and seek a better, or at least alternative, future is going to move up the political agenda. Having lain in the hinterlands for several decades, the pandemic has tipped it over the edge.

66 NHS Digital Hospital Admitted Patient Care Activity 2018–19 National statistics 19 September 2019 <https://files.digital.nhs.uk/77/E87D7E/hosp-epis-stat-admi-ext-cau-2018-19-tab.xlsx> category V01–V99.

67 <https://twitter.com/PolicingCrowds/status/1272126678966374400?s=20>

68 C Stott and S Reicher, ‘How Conflict Escalates: The Inter-Group Dynamics of Collective Football Crowd “Violence”’ (1998) 32 *Sociology* 353; S Reicher et al, ‘An Integrated Approach to Crowd Psychology and Public Order Policing’ (2004) 27 *Policing* 558

69 Above n46.

70 <https://twitter.com/netpol/status/1313392192585699328?s=20>

71 <https://netpol.org/2020/11/26/government-plans-major-crackdown-in-2021-on-the-right-to-protest/>