‘THIS IS NOT A RIOT!’: REGULATION OF PUBLIC PROTEST AND THE IMPACT OF THE HUMAN RIGHTS ACT 1998

A thesis submitted to The University of Manchester for the degree of Doctor of Philosophy in the Faculty of Humanities

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JOANNA GILMORE

SCHOOL OF LAW
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<td>ACAS</td>
<td>Advisory, Conciliation and Arbitration Service</td>
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<td>ACPO</td>
<td>Association of Chief Police Officers</td>
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<td>ALF</td>
<td>Animal Liberation Front</td>
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<td>ARNI</td>
<td>Animal Rights National Index</td>
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<tr>
<td>ASBA 2003</td>
<td>Anti Social Behaviour Act 2003</td>
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<tr>
<td>ASBO</td>
<td>Anti Social Behaviour Order</td>
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<tr>
<td>BMI</td>
<td>British Muslim Initiative</td>
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<tr>
<td>CIU</td>
<td>Confidential Intelligence Unit</td>
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<td>CLS</td>
<td>Critical Legal Studies</td>
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<tr>
<td>CND</td>
<td>Campaign for Nuclear Disarmament</td>
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<td>CO11</td>
<td>Metropolitan Police Public Order Operational Command Unit</td>
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<td>CPM</td>
<td>Commissioner of Police of the Metropolis</td>
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<td>CPS</td>
<td>Crown Prosecution Service</td>
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<td>CTA 2008</td>
<td>Counter Terrorism Act 2008</td>
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<td>DPA 1998</td>
<td>Data Protection Act 1998</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EDL</td>
<td>English Defence League</td>
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<td>HAC</td>
<td>Home Affairs Committee</td>
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<td>HMIC</td>
<td>Her Majesty’s Inspectorate of the Constabulary</td>
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<td>IPCC</td>
<td>Independent Police Complaints Commission</td>
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<td>JCHR</td>
<td>Joint Committee on Human Rights</td>
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<td>MPA</td>
<td>Metropolitan Police Authority</td>
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<td>MPS</td>
<td>Metropolitan Police Service</td>
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<tr>
<td>NPOIU</td>
<td>National Public Order Intelligence Unit</td>
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<td>NETCU</td>
<td>National Extremism Tactical Co-ordination Unit</td>
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</table>
NCDE  National Coordinator for Domestic Extremism
NDET  National Domestic Extremism Team
NUWM  National Unemployed Workers’ Movement
NCCL  National Council for Civil Liberties
NUS  National Union of Students
PFB  Palestinian Forum in Britain
PSC  Palestinian Solidarity Campaign
PBO  Protest Banning Order
PDBA 1998  Police (Detention and Bail) Act 2011
PHA 1997  Protection from Harassment Act 1997
PLO  Protest Liaison Officer
POA 1986  Public Order Act 1986
POA 1936  Public Order Act 1936
PRSRA 2011  Police Reform and Social Responsibility Act 2011
PSNI  Police Service of Northern Ireland
PTAs  Prevention of Terrorism Acts
SOCPA 2005  Serious Organised Crime and Police Act 2005
SPD  Stockholm Police Department
STWC  Stop the War Coalition
TA 2000  Terrorism Act 2000
TAM  Terrorism and Allied Matters
TSG  Territorial Support Group
UAF  Unite Against Fascism
UK  United Kingdom
US  United States
Table of Statutes

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Anti-terrorism, Crime and Security Act 2001
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Contempt of Court Act 1981
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Terrorism Act 2000
Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001
Terrorism Act 2000 (Remedial Order) 2011
Terrorism Act 2006
Terrorism (Temporary Provisions) Act 1989
Treasonable and Seditious Practices Act 1817
Tumultuous Petitioning Act 1661

**SCOTLAND**
Scotland Act 1998

**NORTHERN IRELAND**
Northern Ireland Act 1998
Public Processions (Northern Ireland) Act 1998

**EUROPE**
European Convention on Human Rights
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Bukta v Hungary (25691/04) [2007] ECHR
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United Communist Party of Turkey v Turkey (1998) 26 EHRR 4
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Joanna Gilmore

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2013
‘This is not a riot!’: Regulation of public protest and the impact of the Human Rights Act 1998

Abstract

The death of Ian Tomlinson at the G20 protests in London in April 2009 triggered a haemorrhaging of public confidence in public order policing. The protests were swiftly followed by a plethora of official inquiries and reports tasked with investigating the legitimacy of existing public order policing tactics and the associated mechanisms of accountability. Events since Tomlinson’s death indicate that this is an issue that is unlikely to dissipate any time soon. Dramatic footage taken during the 2010-11 student protests, including police officers charging protesters on horseback and dragging a disabled activist from his wheelchair, attracted widespread condemnation. The on-going revelations into the activities of undercover police officers suggest that such practices may be the tip of the iceberg. These disclosures have caused a serious crisis of legitimacy for an institution supposedly founded on a principle of ‘policing by consent’.

Paradoxically, these developments have occurred during a period in which the right to protest is for the first time reflected in law. In October 2000 the much trumpeted Human Rights Act 1998 (HRA 1998) came into force in England and Wales, incorporating into domestic law the rights and freedoms enshrined in the European Convention on Human Rights (ECHR). Although the ECHR does not establish a legal right to protest per se, it does guarantee positive rights to “freedom of expression” and “freedom of peaceful assembly”, as well as prohibiting arbitrary state interferences with an individual’s liberty and security, thought, conscious and religion and right to privacy. The HRA 1998 appeared to mark a radical departure from the traditional approach and was celebrated as signalling a “constitutional shift” in the state’s approach towards public protest.

A principle aim of this thesis is to examine the impact of the HRA 1998 on the regulation of public protest in England and Wales. Whilst a growing body of academic literature has analysed public order law and policy against abstract human rights principles, relatively few have attempted to ground the analysis in the experiences of protesters. This thesis seeks to begin to fill this lacuna. Moving away from a doctrinal analysis of human rights law, I utilise a socio-legal framework to examine contemporary developments in the regulation of public protest in the context of a view from below. Drawing on extensive ethnographic data and analyses of policy documents, newspaper reports, case-law, legislation and Hansard, I adopt a critical normative perspective to assess the legitimacy of the current restrictive interpretations of human rights principles in legal, political and policing-policy discourses.
Declaration

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Most importantly, I would like to thank my family, who have supported me all of these years. This PhD has been quite a journey both professionally and personally, and I could not have done it without the support of my loving parents, my wonderful sister, Rosie, and my dear grandparents. No words can express how much I love them.

I would like to dedicate this thesis to the loving memory of my wonderful brother, Paul.
1. Introduction

It was a very challenging security environment … London is an iconic city that does run extraordinary events, and against all extraordinary events this was the most extraordinary.¹

These statements by former Commissioner of Police of the Metropolis (CPM) Sir Paul Stephenson were made in the aftermath of the G20 protests. The Commissioner had been summoned to give evidence to the House of Commons Home Affairs Committee (HAC) following widespread public condemnation of the G20 policing operation. Defending the actions of his officers, Stephenson described the difficult “challenge” faced by police in dealing with an unprecedented level of violence in the capital.²

It is undoubtedly the case that London has historically been a centre for mass protest, riot and disorder. Rudé’s historical analysis of the London ‘mob’ suggests that such activities are as old as the city itself.³ However, that there was something particularly exceptional about the G20 protests is a more difficult argument to sustain. Indeed, the decade prior to these events had witnessed some of the largest protests that had ever taken place on the streets of the capital. On 15 February 2003 up to two million people took part in a demonstration in central London.⁴ The protest was called by the Stop the War Coalition (STWC)⁵ in response to the prospect of a US-led invasion of

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² HAC (2009), supra, n.1.
⁵ The Stop the War Coalition (STWC) was founded in London in 2001 in response to the prospect of a US-led war in Afghanistan following the 11th September World Trade Centre attacks. The STWC brought together a range of organisations united in opposition to war, including the Socialist Workers Party, the Green Party and the Campaign for Nuclear Disarmament (CND), as well as a number of trade unions and support from the Labour left. Although the Coalition was from the outset an entirely secular movement, it gained support from a number of Muslim groups, becoming the central organisation in one of the biggest mass movements ever seen in Britain. See Murray, A. and German, L. (2005) Stop the War: the story of Britain’s biggest mass movement (London: Bookmarks); Phillips, R. (2008) ‘Standing together: the Muslim Association of Britain and the anti-war movement.’ Race and Class, 50(2): 101-113.
Iraq, and has been credited as the largest demonstration in British history. The following month, up to two hundred thousand people marched in London, setting a record for the largest wartime demonstration. The protests reflected widespread opposition to the war among the British public. Opinion polls taken on the eve of the invasion showed opposition to military intervention without United Nations (UN) backing as high as sixty-three per cent. Despite their unprecedented scale, these mass demonstrations did not lead to significant confrontations between police and protesters. According to figures released under the Freedom of Information Act 2000 (FOIA 2000) there were only fifteen arrests during the 15 February demonstration and four people convicted of offences.

By the end of 2005, the policing of public protest had become an increasingly contentious issue. In August the controversial provisions of the Serious Organised Crime and Police Act 2005 (SOCPA 2005) came into force which outlawed unauthorised protest within a “designated area” around Parliament. Widely believed to be targeted at the permanent protest camp by anti-war campaigner Brian Haw, the provisions were met with significant public opposition, leading to a number of arrests as protesters attempted to defy the ban. Public concerns about the erosion of the right to protest were fuelled by growing evidence that counter terrorism powers were being used to target lawful political dissent. In September 2005 veteran Labour Party activist Walter Wolfgang was forcibly evicted from the Labour Party conference after he heckled foreign secretary Jack Straw during a speech on the Iraq War. The eighty-two year old was refused re-entry by police officers who cited powers under Section 44 of the Terrorism Act 2000 (TA 2000).

In an embarrassing episode for the government, a further six hundred protesters

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6 Supra, n.4.
7 Ibid.
10 Figures derived from FOIA 2000 response from the Metropolitan Police Service (MPS) to Joanna Gilmore, 31 January 2013. The breakdown of arrests was as follows: Possession of racist material (1); Section 5 Public Order Act 1986 (2); Drunk and disorderly (4); Section 4 Public Order Act 1986 (1); Obstruction of Police (6); Assault on Police (1).
12 See Chapter Five.
13 HL Hansard 20 December 2005 c1633. See Chapter Eight.
assembling outside the conference were reportedly stopped and searched under the Act. The controversy surrounding these events triggered an inquiry by the Joint Committee on Human Rights (JCHR), which in April 2008 issued a call for evidence on the proportionality of existing legislative measures and police powers to restrict protest. As the Committee were taking evidence tensions between protesters and the police continued to escalate. The second half of 2008 saw the return of violent clashes between police and protesters on the streets. In June, a STWC protest organised in response to an official visit to the United Kingdom (UK) by former United States (US) President George W. Bush was prevented by police from marching down Whitehall on the grounds that it could be used as a cover for a terrorist attack. Violent clashes broke out as protesters attempted to defy the ban and twenty-five people were arrested. Described by organisers as a “turning point” in the policing of protest in the UK, these events set the scene for an escalation of public order policing in the months ahead.

It was within this context that this research project began in September 2008. Public order policing appeared to have intensified significantly since the mass demonstrations of 2003 and was becoming a salient political issue. In December 2008, three months after I began my research, Israel began its first airstrike on the Gaza strip. These events triggered some of the largest protests in the UK since the mass demonstrations against the Iraq war almost six years earlier. As an activist within the anti-war movement I attended these protests from the outset. From the day

16 Interview with Protest Organiser A, 14 August 2009.
17 Figures derived from FOIA 2000 response from the MPS to Joanna Gilmore, 31 January 2013.
18 Interview with Protest Organiser A, 14 August 2009.
19 The intensification of public order policing during this period was not limited to the anti-war movement. In August 2008 the policing of a ‘Climate Camp’ protest at the Kingsnorth power station in Kent provoked widespread condemnation (see e.g. HC Hansard 6 July 2009 c675; HL Hansard 15 December 2008 c810). Protesters attending the camp were subject to blanket stop and search powers and seizure of property, amounting to what legal observers have described as “disproportionate and repressive policing” (McLeish, P. and Wright, F. (2009) Policing of the Kingsnorth Climate Camp: Preventing Disorder or Preventing Protest? (Camp for Climate Action’s legal support team), available at <http://www.climatecamp.org.uk/get-involved/working-groups/legal/Kingsnorth_Policing_Report.pdf>, p.3, accessed 10 January 2013.
Israel launched its first airstrike on the Gaza strip, a nightly vigil was held each evening outside the Israeli Embassy in London. When violent clashes broke out between police and protesters outside the Embassy on 28 December, I decided to embark on an ethnographic case study of the policing of the demonstrations. The largest of the protests took place in London on 10 January 2009, where an estimated one hundred thousand people took part in a march in central London. I attended the protest as a participant observer. I saw protesters attacked with police batons and long shields, charged by mounted officers and, in a tactic that later become known as ‘kettling’,21 penned into tightly enclosed cordons and detained for hours before being released on the condition that they submit to being searched, photographed and provide their personal details to police officers. Although this was the first time that I had witnessed the use of many of these tactics, I have observed all of them on demonstrations since. Some of my observations during these protests (hereafter ‘the Gaza protests’) are presented in Chapter Three.

In March 2009, two months after the Gaza protests had come to an end, the JCHR published the results of their inquiry. The inquiry received forty-nine memoranda of evidence, heard from thirteen witnesses and made formal visits to France, Spain, Northern Ireland and the Metropolitan Police Central Communications Command Centre. The report, examined in detail in Chapter Four, acknowledged reports that public order policing “has become more heavy-handed in recent years”.22 The Committee however found “no systematic human rights abuses” in the way protests are policed, highlighting instead a number of concerns that could be addressed through “legal and operational changes”.23 Despite the scale and intensity of the Gaza protests, they did not feature in the report and the JCHR did not reopen its inquiry in light of the protests. A dossier of complaints sent by the protest organisers on 9 February 2009 to the CPM was acknowledged but not responded to.24 The complaint letter warned that the tactics used at the Gaza protests caused “a very real

21 See Chapter Seven.
22 JCHR (2009a), supra n.15, p.56.
23 Ibid., p.i.
potential for serious injuries or even deaths.” Other than a few isolated newspaper reports, the policing of the Gaza protests was not subject to any official scrutiny.

Less than a month after the JCHR report was published, a planned meeting of G20 world leaders in London triggered a series of protests by anti-war, environmentalist and anti-capitalist groups. In the days leading up to the summit, the Metropolitan Police Service (MPS) issued a stark warning of violent disorder in what they predicted would be an unprecedented series of demonstrations in the capital. The police claimed that veteran activists from the 1990 Poll Tax riots had been “lured out of retirement” in order to take part in the violence, and tabloid newspaper headlines warned of plans by hundreds of anarchists masquerading as peaceful protesters to “storm City banks in a series of co-ordinated attacks”. City bankers, warned to anticipate violent attacks from anti-capitalist protesters, were advised to dress down in “chinos and loafers” to avoid identification. The same day, five “suspected protesters” who had planned to attend the G20 protests were arrested in Plymouth under the TA 2000, following a policing investigation into “political activity involving British nationals”. Dubbed the “G20 terror plot”, the arrests followed the discovery of fireworks and political literature at the home of a twenty-five year old man arrested on suspicion of spraying anti-fascist slogans onto a wall. All five were subsequently released without charge.

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25 Ibid.
30 The term “suspected protesters” was used by a number of local and national newspapers to describe the arrested individuals. See e.g. *The Express* (2009), Yob plot to storm City, 1 April, p. 5; Eve, C. and Prince, D. (2009) Police defend use of anti-terror law, *Evening Herald*, 10 April, p. 9.

21
On 1 April 2009, over 35,000 protesters converged in the City of London to take part in a series of demonstrations on the eve of the G20 summit. The largest of the six demonstrations took place outside the Bank of England, where an estimated five thousand people participated in a ‘G20 Meltdown’ protest organised by a coalition of anti-capitalist groups. There, thousands of protesters were ‘kettled’ by police officers for over six and a half hours as part of a policing operation codenamed “Operation Glencoe”. Shortly after 7pm, Ian Tomlinson, a forty-seven year old newspaper vendor and father of nine, collapsed and died of internal bleeding after he was struck from behind by a member of the MPS’s Territorial Support Group (TSG). This tragic event was followed by a growing catalogue of allegations of unjustified violence on the part of the police, prompting a record number of complaints to the Independent Police Complaints Commission (IPCC). These events, together with mounting evidence that the police had deliberately tried to cover-up the circumstances surrounding Tomlinson’s death, quickly shifted the focus away from the alleged violence of protesters towards the tactics of the police. An ICM opinion poll published by the Guardian newspaper on 20 April 2009 found that fifty-nine per cent of people questioned were opposed to the G20 policing operation, believing the police to have used an “unacceptable level of force” towards protesters. Although later praised by MPs as a “remarkably successful operation”, the policing of the G20 protests sparked a serious crisis of legitimacy for an organisation supposedly founded upon a principle of ‘policing by consent’.

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34 HAC (2009), supra, n.1, p.3.
35 Ibid.
36 Ibid. The police rhetoric leading up to the protests, including reports that senior officers were predicting the protests would be “very violent” and insisting they were “up for it, and up to it”, led to speculation among protesters that the policing operation was named after the 1692 Glencoe Massacre in the Highlands of Scotland: see Lewis, P. et al. (2009) ‘Police tactics queried as Met says G20 protests will be “very violent”’, The Guardian, 28 March, p.1. These concerns were subsequently investigated by the JCHR, who concluded that the main responsibility for talking up the prospect of violence rested with the media, rather than the police (JCHR (2009b), supra n.24, pp.15-16).
37 Ian Tomlinson was not a participant in the protests, but was attempting to pass through the area on his return home from work. See HAC (2009), supra, n.1.
38 IPCC (2009) Commissioner’s report following the IPCC independent investigation into a complaint that officers used excessive force against a woman during the G20 protests (London: IPCC).
39 An investigation by the Guardian newspaper found “solid evidence” that Tomlinson’s family, the inquest coroner and the IPCC were deliberately misled by senior police officers about the circumstances surrounding Tomlinson’s death: Lewis, P. (2009) ‘MPs to examine G20 tactics as new claims emerge’, The Guardian, 20 April, p.9.
40 Ibid.
41 HAC (2009), supra, n.1, p.3.
The G20 protests forced into the public spotlight what protesters had long described as a shift towards an increasingly authoritarian style of protest policing in Britain. The protests were swiftly followed by a plethora of official inquiries and reports tasked with investigating the legitimacy of existing public order policing methods and the associated mechanisms of police accountability. Perhaps the most significant was the two-part report published by Her Majesty’s Inspectorate of Constabulary (HMIC) at the request of the CPM. The report recommended that the police adapt to the “changing world” of protest activity whilst maintaining a commitment to the core values of the traditional “British model” of policing based on “independence, impartiality, discretion and accountability”. Representing the most extensive review of public order policing in the Inspectorate’s history, the report provides a template for a new “human rights compliant framework for public order policing”, based on dialogue, communication and an overriding commitment to “facilitating” peaceful protest.

1.1 Policing the ‘summer of rage’

The G20 protests marked the beginning of a new wave of international protest activity, born out of the financial crisis which followed a prolonged period of weakness for the global capitalist system. The economic turmoil that followed the collapse of Lehman Brothers in September 2008 triggered fears deep within the heart of the financial system that the crisis would lead to an upsurge in popular protest on


Ibid., p.39.

a global scale. In February 2009, London’s MPS predicted a “summer of rage” on the streets of London, warning of a return of riots on a scale of the 1980s as those who have lost their jobs, homes or savings become the “footsoldiers” in a wave of mass discontent. Although dissent and opposition has generally been more limited domestically than in mainland Europe, the first months of 2009 did signal the return of mass street protest in the UK. A central feature of these demonstrations was a return of militant forms of direct action associated with the radical international movements of the 1960s and 70s, including the short and long-term ‘occupation’ by protesters of public and private spaces. Within days of the G20 demonstrations in the City of London, protesters, mobilised largely from within Britain’s Tamil diaspora, began a seventy-three day occupation of Parliament Square as part of a series of international protests in response to the Sri Lankan government’s treatment of the Tamil minority. These protests coincided with a return of workplace militancy manifest in a wave of workers’ occupations and unofficial ‘wildcat’ strikes. Sherry has argued that the UK in 2009 was “witnessing the return of a militant form of collective action associated with some of the great, mass struggles of the past – a form of action that many thought had vanished along with the 1970s”.

Although protests in response to the financial crisis continued throughout 2009, it was not until the following year that the MPS’s prediction was eventually realised. On 10 November 2010 a demonstration organised by the National Union of Students

49 In the wake of the Lehman Brother’s collapse, Dominique Strauss-Kahn, then Managing Director of the International Monetary Fund (IMF), warned that in the event of a global recession, “social unrest may happen in many countries - including advanced economies” (quoted in Duncan, G. (2008) ‘Head of IMF fears unrest without more action to boost global economy’, The Times, 16 December, p.42).
55 Ibid., p.9.
(NUS) in response to Government cuts to education and student funding brought protesters onto the streets in numbers which far exceeded the expectations of both the organisers and the police, who were unable to prevent students from occupying the Conservative Party headquarters in Millbank Tower.\textsuperscript{56} Although dismissed by the authorities as the actions of an isolated minority of “hardcore anarchists”\textsuperscript{57}, this symbolic action triggered the birth of the biggest student movement in a generation, including a series of protests, rallies, occupations and student strikes on university and college campuses across the country.\textsuperscript{58} The student movement coincided with the birth of new direct action protest groups such as ‘UK Uncut’\textsuperscript{59}, which began to organise creative protests in response to the Government’s public sector cuts. The pattern continued throughout 2011, including a demonstration organised by the Trades Union Congress (TUC) on 26 March 2011 which brought over half a million protesters onto the streets of London.\textsuperscript{60}

It was against this backdrop of ‘austerity’ cuts and the return of mass street protest that a series of riots exploded across many of England’s towns and cities in August 2011. Triggered by the police killing of twenty-nine year-old Mark Duggan in Tottenham, North London, the riots followed years of anger at police racism, poverty and rising unemployment in some of the country’s most economically marginalised communities.\textsuperscript{61} In October 2011, protesters taking part in a global day of action called by the international ‘Occupy’ movement established a protest camp near the London Stock Exchange, in a symbolic action against the “corporate greed” of the City financiers.\textsuperscript{62} The following month, up to two million public sector workers took

\textsuperscript{56} I attended the protest as a participant observer.
part in the biggest strike action in Britain since the 1926 General Strike, bringing thousands of people onto picket lines, marches and rallies across the country.63

Despite widespread conviction that the HMIC recommendations would foster a “human rights culture” 64 within the police, the policing response to this latest wave of protest activity does not appear to have witnessed any progressive transformation. Instead, dramatic footage taken at the student demonstrations of police officers ‘kettling’ school-age children65, charging crowds of students on horseback66 and dragging a disabled activist from his wheelchair67, has laid bare the extent to which the police are prepared to resort to repressive measures in the face of mass protest - a pattern consistent with state crackdowns in response to popular protests across the globe.68 The criminalisation of protest following the G20 demonstrations has extended beyond the streets. According to figures obtained under the FOIA 2000, the student protests of 2010 led to the arrest of over two hundred and fifty people, many of them minors, tracked down by ‘Operation Malone’ - a specialist team staffed by over two hundred police personnel.69 Following the TUC demonstration of March 2011, one hundred and thirty-nine UK Uncut activists were arrested for ‘aggravated trespass’70 after they briefly staged an occupation inside the luxury goods store Fortnum and Mason that a police officer at the scene described as “sensible and non-violent”.71 The on-going policing operation in response to the 2011 riots has led to the arrest of over four thousand people - a figure so large that some courts found it necessary to hold all-night sessions in order to process those charged.72 Armed with a vast array of new criminal offences73, the courts have subjected protesters to

67 Ibid.
69 Figures derived from FOIA 2000 response from the MPS to Joanna Gilmore, 19 March 2012.
70 See Chapter Six.
72 Supra, n.61.
73 See Chapters Five and Six.
exemplary ‘deterrent’ sentences and scores have been sent to prison. As was a feature of the miners’ strike and both the anti-poll tax and black struggles of previous decades, defence campaigns have been launched in response to arrests and allegations of police brutality.

1.2 The regulation of protest in an age of human rights

The new crisis of legitimacy in public order policing has, paradoxically, occurred during a period in which the right to protest is for the first time enshrined in law. In October 2000 the provisions of the Human Rights Act 1998 (HRA 1998) came into force in England and Wales, giving further effect in domestic law the European Convention on Human Rights (ECHR). The Act was the culmination of a protracted campaign for a bill of rights in the context of growing concerns about the erosion of civil liberties in Britain, and was celebrated as signalling a “constitutional shift” and a “new era” in the state’s approach to individual rights.

At the introduction of the HRA 1998, there was widespread optimism that the Act would bring about a progressive transformation in the regulation of public protest. Ashworth, for example, predicted that public order law would be a major point of impact of the HRA 1998. Writing five years after the HRA 1998 came into force, P. A. J. Waddington claimed that the Act had “strengthened the position of protesters and expanded freedom of speech and assembly into areas previously denied to them.” The discourse of human rights has become central to the crisis of legitimacy triggered by the G20 protests. Human rights principles have become a yardstick

74 See Chapter Three.
76 Redmond-Bate v Director of Public Prosecutions [1999] 163 J.P. 789 at 795.
77 Venables and another v News Group Newspapers Ltd and others [2001] 1 All ER 908 at 100.
78 See Chapter Two.
against which the legitimacy of public order policing practices are measured.\textsuperscript{81} The official reports published in the aftermath of the G20 protest have led to a number of policy reforms aimed at making public order policing more “human-rights compliant”.\textsuperscript{82} Writing in the \textit{Guardian} in May 2011, Sir Hugh Orde, President of the Association of Chief Police Officers (ACPO), claimed that protest policing has been “strengthened by a growing understanding of human rights obligations”.\textsuperscript{83} These developments have been heralded by academics as “some of the most progressive developments in policing in over a decade”.\textsuperscript{84}

This thesis questions the assumption that the HRA 1998 has led to progressive developments in public order policing. Existing academic work in this area is largely located in the discrete fields of law and criminology. Legal academic work tends to analyse developments in the regulation of public protest within a doctrinal framework of human rights law.\textsuperscript{85} This narrow legal approach tends to ignore what people experience and the impact these experiences have on their lives.\textsuperscript{86} Moreover, in limiting the analysis to the application of abstract legal principles, much of this work overlooks the role of law and human rights discourses in sustaining political and social inequality, and the impact of police culture on the exercise of police discretion.\textsuperscript{87} In other words, it overlooks the difference between “law in books” and “law in action”.\textsuperscript{88}

\textsuperscript{81} See Chapter Four.
\textsuperscript{82} HMIC (2009b), \textit{supra}, n.44, p.121.
\textsuperscript{87} This point will be explored further in Chapter Two.
Furthermore, recent criminological work in the area has tended to present a police-centred view of developments in public order policing and has omitted to consider the relationship between law, politics and policing policy.\(^89\) Whilst critical criminological work has addressed these issues in the past, much of this work significantly pre-dates the HRA 1998.\(^90\) There is thus an absence of socio-legal analyses of contemporary developments in the regulation of public protest and the impact of the HRA 1998 on these processes. This thesis is an attempt to begin to fill this lacuna. In doing so, this thesis makes an original contribution to knowledge by utilising a socio-legal framework to assess the legitimacy of the current restrictive interpretations of human rights principles in legal, political and policing-policy discourses.

Since this research began the focus and methodology have developed organically, taking into account the rapidly changing legal, social and political climate. The period during which the research took place is one that has witnessed some of the most significant developments in the regulation of public protest in recent history. The student protests of 2010, the urban riots of 2011 and the controversial revelations surrounding undercover officer PC Mark Kennedy significantly influenced the direction of the research. Moreover, there have been several important legal developments during this time, including a raft of new measures introduced to restrict protest in the context of the 2012 London Olympics and several significant domestic and European legal rulings. As discussed in Chapter Four, the crisis of legitimacy has also triggered several official inquiries and policy reports, leading to important developments in policing practices. This thesis attempts to make sense of these developments, analysing the complex interplay between law, policy and criminal justice practice.

This thesis does not purport to present a doctrinal analysis of the impact of the HRA 1998 on the right to protest. Rather, I examine the impact of the HRA 1998 from

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\(^{89}\) This point will be explored further in Chapter Four.

below by locating the analysis in the experiences of protesters. The approach I have adopted is an inter-disciplinary one, combining legal analysis with sociological inquiry. I attempt to place the law in a social context in order to understand better its deficiencies in protecting human rights. The analysis presented in this thesis draws upon data gathered from a detailed ethnographic case study of the Gaza protests. The data was gathered utilising multiple ethnographic research methodology, including participant observation, interview-based data collection and document analysis. I attended protests outside the Israeli Embassy in London on 3 January 2009 and 10 January 2009 as a participant observer and gathered detailed field notes during these events. I also observed over one hundred and thirty hours of court hearings in West London Magistrates’ Court, Isleworth Crown Court and the Court of Appeal. Moreover, I attended legal meetings with protesters and their legal counsel, and meetings organised by the defence campaign established in the aftermath of the protests. This information was supplemented by twenty-eight unstructured interviews with a range of relevant actors including protest organisers, stewards, protesters and their family members, lawyers and probation officers. Further, I analysed hundreds of pages of legal case-files, eyewitness testimony, newspaper reports and press releases and I observed over three hundred hours of film and photograph material gathered from independent media sources and personal correspondence. I also made eighteen requests for information under the FOIA 2000 to the MPS, IPCC, Metropolitan Police Authority (MPA) and the Crown Prosecution Service (CPS). Only a small sample of the ethnographic data is presented in this thesis. The overall aim is to capture the experiences of protesters at particular stages in the chronology of events that are analysed in the study. The ethnographic research is supplemented by an analysis of policy documents, media reports, case-law, statutes and Hansard. In doing so, I seek to contrast official interpretations of public protest and human rights with the material conditions faced by protesters.

91 The research data was gathered between December 2008 and January 2012.
92 Information collated in relation to the criminal proceedings was initially recorded on Defence Monitoring Forms that were completed by defendants during the initial court hearings. This information was supplemented by follow-up interviews with defendants and their legal counsel and field notes taken during the subsequent hearings.
93 Interviewees were selected using a snowball sample which utilised networks established during the protest events and in court, as well as existing legal and activist networks.
Although not directly referred to in the thesis, the research also draws upon my experiences as a participant observer at several key events that have taken place since the Gaza protests. These include the G20 protests on 1 April 2009, the NUS demonstration on 10 November 2010, the TUC demonstration on 26 March 2011 and protests organised by Unite Against Fascism (UAF) in Manchester (October 2009), Bolton (March 2010), Bradford (August 2010) and Luton (May 2012). I attended the planning meetings between police and protest organisers in advance of the Manchester, Bolton and Bradford demonstrations and I have monitored the criminal and civil cases that arose following these events.

My aim in this thesis is to present a *view from below*[^94]. In doing so, I present a self-conscious adoption of the standpoint of the policed. For Howard Becker, who famously asked the question “whose side are we on?”[^95], it is impossible to undertake neutral, objective and value-free research. Becker argued that the researcher must choose a standpoint reflecting either the interests of the subordinate or superordinates of any given research context. I was not a passive observer of the events that I describe in this thesis. Rather, I was centrally involved in several of the defence campaigns that were established during the course of the research project.[^96]

In the aftermath of the Gaza protests, for example, I coordinated liaison between protesters and specialist lawyers and I provided information that was used in the course of the legal proceedings. The research findings were instrumental in a series of appeals in the Court of Appeal[^97] and substantial payments of compensation following civil actions against the police.[^98] The research also attracted significant media attention[^99] and triggered an Early Day Motion in the House of Commons[^100].


[^96]: *Supra*, n.75.


[^98]: See Chapter Three.


[^100]: HC EDM 1093 of Session 2009-10.
and Parliamentary Questions in the House of Lords\textsuperscript{101}. As such, the research went some way to influencing the events that were under observation.

1.3 Structure of the thesis

The principal aim of this thesis is to examine the impact of the HRA 1998 on the right to protest in England and Wales.

Chapter Two considers the significance of the introduction of “a fully-fledged right to protest”\textsuperscript{102} under the HRA 1998. In doing so, the chapter explores the status of the right to protest under the ECHR including the concomitant principles that mediate its application. The chapter considers the social and political context within which the HRA 1998 was introduced and explores the way in which the Act has been received in judicial, political and academic circles. The second part of the chapter outlines the critical analytical framework that underpins the analysis presented in this thesis. The chapter examines the challenge to human rights law presented by the critical legal studies movement and considers the utility of human rights discourses as a tool for critique. The relationship between law, policy and policing practices is also considered.

In Chapter Two it is proposed that the impact of the HRA 1998 should be measured against the material circumstances that people experience. To this end, Chapter Three presents a case study of the Gaza protests drawing on the ethnographic data gathered during the course of the research. The purpose of the chapter is to present a ‘view from below’ and thus locate the analysis within the experiences of protesters. The material presented in this chapter will be used as a reference point throughout the thesis in order to examine the legitimacy of official interpretations of public protest and human rights.

As noted above, the widespread condemnation of the G20 policing operation triggered the introduction of a plethora of official inquiries and reports, leading to a

\textsuperscript{101} HL Hansard 9 March 2010 cWA52.
number of important developments in public order policing practices. Chapter Four considers how the ‘right to protest’ has been interpreted in official policy discourses and the impact that these interpretations have had on public order policing policy.

The remainder of the thesis considers the regulatory framework surrounding public protest in England and Wales. In the first of two chapters examining the statutory public order framework, Chapter Five considers the regulation of protest through measures of ‘prior restraint’\(^\text{103}\), including pre-emptive powers to limit or prevent protests taking place in advance. The chapter charts the expansion of the statutory regime in the years following the introduction of the Public Order Act 1986 (POA 1986), including measures to control protest around Parliament under the SOCPA 2005 and the Police Reform and Social Responsibility Act 2011. Chapter Six develops this analysis by considering measures of ‘subsequent restraint’\(^\text{104}\), including powers of arrest and prosecution for public order offences. The chapter considers the impact on the right to protest of the recent proliferation in criminal offences and policing powers and the significance of processes of privatisation and the propagation of ‘quasi-public spaces’.

At the introduction of the HRA 1998, it was predicted that the Act would bring about a “constitutional shift”\(^\text{105}\) towards a rights based system of law. Chapter Seven considers the extent to which the HRA 1998 has led to progressive developments in judicial attitudes towards the right to freedom of assembly. Focusing on a case-study of the development of the ‘kettling’ tactic, the chapter considers the impact of official constructions of public protest and human rights on the development of public order policing policy.

Chapter Eight considers development of covert security and intelligence gathering practices and their use against political activists. Taking as its starting point the recent crisis of legitimacy triggered by the revelations into the activities of PC Mark Kennedy, the chapter analyses the centralisation and significant expansion of the state’s intelligence gathering apparatus in the decades following the 1984-5 miners’


\(^{104}\) Ibid.

\(^{105}\) Redmond-Bate v Director of Public Prosecutions [1999], supra, n.76.
strike, including strategies to counter ‘domestic extremism’. The impact of counter terrorism powers on the right to protest will also be examined.

Finally, the concluding chapter draws the thesis together by considering the role of official discourses in legitimising coercive public order policing practices and the extent to which protesters’ experiences have been marginalised.
CHAPTER TWO

2. The right to protest and the Human Rights Act 1998

Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them. Sometimes they are wrongheaded and misconceived. Sometimes they betray a kind of arrogance: an arrogance which assumes that spreading the word is always more important than the mess which, often literally, the exercise leaves behind. In that case, firm but balanced regulation may well be justified.\footnote{Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23 at 43.}

Public protest, whether in the form of public demonstrations, industrial picketing or mass petitioning, is traditionally considered an important liberty within liberal society. The toleration of public protest is often said to be “the cornerstone of democracy”\footnote{See e.g. Joint Committee on Human Rights (2009a), Seventh Report of 2008–09, Demonstrating respect for rights? A human rights approach to policing protest, HL Paper 47-1, HC 320-1, p.1.}, providing an arena within which dissent and opposition may be expressed outside of the formal parliamentary structures. Such actions have historically resulted in important social reforms, including the right to vote, women’s rights and the right to form and to belong to a trade union.\footnote{Hillyard, P. and Percy-Smith, J. (1988) The coercive state (London: Pinter Publications).} Although Britain is often celebrated as a nation with a strong tradition of upholding social and democratic rights\footnote{See e.g. Dicey, A. V. (1985) Introduction to the study of the law of the constitution (Basingstoke: Macmillan), 10th Edition; Dworkin, R. (1986) Law’s Empire (London: Fontana); HAC (1980) The Law Relating to Public Order, Fifth Report of Session 1979-80 (London: HMSO), para.36.}, the right to engage in public protest has not historically been recognised in law.\footnote{See e.g. Ex p Lewis (1888) 21 QBD 191; Bailey v Williamson (1873) LR 8 QB 118. Whilst the Courts have from time to time referred in very general terms to the right to demonstrate (see e.g. Hubbard v Pit [1976] QB 142, at 174; R v Chief Constable of Devon and Cornwall ex parte Central Electricity Generating Board [1982] QB 458 at 470; Hirst and Agu v Chief Constable of West Yorkshire (1987) 85 Cr App R 143 at 143), no strictly legally enforceable right to protest has historically existed in UK law. See Robertson, G. and Street, H. (1967) Freedom, the Individual and the Law (Harmondsworth: Penguin).} In contrast to, for example, the United States and Canada, where constitutional rights protecting the right to protest can be upheld by the courts\footnote{See e.g. New York Times Co. v United States 403 U.S. 713 (1971) (per curiam); Canadian Charter of Rights and Freedoms, ss.2(b) and (c) (as incorporated by the Constitution Act 1982, Schedule B).}, public marches and assemblies in the United Kingdom have not traditionally derived their legality from any positive rights. Instead, the legality of a particular march or protest has depended solely upon whether the activity concerned
is legally prohibited.112 Such conservatism is reflected in the approach of the judiciary, who have historically refused to recognise the existence of any positive right to hold public meetings or gatherings.113

In October 2000 the much trumpeted HRA 1998 came into force in England and Wales114, giving further effect in domestic law the rights and freedoms enshrined in the ECHR.115 The ECHR was ratified by the UK in 1951 and since 1966 individuals have been granted a right to petition the European Court of Human Rights (ECtHR) in Strasbourg to hear complaints of human rights violations by the UK. However, the approach of the ECtHR is not ultimately coercive. Although the ECtHR may rule against the governments of Member States, the government is in effect free to determine the extent of changes needed in order to respond to any adverse rulings.116

The HRA 1998 gave the Convention significant new legal and constitutional meaning. Individuals whose Convention rights have been infringed are now able to seek direct redress for human rights violations in the domestic courts which, by Section 3 HRA 1998, are required to interpret domestic laws in a manner compatible


113 In Duncan v Jones [1936] 1 K. B. 218, Lord Hewart CJ (at 22) stated: “English law does not recognize any special right of public meeting for political or other purposes”. Cf Denning LJ in Hubbard v Pitt [1976] QB 142, who recognised in very general terms a right to protest and assemble (at 174).


115 Drafted in 1949 by the Council of Europe, the ECHR was based on the United Nations Declaration of Human Rights, conceived after the Second World War as a means of preventing the kind of human rights violations unleashed by Nazi Germany. Under the terms of the ECHR, contracting parties undertake to secure to everyone within their jurisdiction the rights and freedoms defined in Section 1. These are: right to life (Article 2), prohibition of torture (Article 3), prohibition of slavery (Article 4), right to liberty and security (Article 5), right to a fair trial (Article 6) no punishment without law (Article 7), right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10) freedom of assembly and association (Article 11) and right to marry (Article 12). In addition, Article 14 provides that the enjoyment of the rights and freedoms set out in the Convention must be secured without “discrimination on any ground” including on the grounds of sex, race, religion and political opinion.

with the Convention “so far as it is possible to do so”. Convention guarantees are also binding against “public authorities”, including tribunals\(^{118}\) and “any person certain of whose functions are functions of a public nature”\(^{119}\), including the police.

The ECHR does not establish a legal right to protest *per se*, but does guarantee positive rights to “freedom of expression”\(^{120}\) and “freedom of peaceful assembly”\(^{121}\), as well as prohibiting arbitrary state interferences with an individual’s liberty and security\(^{122}\), thought, conscience and religion\(^{123}\) and right to privacy.\(^{124}\) As documented on Table 2.1 at the end of this chapter, not all of these rights are absolute. The right to freedom of assembly under Article 11, for instance, applies only to “peaceful” assembly – a concept left undefined in the Convention.\(^{125}\) Moreover, though the provisions of such articles appear at first to provide cast iron legal guarantees they are subject to “clawback clauses”\(^{126}\) where conditions within the article allow for circumvention.\(^{127}\) For example, the rights to freedom of expression and peaceful assembly under Articles 10 and 11 ECHR are subject to a number of legitimate restrictions, including those made in the interests of “national security”, “public safety”, “the prevention of disorder or crime”, and the protection of the “rights of others”.\(^{128}\) This latter exemption is intended to apply to situations

\(^{117}\) Where such an interpretation is not possible, the courts can make a “declaration of incompatibility”, although it is for Parliament to appeal or amend any existing law in order to bring it in line with the Convention: HRA 1998, s.4.

\(^{118}\) Ibid., s.6(3)(b).

\(^{119}\) Ibid., s.6(3)(c).

\(^{120}\) Article 10(1).

\(^{121}\) Article 11(1).

\(^{122}\) Article 5(1).

\(^{123}\) Article 9(1).

\(^{124}\) Article 8(1).

\(^{125}\) See e.g. *Ciraklar v Turkey*, App. No. 19601/92, 80 DR 46; *G v Federal Republic of Germany* (1989) 60 DR 256, ECommHR; *Christians Against Racism and Fascism v UK* App. No. 8440/78, 21 DR 138.


\(^{127}\) The ECtHR recognises three categories of rights under the Convention. Absolute rights (Articles 3, 4(1) and 7) are the most strongly protected and cannot be restricted in any circumstance, even in times of war or other public emergencies. Limited rights (Articles 2, 5, 6 and 12) can be restricted, but only on the grounds expressly provided for in the text of the article and cannot be limited on the grounds of public interest. Qualified rights (Article 8, 9, 10 and 11) can be derogated from in times of war and other public emergencies (Article 15). Interference with qualified rights may also be justified in terms of the general public interest (see e.g. Article 11(2). Qualified rights are thus the most vulnerable to circumvention. See Starmer, K. (1999) *European human rights law* (London: Legal Action Group), p.155; White, R. and Ovey, C. (2010) *Jacobs, White & Ovey: The European Convention on Human Rights*, Fifth Edition (Oxford: OUP).

\(^{128}\) Articles 10 (2) and 11(2).
where there is a possibility that protecting the rights of one group may infringe on the rights of another, requiring a ‘balance’ or ‘trade-off’ of conflicting rights between competing groups or individuals.\textsuperscript{129} Whilst the ECHR have made clear that the balance should always fall in favour of those seeking to assert their right to protest unless there is strong evidence for interfering with their rights\textsuperscript{130}, in reality the Strasbourg Court has produced very little guidance as to how the balance between conflicting rights should be struck and States are granted a very wide margin of appreciation in such cases.\textsuperscript{131} Furthermore, whilst domestic courts are obliged under Section 2 of the HRA 1998 to take account of ECHR jurisprudence when interpreting the Convention rights, there are very few Strasbourg cases in favour of applicants.\textsuperscript{132} Nevertheless, in recognising the existence of some positive legal rights that could be enforced in the context of public protest, the HRA 1998 appeared to mark radical departure from the traditional approach and was celebrated as signalling a “constitutional shift”\textsuperscript{133} and a “new era”\textsuperscript{134} in the state’s approach to individual rights.

This chapter considers the significance of these developments for the regulation of public protest in England and Wales. The chapter is split into two parts. Part one considers the background and context of the HRA 1998 including the social and political influences driving its introduction. It further considers how the Act has been received in legal, political and academic circles. Empirical research analysing the impact of the Act on policing and the criminal process will be examined. Part two considers the role of human rights law in securing progressive social and political reform. In doing so, it highlights some of the problems associated with relying on the enumeration of rights as a mechanism to restrain coercive state practices. In considering calls to abandon the language of human rights as a tool for critique, the chapter proposes an alternative interpretation that recognises the dialectical nature of human rights discourse and is grounded in the experiences of the policed. In doing

\textsuperscript{129} In \textit{Chorherr v Austria} (1993) A 266-B, for example, the interference of the State with the Article 10 rights of protesters was held to be justified since it had the aim of upholding the Article 11 rights of another group to peacefully enjoy a parade.

\textsuperscript{130} See e.g. \textit{Otto-Preminger Institut v Austria} (1994) 19 EHRR 34.


\textsuperscript{133} \textit{Redmond-Bate v Director of Public Prosecutions} [1999] 163 J.P. 789 at 795.

\textsuperscript{134} \textit{Venables and another v News Group Newspapers Ltd and others} [2001] 1 All ER 908 at 100.
so, this chapter outlines the critical analytical framework that underpins the analysis presented in this thesis.

2.1 Bringing rights home: The campaign for a British ‘Bill of Rights’

The HRA 1998 was part of a trio of Acts introduced by the newly elected Labour Government that were said to “transform the way in which this country is governed”. The Act followed decades of debate about the desirability of an entrenched bill of rights in Britain. Although the question had been raised at various times following the UK’s ratification of the ECHR in 1951, it was not until Lord Scarman endorsed the idea in his 1974 Hamlyn Lecture that the subject became a serious issue for debate. Over the course of the next two decades, support for an entrenched bill of rights began to grow from across the political spectrum. This was fuelled by a crisis of public confidence in the criminal justice system. A series of high profile miscarriages of justice cases and police corruption scandals under the Conservative Government had highlighted the paradox between the principles of the ‘rule of law’ and the erosion of liberties by the executive, legislature and judiciary. By the early 1990s a growing chorus of commentators argued for the creation of a bill of rights in Britain or the incorporation of the ECHR into domestic law. Under the leadership of John Smith and subsequently Tony Blair, the Labour Party departed from its longstanding opposition to a bill of rights and in 1996

136 HL Deb 10 February 1999 c313.
143 The Labour Party had previously regarded an entrenched bill of rights as undemocratic on the grounds that it would confer too much power to an unelected judiciary. See Fenwick, H. (2007), supra, n.116, pp.144-145.
published a consultation paper, ‘Bringing Rights Home’. The White Paper set out the Party’s proposals to incorporate the ECHR into domestic law and thus “redress the dilution of individual rights by an over-centralising government” that had taken place under the previous Conservative administration. The paper was followed after Labour’s 1997 election victory by a Human Rights Bill and accompanying White Paper, ‘Rights Brought Home’, which proposed “to make more directly accessible the rights which the British people already enjoy under the Convention”.

Despite their own poor historical record of protecting civil liberties, support from the judiciary for the Human Rights Bill was significant, with the majority of speeches in favour of the Bill at its Second Reading stage coming from serving or retired judges. The judiciary’s traditional hostility towards rights on the grounds of the exceptionalism of the English common law system was limited to a small but determined group, with a number of senior judges engaging in what was in effect a “political campaign” for incorporation of the Convention. One of the most prominent supporters of the Bill of Rights was then Master of the Rolls, Sir Thomas Bingham. In a lecture delivered to the Bar Association for Commerce, Finance and Industry in 1992, Sir Bingham said that the failure of successive governments to

145 Ibid., p.80.
147 Ibid., para.1.19.
148 Ewing and Gearty’s analysis of British case-law during the first half of the twentieth century indicates that whilst the courts have historically been keen to protect private property rights, they have been far less willing to recognise socio-economic rights and what Ewing and Gearty categorise as ‘civil liberties’ – rights relating to civic and democratic participation such as voting rights, collective bargaining rights and the right to protest and expression. See Ewing, K. and Gearty, C. (2000) The struggle for civil liberties: political freedom and the rule of law in Britain, 1914-1945 (Oxford: OUP). See also Griffith, J. (1977) The politics of the judiciary (London: Fontana).
149 HL Hansard 24 November 1997 cc754-85.
150 Such critique reflected a historical scepticism from the judiciary about the ‘un-English’ character of the Convention. At the time the UK signed the ECHR, Lord Jowitt, then Lord Chancellor, warned of the dangers in encouraging “our European friends to jeopardise our whole system of law, which we have laboriously built up over the centuries, in favour of some half-baked scheme to be administered by some unknown court” (quoted in Lester, A. (1984) ‘Fundamental rights: the United Kingdom isolated?’, Public Law 46-71, pp.51-52). Lord Denning claimed that the perils of a Bill of Rights came less from judges but from potential litigants, warning that the judiciary would become overwhelmed by “a myriad of cases by a lot of crackpots” (quoted in Marshall, G. (1998) ‘Constitutional reform in the UK: practice and principles’ in University of Cambridge Centre for Public Law (Eds.) Constitutional Reform in the United Kingdom (Oxford: Hart), pp.73-84, p.73.
incorporate the Convention into United Kingdom law had “inhibited” the ability of the judiciary to protect human rights in the courts. The incorporation of the Convention would therefore:

restore this country to its former place as an international standard bearer of liberty and justice. It would help to reinvigorate faith, which our 18th and 19th century forebears would not for one instant have doubted, that these were fields in which Britain was the world’s teacher, not its pupil. And it would enable the judges more effectively to do right to all manner of people after the laws and usages of this realm, without fear or favour.

The HRA 1998 was one of the most celebrated pieces of legislation to be passed in the UK for decades and was widely welcomed by lawyers, politicians, academics and sections of the public alike. The Government claimed that the impact of the Act would be felt far wider than the courts. In the White Paper which preceded the HRA 1998, Prime Minister Tony Blair promised that the proposals would “enhance the awareness of human rights in our society” standing “alongside our decision to put the promotion of human rights at the forefront of our foreign policy”. Home Secretary Jack Straw described the Act as “a key component of our drive to modernise society and refresh our democracy”, promising that the legislation would improve the protection of human rights throughout the country:

The UK had a major role in drafting the convention but we have been almost alone in Europe in not incorporating it into our own law. Now, nearly 50 years later, the British people’s rights are coming home.

2.1.1 A ‘constitutional shift’?: Analysing the impact of the HRA 1998

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153 Ibid., p.400. Those who questioned whether so much power should be conferred on the judiciary were dismissed as “ageing Marxist[s] decrying the establishment’s conspiracy against the proletariat”: HC Hansard 16 February 1998 cc858.
156 HC Hansard 16 February 1998 cc769, 782-3.
Despite the widespread optimism surrounding the introduction of the HRA 1998, the Act was not universally welcomed as a progressive development. A number of critics highlighted the danger in relying on a bill of rights as a panacea for the erosion of civil liberties in Britain.\textsuperscript{158} In a powerful essay published a year after the introduction of the HRA 1998, public law professor Keith Ewing criticised the “distorted vision of human rights” promoted by the Act, arguing that the absence of collective social and economic rights has entrenched the “hierarchy of rights”, which gives priority to liberal principles of individual liberty over social and political equality.\textsuperscript{159} Others claimed that the Act was unlikely to remedy the injustices experienced by socially excluded groups; McColgan\textsuperscript{160}, for example, questioned the extent to which incorporation of the ECHR would improve the position of women and other disadvantaged groups, given the unequal access to justice among these groups. Sir Stephen Sedley\textsuperscript{161} warned that the impact of the Act might be merely rhetorical, with the winners and losers in society remaining the same despite the introduction of the Act. Notwithstanding these concerns, at the introduction of the HRA 1998 there was a broad measure of agreement among politicians, academic commentators and legal practitioners that the Act had the potential to bring about a real and enduring “cultural transformation” within the judiciary.\textsuperscript{162} In incorporating the ECHR more fully into the jurisprudence of the domestic courts, the Government claimed that Convention rights would “be far more subtly and powerfully woven into our law”\textsuperscript{163}, giving “further effect” to the rights and freedoms enshrined in the


\textsuperscript{163} Home Office (1997), \textit{supra}, n.146, para.1.14.
Convention. The HRA 1998 was celebrated by academics as heralding the arrival of an entrenchment of human rights principles in the jurisprudence of the courts - “a shift in the legal tectonic plates” and “a quantum leap into a new legal culture of fundamental rights and freedoms”. A year before the Act came into force in the UK, Sedley LJ in Redmond-Bate v Director of Public Prosecutions, spoke of the “the constitutional shift which is now in progress”, claiming that the HRA 1998 would represent a radical departure from the “old order” in allowing for the right to protest to be asserted in the face of legal restrictions.

The voluminous literature on human rights published since the introduction of the HRA 1998 indicates broad variation on the academic assessment of the impact of the Act. Whilst Jowell has argued that the introduction of the HRA 1998 amounted to a “new democratic order” whose application “constrains all public institutions”, the weight of empirical evidence appears to indicate otherwise. Writing three years after the HRA 1998 came into force in England and Wales, Gearty noted that the majority of decisions taken under the HRA 1998 have been conservative, with the courts either rejecting human rights arguments outright or incorporating them “with such seamlessness into the pre-existing law that it has been hard to tell whether they have made any difference to the overall result.” Research by Shah and Poole on the impact of the HRA 1998 on the House of Lords indicates that although there has been an increase in human rights cases heard by the court (by 2009 human rights and rights-related cases constituted some forty-two per cent of the caseload of the House of Lords compared to only seventeen per cent in the years before the Act came into force), there is a very low win rate for such cases, with on average only one in three

168 Ibid., at 795.
cases being successful. Ewing stresses the continuing “futility” of the HRA 1998, noting that judicial deference to the executive has continued notwithstanding the introduction of the Act:

While it is true that the HRA has allowed a wider range of questions to be asked before the courts, by applying the same deference that affected the approach to statutory interpretation and judicial review in earlier cases, the answer remains the same: it simply takes more words to produce and more time to read.

Indeed, a report published by the Department of Constitutional Affairs in 2006 claimed that arguments that the HRA 1998 has significantly altered the constitutional balance between the Parliament, the Judiciary and the Executive “have been considerably exaggerated”, noting that the Act “has not seriously impeded the achievement of the Government’s objectives on crime, terrorism or immigration”. Moreover, there is little evidence that the Act has gone any way to materially improve the lives of those groups who are more likely to bear the brunt of unrestrained state practices. Research by Costigan and Thomas indicates that whilst there is evidence of a growing awareness and involvement of specialist practitioners in human rights actions and a plethora of literature on the HRA 1998, this has been a “top down process”, with the Act having had only a limited impact on the activities of legal practitioners working within areas of high social and economic deprivation. The researchers found that although the lower courts might pay “lip service” to the HRA 1998, there has been a general reluctance to properly consider human rights arguments, with the Act playing only a “symbolic role” in the day to day activities of the courts. Other researchers have noted the failure of the Act to reach those groups who should have benefited from it most, including asylum seekers, Gypsies and travellers, the poor and mentally disordered.

individuals. Clements claims that the Act has done little to materially improve the lives of socially excluded groups: “New rights may be open to all – like the doors of the Savoy hotel – but in practice they prove more accommodating to the rich than the poor”.

Conversely, despite the weight of evidence indicating the limited impact of the HRA 1998 on the courts, the response from politicians and the media has been largely critical of the way that it has been used by judges. The HRA 1998 is frequently derided in the tabloid press and there is evidence of scepticism towards the Act from a significant section of the public: a poll conducted by the Ministry of Justice in 2008, for example, found that whilst the concept of having a law that deals with human rights in Britain is overwhelmingly popular, when it comes to the operation of the legislation, forty-three per cent of respondents believe that “too many people (mostly asylum seekers and other ‘foreigners’) take advantage of the Human Rights Act”. The 2010 Conservative Party manifesto promised to repeal the HRA 1998 and replace it with a “British Bill of Rights” in order to “protect our freedoms from state encroachment and encourage greater social responsibility”. Whilst Liberal Democrat support for the Act may have so far prevented its repeal, in March 2011 the Government established a ‘Commission on a Bill Of Rights’, tasked with investigating the creation of a “UK Bill of Rights”. In their report published in December 2012, the Commission found in favour of the creation of a Bill of Rights that would “incorporate and build on all of the UK’s obligations under the ECHR”. The Commission, however, failed to reach a consensus on the question whether this should entail a repeal of the HRA 1998. The same month, seventy-two

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182 In 2006, the Sun newspaper launched a campaign to repeal “this disgraceful piece of legislation”, claiming that it had led to “barmy rulings where a criminal’s so-called rights come ahead of their victim’s”: The Sun (2006) ‘Time to Act’, 15 May, p.1.
186 Ibid., para.84.
Conservative Party and Democratic Unionist MPs supported a motion to repeal the HRA 1998 on the grounds that the influence of the ECtHR over UK law is “fundamentally undemocratic”. Over twelve years after the introduction of the HRA 1998, its future remains as uncertain as ever.

2.1.2 The HRA 1998 and the criminal process

At the introduction of the HRA 1998 there was a great deal of optimism that the Act would lead to progressive developments in the criminal justice system. Ashworth, for example, predicted that the “greatest impact” of the Act would fall on the criminal process. For Neyroud and Beckley, the HRA 1998 provided a way out of the cycles of “boom” and “bust” that had characterised policing during the previous decades, including zero tolerance, corruption and miscarriages of justice. Securing and reconciling human rights could thus be at the core of a new “ethical policing”.

Although some academic commentary has examined the impact of the HRA 1998 on policing, little empirical research has examined the influence of the Act on the procedural structures of the police service or the day-to-day activities of police officers. A notable exception is Bullock and Johnson’s recent research examining the impact of the HRA 1998 on the working and organisational practices of the police. Drawing on data gathered from interviews with policing personnel, Bullock and Johnson found that although the HRA 1998 has led to a “new framework” through which police officers carry out their work, there is little evidence to suggest it has promoted a greater awareness and respect for human rights amongst officers. Instead, the Act has become “institutionalised” within the police service, primarily by the introduction of new bureaucratic procedures through which officers justify and make audible their decision making and legitimise existing practices.

187 Motion for leave to bring in a Bill (Standing Order No. 23), HC Hansard 4 December 2012 cc728-732. The move appears to have been based a misunderstanding or misrepresentation of the impact of the Act. Withdrawal from the HRA 1998 would not take the UK out of the jurisdiction of the ECtHR, which, as discussed above, stems from the UK’s ratification of the ECHR rather than the HRA 1998.


192 Ibid., p.633.
human rights principles of proportionality and legality were found to be enabling, rather than constraining, existing police practices, providing both a bureaucratic “safety net” through which the police could justify their actions and a veneer of accountability to police decision-making. Moreover, the researchers found that whilst a rights discourse has become established within the police service, the dominant discourse among police officers is one of ‘risk’. The importance of risk management over rights protections means that the language of risk is frequently used to justify interference with rights. Contrary to assumptions that compliance with HRA 1998 procedures would lead to progressive changes in police work, Bullock and Johnson found that the “template for justification” provided by the Act has produced little or no impact on the day-to-day activities of the police.

As one of the interviewed officers put it: “I don’t think anything has changed. It hasn’t made us question the way we operate. I haven’t seen any impact. I can’t think of any obvious difference in what we have done”.

The HRA 1998 was arguably never intended to offer any drastic shift in the relationship between individual and state. Alongside devolution and reform of the House of Lords, the Act was introduced as part of a raft of constitutional reform measures introduced by the newly elected Labour government. Norrie has argued that at a time of economic expansion, such measures became a symbolic

Proportionality is the basis of human rights legal reasoning in the ECtHR and has four central elements: (i) any restriction of a Convention right must be considered to be legitimate, that is that the curtailment of the right is done in pursuit of a legitimate aim; (ii) the restriction must be suitable to the legitimate aim pursued. That is that consideration should be given to ensure that the measures being adopted are actually intended to meet the objective criteria of legitimacy claimed; (iii) the restriction must be considered to be an absolute necessity and that no other means could be adopted in their place. Thus there should be the least interference with the right as possible; (iv) to justify a restriction there must be a strong and pressing social need outweighing normal adherence to convention rights. See Fordham, M. and de la Mare, T. (2001) ‘Identifying principles of proportionality’, in J. Jowell and J. Cooper (Eds.) Understanding human rights principles (Oxford: Hart Publishing), pp.27-89. cf. Çali, B. (2007) ‘Balancing human rights? Methodological problems with weights, scales and proportions’, Human Rights Quarterly 29: 251-270.

The principle of legality requires that the police (and other state agents) only act in a way that is “prescribed by law”. The principle is incorporated into the ECHR through Article 7, which entails three distinct rules. First, only the law can define a crime and prescribe a penalty. Second conduct must not be retrospectively prohibited. Third, conduct must not attract a heavier penalty than the one that was applicable when the offence was committed. The principle is further reflected in specific Convention articles. Restrictions on peaceful assembly under Article 11, for example, will only be legitimate if it is “prescribed by law” and in pursuance of a legitimate activity including “the prevention of disorder or crime” (Article 11(2)). See Murphy, C. (2010) ‘The principle of legality in criminal law under the European Convention on Human Rights’, European Human Rights Law Review 2: 192-207.

Bullock, K. and Johnson, P. (2012), supra, n.192, p.14

modernizing substitute for a real programme of social and economic reform: “a way of doing as little as possible to the status quo while appearing to offer a significant ‘third way’ agenda.”¹⁹⁸ Unlike statutory law, the HRA 1998 does not comprise a list of rules, but instead outlines a list of principles that public authorities must follow. The distinction between formal legal rules and principles is highly significant, as Phillipson argues:

‘Rules’ denote norms which, if applied, determine the relevant issue conclusively. They thus apply in an all or nothing way. ‘Principles’, by contrast, have a dimension of weight and the application of one principle to an issue does not necessarily determine it: principles merely argue for a particular outcome; more than one may well be relevant to a given issue, and in such a case these competing principles must be weighed against each other.¹⁹⁹

The ECtHR have repeatedly stated that the Convention is intended to guarantee rights that are “practical and effective” not merely “theoretical or illusory”.²⁰⁰ There is, however, scope within its constitution for the authorities to invoke broad and often competing principles to conceal political decision-making, something they would have been otherwise reluctant to do openly.²⁰¹ The principle of proportionality requires that any deviation from Convention rights must not be excessive in relation to the legitimate aim being pursued. It requires the authorities to “search for a fair balance”²⁰² between the general public interest and the individual’s fundamental rights.²⁰³ Since such decisions can never be entirely neutral and objective, proportionality allows for political decisions to masquerade as human rights adjudications.²⁰⁴ Moreover, though the HRA 1998 was the centrepiece to the New Labour administration’s commitment to citizenship, political freedoms and the fostering of a claimed human rights culture, from its inception the rights contained

²⁰⁰ See e.g. United Communist Party of Turkey and Others v Turkey (1998), Application no. 133/1996/752/951, para.33.
²⁰¹ Norrie, A. (2001), supra, n.159.
²⁰² N v the United Kingdom [2008] ECHR  at 44.
²⁰³ The ECtHR regards “the search for a fair balance being inherent in the whole of the Convention”: Brumarescu v Romania (1999), App. No. 28342/95, ECHR 79.
were portrayed as conditional upon responsibilities. Rather than securing civil liberties and restraining the coercive power of the state, the HRA 1998 had from its outset the potential to serve an essentially repressive and legitimising function, as Norrie has argued:

for now it will be possible to argue that the system is not just good because ‘we say so’ but because it has undergone a rigorous human rights audit, and, barring problems at the edge, been pronounced fair. This will be possible even though no substantial changes have been made to the system as a whole.  

2.2 Rights brought home: A critique of human rights law

The above analysis raises fundamental questions about the capacity for the HRA 1998 to secure progressive reforms in the regulation of public protest. An analysis of the impact of the HRA 1998 thus necessitates a critical examination of the character of human rights law and the relationship between human rights discourse and the state. This requires consideration of (i) the social and political function of law in society and (ii) the normative content of human rights. It is to these two questions that this chapter will now turn.

2.2.1 The social and political function of law

The optimism surrounding the introduction of the HRA 1998 was premised on the supposition that law can be a vehicle through which progressive reforms can be materialised. This assumption reflects a liberal conception of law as an independent, autonomous system of rules divorced from the social context in which they are formulated and applied. In Crime, Reason and History, Alan Norrie highlights the conflicts inherent within liberal legalism. Norrie notes that whilst law is structured around the “juridical individual”, emphasising individual responsibility as the basis

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205 See e.g. HC Hansard 21 October 1998 c1357, Jack Straw: “[T]he truth is that rights have to be offset by responsibilities and obligations. There can and should be no rights without responsibilities and our responsibilities should precede our rights … I want to see developed a much clearer understanding among Britain’s people and institutions that rights and responsibilities have properly to be balanced – freedoms by obligations and duties.”  


of punishment, law is in fact a “relational phenomenon”, which mediates social conditions, structures and relations. The possibility of regulating power through law is, for Norrie a false one, “for liberal law already entails, indeed is ‘contaminated’ by, that which it would control”.

A Marxist interpretation of law can be found in the work of Soviet jurist Evgeny Pashukanis, who argued that law was not a neutral concept, but an expression of the concrete relations of capital. Drawing on Marx’s analysis of the bourgeois state as an emancipated reflection of class relations, Pashukanis argued that both the rule of law and the institutions under which it is administered are important instruments of class domination, providing a veneer of legitimacy to the exercise of ruling class power.

By appearing as a guarantor, authority becomes social and public, an authority representing the impersonal interest of the system … Thus there arises, besides direct unmediated class rule, indirect reflected rule in the shape of official state power as a distinct authority, detached from society.

Over half a century later, a Marxist historian E. P. Thompson attacked the traditional hostility of radical left towards the law, arguing that the “legal order”, reflecting the institutions of law and legal actors, should be understood as a separate entity from the “rule of law” - an autonomous and “unqualified human good” which represented a progressive historical development against the arbitrary exercise of power under absolutism. In the closing pages of his influential book Whigs and Hunters, Thompson argues that although law operates to reinforce and ideologically legitimise class relations, law cannot be dismissed simply as an instrument of class power. Instead, law should be viewed not only instrumentally but “simply in terms of its own logic, rules and procedures - that is, simply as law”.

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208 Ibid, p.223.
212 Ibid., pp.137-8.
214 Ibid, pp.258-269.
interpretation of law has been more recently defended by Cowling\textsuperscript{215}, who argues that the left cannot dismiss law outright as a tool of reaction, for to do so would ignore the fact that many demands for civil rights have been given expression through law. A leftist defence of law can also be found in the work of Ian Taylor\textsuperscript{216}, who sought to respond to the growing social turmoil and anxieties arising from Thatcherite economic and social policy in the early 1980s. Taylor argued that the law and the state are not simply instruments of class domination but are instead contested terrains through which progressive policies and democratic and accountable systems of policing could be constructed. Any analysis which seeks to present law as dominated by single class interests and fails to take seriously popular anxieties about law and order is, for Taylor, an inherently “paralyzing” strategy.\textsuperscript{217}

It is submitted that both Thompson and Taylor are correct to argue that law is not simply an instrument of class domination, but a field in which such domination can be contested. As Poulantzas reminds us, law is not merely a reflection of the material base of society, but is “a constitutive element of the politico-social field” through which social relations can be both contested and reproduced.\textsuperscript{218} Yet in arguing that law serves a legitimate function in the suppression of violence and the mediation of state power, both of these accounts overlook what Merritt has described as the “legitimating ideological function” played by law in facilitating acceptance of a social system and institutions by which particular sections of society are “oppressed, alienated and dehumanised”.\textsuperscript{219} Law not only reflects, but constitutes certain economic relations under capital, a process by which the dominant ideology secures its dominance and neutralises class struggle. That law can at times serve the interests of the powerless as well as the powerful does not, therefore, undermine structural accounts of law but is rather central to the analysis. Any attempt to counterpose the rule of law to abuse of power or acts of violence is a false dichotomy. Instead, as this thesis will attempt to argue, reliance on law to protect human rights is an example of

\textsuperscript{217} Ibid, p.4.
the “legal fetishism” described by Hillyard and others, which ignores the reality of law as “an integral part of the repression and organisation of state violence”.\textsuperscript{220}

An understanding of the social and political function of law highlights the problems with relying on law to bring about progressive reforms in public order policing. In their ground-breaking research published in \textit{The Case for the Prosecution}\textsuperscript{221}, McConville \textit{et al} highlight the limits of legal constraints on the exercise of police discretion, arguing that reformist strategies embody the “false promises” of liberal legalism:

namely, that the law offers significant protection of the person of the individual; that the law assists citizens in making decisions free of restraint, coercion and undue influence; that the behaviour of official actors is normatively ordered according to legal rules legally recognized principles; that adversarial confrontation is the hallmark of criminal justice; and that all significant decisions are made according to revealed criteria in public settings.\textsuperscript{222}

The legal reform model, argue McConville \textit{et al}, relies on the false assumption that legal rules are \textit{benign} (intended to have a protective effect), \textit{instrumental} (have the potential to constrain deviant behaviour) and \textit{targeted} (not open to manipulation by those intended to be bound by them). Failing to recognise the limits of legal protection, “leads inexorably on the treadmill of permanent law reform in which every ‘failing’ of the law to deal with certain forms of social behaviour is addressed by a reformulation of the rules”\textsuperscript{223}. Using the example of the development of ‘reasonable suspicion’ as a trigger for police stops and searches in the Police and Criminal Evidence Act 1984 (PACE 1984) reforms, McConville \textit{et al} note that despite claims from the Home Secretary that the reforms would “strengthen the rights of the citizen”\textsuperscript{224}, the broad powers were deliberately drafted in such a way as to maximise police discretion while limiting the opportunity for legal challenge.

\textsuperscript{222} \textit{Ibid.}, p.191 \textsuperscript{223} \textit{Ibid.}, p.194.
\textsuperscript{224} HC Hansard 7 November 1983 c102.
Rather than directing the exercise of police discretion, the reforms legitimised existing practices and reinforced police constructions of “suspect communities”.

It has always been the case that particular sections of the population have experienced a different style of policing to the rest of society. In *The Coercive State*, Hillyard and Percy-Smith argued certain categories of the population are treated as automatically ‘suspect’ and subjected to considerable scrutiny and surveillance. This process of marginalisation and criminalisation is reflected in the policies and practices adopted by the police. The focus “is not on crime but on people”, with stop and search, arrest and detention powers regularly abused in order to gather information or simply harass. Some sections of the population have historically experienced a more coercive policing style. Hall *et al*’s seminal work into the ‘mugging’ panic of the 1970s, for example, described how pre-existing beliefs about the supposed criminality of black people resulted in their demonization as ‘folk devils’ by the media, politicians and criminal justice agents and subject to extraordinary policing tactics.

### 2.2.2 The normative content of human rights

It is essential that the HRA 1998 is located within the context of a broader proliferation of human rights charters and institutions across Western democracies. In his historical analysis of the origins of human rights, Moin suggests that despite a public and political consensus that portrays human rights as an age-old ideal, in reality it was not until the period following the mid-1970s that human rights began to

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225 Hillyard defines a ‘suspect community’ as: “a sub-group of the population that is singled out for state attention as being ‘problematic’. Specifically in terms of policing, individuals may be targeted, not necessarily as a result of suspected wrong doing, but simply because of their presumed membership to that sub-group. Race, ethnicity, religion, class, gender, language, accent, dress, political ideology or any combination of these factors may serve to delineate the sub-group.”; Hillyard, P. (1993), *supra*, n.220. See also Loader, I. and Zedner, L. (2007) *Police beyond law? Criminal Law Review*: 10(1): 142-152.


228 Ibid, p.270


take on “literally millennial appeal in the public discourse of the West”.

Moin argues that during this period human rights were embraced both by the left as a persuasive alternative to “universalistic” theories following the fall of the Communist states and the right in response to the moralization of US foreign policy following the military disaster in Vietnam. As Stan Cohen reminded us, human rights has become the major normative discourse of the current era and a major standard of international legitimacy.

The advancement of human rights has been the subject of a powerful critique by the Critical Legal Studies (CLS) movement in the United States. This body of work has highlighted the conspicuous role played by “rights talk” within neo-liberal political discourse as a response to the revolutionary aspirations of socialism. Drawing on Marx’s dismissal of bourgeois rights in *On the Jewish Question* as “the rights of the egotistic man” and “obsolete verbal rubbish”, CLS critics highlight the dangers in relying on a liberal myth of rights which assumes that the realisation of rights through litigation and legal declarations is tantamount to meaningful social change.

The CLS literature on human rights raises three central objections. First, human rights are inherently *individualistic*. Human rights charters, on the whole, been developed under capitalism, reflecting what McPherson has described as the “possessive individualism” of liberal ideology rather than socialist principles.

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230 Ibid., p.6.
234 Marx, K. (1972), *supra*, n.210, p.43. Marx’s critique of rights stems from his critique of ideology. For Marx, liberal concepts of liberty and equality are ideological fictions emanating from the state which sustain a social order based on inequality, exploitation and oppression: see Douzinas, C. (2010), *supra*, n.231, p.83.
235 McPherson describes possessive individualism as the “conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them”: Macpherson, C.
translating rights into a narrow individualistic form, the HRA 1998 reinforces a key ideological assumption of liberal ideology - that the individual is the most basic unit through which society should be composed and analysed. This “abstract legal individualism”\textsuperscript{236} that lies at the core of the Act inherently excludes social and structural questions, ignoring the social context within which individuals operate.\textsuperscript{237} Second, human rights are indeterminate. Tushnet’s powerful critique of the liberal theory of rights highlights the problems associated with reducing incommensurable interests to some common measure of value.\textsuperscript{238} The language of rights, Tushnet maintains, “is so open…that the opposing parties can use the same language to express their positions”.\textsuperscript{239} Describing the limitations of the rights-balance framework in the US Supreme Court’s interpretation of the US Constitution, Tushnet describes how defining a right as the result of a balancing process is the most familiar technique used to acknowledge the existence of rights and to define them so as to deny their existence:

The Constitution recognizes many generally protected interests: national unity, state autonomy, individualism, personal autonomy, private association, private property, and social control of property to guarantee economic growth with liberty. In any particular case a court can draw items from that catalogue and balance them as it chooses.\textsuperscript{240}

Third, the enumeration of rights is an inherently depoliticising strategy.\textsuperscript{241} Rather than securing civil liberties, human rights charters reduce the substance of progressive campaigns to legal rights claims, thereby atomising social movements in

\textsuperscript{236} Norrie, A. (2001), supra, n.159, pp.261-276.
\textsuperscript{238} Tushnet, M. (1984), supra, n.233, p.1363.
\textsuperscript{239} Ibid., p.1371.
\textsuperscript{240} Ibid., p.1373. Salecl has highlighted the endless proliferation of rights-claims: “Although we have rights, a right that would express the notion of rights does not exist. All we can do, in this regard, is to invent new rights perpetually, searching in vain for a right that would affirm us as non-split subjects”. Salecl, R. (1995) ‘Rights in psychoanalytic and feminist perspectives’, Cardozo Law Review 16(3-4): 1121-1138, p.1134.
\textsuperscript{241} Brown has argued that depoliticisation has become a particularly destructive element of neo-liberal discourse. She defines this process as “removing a political phenomenon from comprehension of its historical emergence and from a recognition of the powers that produce and contour it. No matter its particular form and mechanics, depoliticisation always eschews power and history in the representation of its subject. When these to constitutive sources of social relations and political conflict are elided, an ontological naturalness or essentialism almost inevitably takes up residence in our understandings and explanations”: Brown, W. (2006) Regulating aversion: Tolerance in the age of identity and empire (Princeton: Princeton University Press), p.15.
a way which limits their social and political effectiveness.\textsuperscript{242} Placing rights in a legal framework can have the effect of imposing limitations on those rights whilst at the same time appearing to make concessions to the existence of the rights, giving capitalism a veneer of legitimacy. The enumeration of rights can be a mechanism by which states can conceal their continuing human rights abuses behind a facade of reform\textsuperscript{243}, or develop various “techniques of neutralisation” as documented in the work of Stan Cohen.\textsuperscript{244} As Green and Ward\textsuperscript{245} point out, these techniques often build upon exceptions written into domestic or international law. Ewing\textsuperscript{246} takes the example of the recent recognition of fundamental labour rights in the Chinese legal system, arguing that far from representing a progressive development, their inclusion allows for the more effective regulation of those rights in response to a wave of illegal strike action.

The unstable and indeterminate nature of human rights can thus conceal attempts to impede advances by progressive social forces and impose state authority.\textsuperscript{247} Writing in the British context, Fredman has described how the ‘right to work’ – a key rallying call from the left in the face of rising unemployment – was “hijacked” by the Thatcher administration in order to legitimise measures which undermined the power of trade unions.\textsuperscript{248} According to a 1987 Green Paper\textsuperscript{249} which led to stringent new restrictions on industrial action, election ballots and union finances, the “right to cross a picket line and go to work” and the “right not to be intimidated by threats from union leaders” are “essential freedoms” that must be defended by the state.\textsuperscript{250} “Rights talk” was thus embraced by the Government in order to legitimate an essentially individualistic, laissez faire, view of society.\textsuperscript{251} The defence of human

\textsuperscript{249} HM Government (1987) \textit{Trade Unions and Their Members}, Cm 95 (London: HMSO).  
\textsuperscript{250} Many of the Green Paper’s recommendations were incorporated into the Employment Act 1988, which included a range of measures designed to undermine the collective strength of the trade unions. See Wrigley, C. (1997) \textit{British trade unions: 1945-95} (Manchester: Manchester University Press).  
\textsuperscript{251} \textit{Ibid.}
rights is, moreover, increasingly invoked to legitimise military interventionism\textsuperscript{252}, such that human rights discourse has been characterised as the “language of imperialism”.\textsuperscript{253} The appropriation of human rights under neoliberalism has transcended the nation state; Whyte, for example, notes that human rights discourses are increasingly “hijacked” by multinational corporations in order to obscure the direct role that foreign capital plays in sustaining conflicts in developing countries.\textsuperscript{254} Indeed, as Costas Douzinas has powerfully argued, the period which has seen human rights triumph on the world stage as the ideology of postmodernity has also been that which has witnessed more human rights violations than any other period in history.\textsuperscript{255}

2.2.2 \textit{An instrumentalist interpretation of human rights}

The role of human rights discourses in legitimising some of the worst excesses of neoliberal policies and practices raises fundamental questions about the utility of human rights as a tool for critique. If human rights are so vulnerable to appropriation by the state, should progressive social movements abandon the language of rights altogether? These were important questions asked by the CLS movement, whose critique of the liberal theory of rights led to calls for the left to abandon the language of human rights as a mobilising discourse. Of particular influence was the work of Mark Tushnet, who, in his \textit{An Essay on Rights}, claimed that not only is the discourse of human rights futile, “it is positively harmful”.\textsuperscript{256} Tushnet argued that whilst the experiences of independence and solidarity which give rise to rights claims are important, reducing those experiences to abstract rights mischaracterises their very nature. Rights talk should therefore be avoided entirely, focusing instead on people’s “real experiences”:

When I march to oppose United States intervention in Central America, I am “exercising a right” to be sure, but I am also, and more importantly, being together with friends, affiliating myself with strangers, with some of whom I disagree profoundly, getting cold, feeling alone in a crowd, and so on. It is a form of alienation or reification to characterize this as an instance of “exercising my rights.”

More recently, Wendy Brown has highlighted the extent to which human rights discourses have the capacity to depoliticise social movements and entrench existing relations of power. Brown argues that human rights activism is a moral-political project that “displaces, competes with, refuses, or rejects other political projects”, calling for radicals and progressives to avoid using the language of rights within their emancipatory projects. Brown’s scepticism towards the “emancipatory potential” of rights is premised on an assumption that human rights are intrinsically and eternally associated with liberalism. To move beyond liberalism it is necessary to move beyond the limits of liberal discourse, and thus abandon the language of human rights. Following Brown, Jackson has argued human rights are so fundamentally tied up with the logic of liberal individualism that they cannot possibly offer any emancipatory potential. For Jackson, human rights are “not only of little utility but arguably a detrimental accompaniment”, advocating “a scathing critique and a wholesale rejection of human rights as tools for critique”:

If a drive for collective justice – or indeed any true sense of justice which by definition must be collective – is to be at the core of emancipatory politics then human rights cannot, by way of their equation with liberal individualism, assist such a project. This revelation should provide real cause for concern for those on the left who seek to articulate critiques of the violence of liberal politics – including the current security politics – in the language of human rights.

The leftist critique of human rights focuses on the potential for rights discourses to divert social movements from a focus on the real sources of social, political and

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259 Ibid, p.453.
260 Ibid.
economic inequality. In his *Ethics: An Essay on the Understanding of Evil*, Badiou argues that the intensification of human rights discourse is a product of the collapse of revolutionary Marxism “and of all forms of progressive engagement that it inspired”. For Badiou, human rights discourse is a nihilist doctrine that has the damaging effect of blocking “the positive prescription of possibilities” and confirming “the absence of any project, of any emancipatory politics, or any genuinely collective cause.” Badiou argues that human rights cannot serve an emancipatory function since they are nothing more than “the ideology of modern liberal capitalism.” In order to transcend the limits of neoliberalism, he contends, it is necessary to move beyond human rights: “Our ability to once again have real ideas and real projects depends on it.”

In merely acknowledging the possibility of a more just social order, rights discourses are capable of serving a repressive function and entrenching an unjust status quo. Human rights are typically articulated in abstract and indeterminate terms, creating the illusion that a more just social order has been achieved and thereby deflating and defeating the progressive transformative demands of social movements. Human rights as an ideology can thus be an important guarantor of state legitimacy.

Recognising the pacifying potential of human rights does not, however, necessarily lead to the conclusion that the language of rights should be abandoned altogether. Whilst it is vital to understand the potential for human rights to depoliticise social

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movements, such a critique is limited to what Bowring\(^{270}\) has described as “the bourgeois (mis)appropriation of the discourse of human rights”.\(^{271}\) It is true that human rights do not possess any “innate capacity” to advance emancipatory projects.\(^{272}\) However, this does not mean that they cannot play a useful role in such a project. This ambivalence towards rights, as Baynes\(^{273}\) has argued, rests upon an excessively narrow liberal and proprietary notion of rights and an insufficiently dialectical understanding of the relationship between rights and emancipatory struggle. The language of human rights has historically played an important role in progressive social and political movements, both as a framework for critique and as a strategy for change.\(^{274}\) A more optimistic view of the emancipatory potential of human rights can be found in the work of Costas Douzinas.\(^{275}\) Following utopian Marxist Ernst Bloch\(^{276}\), Douzinas sees rights as a method to resist domination and oppression. Although critical of human rights mechanisms and institutions, he is optimistic about the role of human rights in mediating the unjust character of law under liberalism. Douzinas reminds us that rights are not “eternal, inalienable or natural” but “deeply intersubjective” and “deeply political”.\(^{277}\) His vision of rights is, however, a utopian one. In the End of Human Rights Douzinas sees human rights as “the necessary and impossible claim of law to justice … the epiphany of which will never occur but whose principle can stand in judgment of the present law”.\(^{278}\) Bill Bowring has challenged Douzinas’ view of human rights as a utopian aspiration, arguing that:

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\text{this position is implausible in the face of real struggles for human rights in the face of cruel and undiminishinog oppression at the hands of repressive regimes and in the face of ‘globalisation’. To fight to prevent and seek redress for violations of human rights is not to aspire to utopia. It is to}
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\(^{271}\) Ibid, p.126.
\(^{274}\) Baynes notes that the trade unionist, civil rights, feminist, and gay rights movements have all utilised the language of human rights as a mobilising discourse. Ibid, p.451.
\(^{275}\) Douzinas, C. (2000), supra, n.255.
\(^{277}\) Douzinas, C. (2000), supra, n.255, p.274
\(^{278}\) Ibid, p.380.
struggle to provide the conditions here and now to become more human. Douzinas has arrived at a blind alley.\footnote{279}

Against Douzinas, Bowring offers a materialist account of human rights which recognises the praxis and dialectical nature of human rights discourse. Bowring argues that seeing human rights as mere rhetoric, whereby their content is decided by the state and their impact is to defeat and co-opt social movements, strips rights of their material content. Instead, human rights should be understood as substantive political projects which serve as a tool in the political struggle for the emancipation of the oppressed. To the extent that human rights have been appropriated by the state, they need to be “reappropriated” in struggle.\footnote{280} To this end, Bowring seeks to restore human rights “to their proper status as always scandalous, the product of, and constantly reanimated by, human struggle.”\footnote{281}

A similar interpretation of human rights can be found in the work of David Harvey.\footnote{282} Writing in the context of the ‘right to the city’, Harvey highlights the legitimising role played by liberal rights discourses:

> We live in an era when ideals of human rights have moved centre stage both politically and ethically. A great deal of energy is expounded in promoting their significance for the construction of a better world. But for the most part the concepts circulating do not fundamentally challenge hegemonic liberal and neoliberal market logics, or the dominant modes of legality and state action. We live, after all, in a world in which the rights of private property and the profit rate trump all other notions of rights.\footnote{283}

Harvey argues that the language of rights should not, however, be abandoned. Instead, recognising that human rights discourse has attained an important position in contemporary society, he argues that human rights should be used as a tool for mobilisation. As against the narrow state deployment of human rights, Harvey argues that it is necessary to “democratize” human rights, through the construction of a broad social movement which insists on the right to the city in the form of popular participation in the control of its surplus. Such a right would transcend the state’s liberal deployment of human rights, since:

\footnote{279} Bowring, B. (2008), supra, n.270, p. 140.
\footnote{280} Ibid.
\footnote{281} Ibid, p.112.
\footnote{283} Ibid, p.23.
The right to the city is far more than the individual liberty to access urban resources: it is a right to change ourselves by changing the city. It is, moreover, a common rather than an individual right since this transformation inevitably depends upon the exercise of a collective power to reshape the processes of urbanization. The freedom to make and remake our cities and ourselves is … one of the most precious yet most neglected of our human rights.  

Ward and Green utilise Gramsci’s concept of hegemony to consider the ambiguous nature of human rights discourses. Ward and Green argue that, paradoxically, it is the state’s acceptance of the universality of human rights that makes them an effective tool of global hegemony. Human rights norms are an important part of political legitimation, giving greater political leverage to resistance movements campaigning for an end to human rights violations. Similarly, Alan Hunt draws out the connection between hegemony and rights discourse. For Hunt, human rights are constituted by and through social and political struggle. Rights thus have the capacity to be elements of an emancipatory movement even though “they are neither a perfect nor exclusive vehicle for emancipation.”

It is submitted that any serious critique of human rights must recognise that human rights can be useful on an instrumental basis. Rights rhetoric has been and continues to be an effective form of discourse for social movements, awarding political legitimacy to their demands. It is this instrumentalist interpretation of human rights that underpins the analysis presented in this thesis. Following Bowring, I adopt a substantive rather than procedural interpretation of human rights that recognises the dialectical nature of human rights discourse. I conceptualise human

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284 Ibid.
286 Ibid., p.85.
288 Ibid., p.247.
290 This thesis adopts Steinberg’s analysis of discourse as an “ongoing process of social communication” that is both “multivocal”, in that it can be subject to multiple meanings and interpretations, and “ideologically saturated”, in that the meanings it provides offer conflicting
rights not as a fixed extraction but as a dynamic instrument that can be used both as a guarantor of state legitimacy and as an effective mechanism to challenge abuses of state power. Recognising the political struggles from which human rights have emerged, I adopt a ‘bottom up’ approach which assumes that human rights should not be conceived as a set of abstract principles but instead measured against the material circumstances faced by people, that is as “the subjects and objects of real struggles in the real world”.291

2.3 Conclusions

The HRA 1998 was celebrated as marking a watershed in the relationship between citizen and the state. The Act sought to remedy a serious deficit in state legitimacy, fuelled by a series of high profile cases of police corruption, scandal and miscarriage of justice. Yet over ten years after its introduction there is little evidence that the HRA 1998 has lived up to its high expectations and its future remains uncertain. The above analysis suggests that the optimism surrounding the Act may have been ill-founded. As this chapter has attempted to argue, much of this euphoria was premised upon a fetishised reliance on law and a failure to recognise the potential for human rights discourses to reinforce the hegemonic power of the state. This thesis in contrast seeks to highlight the repressive function of law and policing practices and the fragility of official interpretations of human rights. The following chapter presents a case study of the Gaza protests. In grounding the analysis in the experiences of the policed, I endeavour to highlight the human harm and suffering that can be lost when analysing state practices against abstract legal principles.


<table>
<thead>
<tr>
<th>Article</th>
<th>Right</th>
<th>Restrictions and/or Limitations</th>
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<tbody>
<tr>
<td>Article 5: Right</td>
<td>Everyone has the right to liberty and security of person.</td>
<td>No one shall be deprived of his liberty save in six limited situations set out in Article 5(1), including:</td>
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<td>to liberty and</td>
<td></td>
<td>- following conviction by a court;</td>
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<td>security (limited</td>
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<td>- on reasonable suspicion of having committed an offence;</td>
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<td>right)</td>
<td></td>
<td>- to prevent his committing an offence or fleeing after having done so.</td>
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<tr>
<td>Article 6: Right</td>
<td>Everyone is entitled to a fair and public hearing within a</td>
<td>N/A</td>
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<td>to a fair trial</td>
<td>reasonable time by an independent and impartial tribunal</td>
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<tr>
<td>(absolute right)</td>
<td>established by law.</td>
<td></td>
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<tr>
<td>Article 8: Right</td>
<td>Everyone has the right to respect for his private and family life,</td>
<td>Subject to restrictions that are prescribed by law and are necessary in a democratic society in the interests of:</td>
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<td>to respect for</td>
<td>his home and his correspondence.</td>
<td>- national security;</td>
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<td>private and</td>
<td></td>
<td>- public safety;</td>
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<td>family life</td>
<td></td>
<td>- the economic well-being of the country;</td>
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<td>(qualified right)</td>
<td></td>
<td>- the prevention of disorder or crime;</td>
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<tr>
<td>Article 9: Freedom</td>
<td>Everyone has the right to freedom of thought, conscience</td>
<td>Subject to restrictions that are prescribed by law and are necessary in a democratic society in the interests of:</td>
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<td>of thought,</td>
<td>and religion; this right includes freedom to change his religion or</td>
<td>- public safety;</td>
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<tr>
<td>conscience and</td>
<td>belief or freedom, either alone or in community with others and in</td>
<td>- public order;</td>
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<td>religion (qualified</td>
<td>public or private, to manifest his religion or belief, in worship,</td>
<td>- the protection of health or morals;</td>
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<td>right)</td>
<td>teaching, practice and observance.</td>
<td>- the protection of the rights and freedoms of others.</td>
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<td>Article 10:</td>
<td>Everyone has the right to freedom of expression. This right shall</td>
<td>Subject to restrictions that are prescribed by law and are necessary in a democratic society in the interests of:</td>
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<tr>
<td>Freedom of</td>
<td>include freedom to hold opinions and to receive and impart</td>
<td>- national security, territorial integrity or public safety;</td>
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<tr>
<td>expression</td>
<td>information and ideas without interference by public authority and</td>
<td>- the prevention of disorder or crime;</td>
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<tr>
<td>(qualified right)</td>
<td>regardless of frontiers.</td>
<td>- the protection of health or morals;</td>
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<tr>
<td>Article 11:</td>
<td>Everyone has the right to freedom of peaceful assembly and to</td>
<td>Subject to restrictions that are prescribed by law and are necessary in a democratic society in the interests of:</td>
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<tr>
<td>Freedom of</td>
<td>freedom of association with others, including the right to form and</td>
<td>- national security or public safety;</td>
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<tr>
<td>assembly and</td>
<td>to join trade unions for the protection of his interests.</td>
<td>- the prevention of disorder or crime;</td>
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<tr>
<td>association</td>
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<td>- the protection of health or morals;</td>
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<tr>
<td>(qualified right)</td>
<td></td>
<td>- the protection of the rights and freedoms of others.</td>
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3. Policing protest: A view from below - A case study of the Gaza War protests

On the evening of 23 March 2009, Nadifa, a twenty-four year-old British woman of Somali descent, and her husband Hakim, went to sleep for the night at their home in an apartment block on a busy West London high street. Nadifa’s nineteen year old brother, Yusuf, who had been staying with the couple for the past few weeks, was sleeping in the next room. In the early hours of the following morning, at around five o’clock, Nadifa and her husband were awoken by the sound of a door being kicked open and loud screams coming from a nearby flat. Moments later, the couple became aware that someone had broken down their own front door and heard footsteps coming up the stairs towards their bedroom. Nadifa and her husband began to scream and heard the screams of Yusuf coming from the nearby room. The couple then saw their bedroom door fly open and around ten to fifteen men, some in plain clothes and some in police uniform, burst into the room. The couple were pulled from their bed, dragged to the floor and handcuffed. Nadifa described what happened next:

I was in shock, we didn’t know what to do because we didn’t know who they were, so we were just screaming ... I asked them why they were there and they said ‘we can’t tell you at this point’. My husband was saying ‘how can you not tell us?’, and they said ‘we can’t tell you in case you try to hide any kind of evidence’, we said ‘how can we hide anything if you’re keeping us handcuffed?’, but they just ignored us. I asked them whether I could be covered because I felt uncomfortable with all these men in the house. I was in my night clothes and I wanted to wear something longer. I’m a Muslim and I usually wear a scarf, so I felt even more uncomfortable. But when I asked them they said ‘not now, not now, you might be a threat, you might be hiding something’. I didn’t know my rights. Eventually one of the police officers gave me an old piece of cloth he had found in the house and I used it to cover my head. Most of the police were in the living room with my brother, but I couldn’t speak to him and they didn’t tell us what was going on ... eventually they said that they were there for my brother but they

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1 Part of this chapter has been published; see Gilmore, J. (2012) ‘Criminalizing dissent in the ‘war on terror’: The British State’s reaction to the Gaza war protests of 2008-2009’. In S. Poynting and G. Morgan (Eds.) Global Islamophobia: Muslims and moral panic in the West. London: Ashgate, pp.197-213 (Appendix B).

2 This account is based on an interview with Nadifa, 15 July 2009. All names appearing in this chapter are pseudonyms.
didn’t tell us until an hour afterwards, after they had finished searching the house. I assumed it was something really, really big.³

This whole episode lasted around two and a half hours, during which time the police thoroughly searched the couple’s home, seizing shoes, clothing, paperwork and mobile phones belonging to Nadifa and her brother. When the police eventually found Nadifa’s laptop computer they demanded to know whether her brother had ever used it. Nadifa explained that the laptop was hers and she only used it for her university work. She asked why they were interested in her computer and was shocked by the response:

They said they wanted to know whether my brother had been looking at any terrorist material, or whether he was part of any terrorist network. That was bizarre because [Yusuf] has nothing to do with terrorism, my brother doesn’t even know his own religion very well.⁴

After the search had finished, the police arrested Yusuf who had been handcuffed in the next room, leaving Nadifa and her husband in their badly damaged home. Yusuf was taken to a police station, where he was questioned by police officers, in the absence of a solicitor, about his political and religious beliefs. The arrest has had a lasting effect on Nadifa and her family:

I don’t feel that I have a private life at all after that, it was really embarrassing, especially not wearing anything as a woman with many men being there, it was an awful experience. And the way they came into the house, not telling us what was going on, handcuffing people who had nothing to do with it, was even worse. I feel like I was assaulted.⁵

Unbeknown to the family at the time, and indeed until many months later, the experience of Nadifa, Hakim and Yusuf was being repeated in the homes of families across the UK. During the following six months, one hundred and sixty-nine people were arrested in a series of these aggressive dawn raids, as part of a policing operation codenamed “Operation Ute”.⁶ The arrests followed the publication of police press releases containing CCTV images of “wanted” men, most of Asian appearance, together with a large-scale police surveillance operation which involved tracking the movements and associations of suspects over several weeks. Another of

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³ Ibid.
⁴ Ibid.
⁵ Ibid.
⁶ Figures derived from FOIA 2000 response from the MPS to Joanna Gilmore, 17 January 2011.
those pursued by police was thirty-seven year old Mohammed\(^7\), who became aware that the police were pursuing him when his photograph was printed on the front page of his local newspaper. Mohammed later discovered that his image had been included in Scotland Yard’s “Top 10 Most Wanted” list, prompting one national tabloid newspaper to label him an “Islam convert” and “suspected Muslim fanatic” who was “wanted by cops”.\(^8\) The newspaper claimed he had made “chilling references to death” on the social networking website Facebook, declaring himself “Muslim first before anything” and expressing “support for the Palestinians”.\(^9\) Mohammed described his reaction when he discovered the police were pursuing him:

I was in shock, I was really, really scared, they’d made me look like a fanatic, a lunatic, I was thinking ‘what’s going to happen to me?’, I was absolutely terrified.\(^10\)

The experiences of these individuals mirror those of many of the over one thousand, eight hundred people arrested in connection with terrorism offences in Britain since September 11th 2001.\(^11\) However, none of those arrested in this series of dawn raids were arrested in connection with involvement in domestic or international terrorism. Nor were they accused of inciting, glorifying, financing or conspiring to commit any of the wide-ranging terrorist-related offences that have been introduced in Britain during the last decade.\(^12\) Instead, what united those arrested as part of this policing operation, was that they had attended at least one of a series of political demonstrations in response to the Israeli state’s military assault on the Gaza strip earlier that year.

### 3.1 From Operation Cast Lead to Operation Ute: The protests

On 27 December 2008, Israeli forces launched ‘Operation Cast Lead’ – a three-week military incursion into the Gaza Strip that resulted in the death of over one thousand,
four hundred Palestinians, thirteen Israelis and injured thousands more. This attack by the world’s fourth largest military power on a civilian population triggered a wave of protests, vigils and occupations throughout the world. In the UK, these protests culminated in what organisers claim was the largest demonstration in support of the Palestinian people in British history. From the day Israel launched its first air strike on the Gaza Strip, pro-Palestinian protesters held a nightly vigil outside of the Israeli Embassy in London. Organized by a coalition of groups in opposition to the conflict and beginning with a few hundred people, the protests rapidly grew in size as the strength of public opposition to the Israeli offensive intensified. By the start of the New Year these larger protests had forced the closure of a number of streets surrounding the Embassy. At the same time, a wave of student protests spread across the UK, with students at sixteen universities occupying management buildings and lecture theatres, demanding both university divestment from companies which support arms to Israel and a boycott of Israeli goods.

The first national day of action took place on 3 January 2009, when anti-war protesters held demonstrations, vigils and rallies in towns and cities across the country. By far the largest of these demonstrations took place in central London, where up to sixty thousand people participated in a demonstration from Embankment to Trafalgar Square. The demonstration was heated but peaceful and there were no

16 Stop the War (STW), Palestinian Solidarity Campaign (PSC), British Muslim Initiative (BMI), Palestinian Forum in Britain (PFB) and Campaign for Nuclear Disarmament (CND).
20 This figure is based on estimates provided by the protest organisers. The MPS claimed that the figure was closer to twelve thousand protesters. See ibid. I attended the demonstration as a participant observer.
obvious signs of disorder. After the main demonstration had come to an end, several thousand protesters left the rally and set out to march on the Israeli Embassy in High Street Kensington. Although the march to the Embassy was not part of the officially agreed route, the likelihood of protesters moving towards the Embassy once the rally had concluded was communicated by protest organisers in the planning meetings with police. Senior officers present at the meetings had agreed that such an event would be “facilitated”. When the march reached Hyde Park Corner, the protesters attempted to cross the road to reach the Embassy, but were prevented from doing so by police officers who directed the demonstration into an underpass. The protesters were initially unwilling to follow this route and a number of people raised concerns that it was potentially unsafe. The demonstration was static for around thirty minutes, after which time the protestors were informed by a senior police officer on loudhailer that they would be able to march to the Embassy if they went via the underpass. After some hesitation, the protesters appeared to agree and the march proceeded into the underpass. Stephen, a steward at the front of the march, described the situation faced by protesters once inside:

The march progressed peacefully at a good rate through the tunnel until approximately half way through the police stopped us with no explanation. We waited for a few uneventful minutes and then without warning a line of riot police in black boiler suits charged at us, hitting marchers indiscriminately with their batons … There was pandemonium.

The police charge was repeated three times. Protesters recalled how the police action triggered panic, confusion and distress among the crowd, as those inside the tunnel tried desperately to escape:

There was a stampede of people walking towards the back of the tunnel, trying to get out … people were panicking, screaming, falling over, there were people who fell over and were buried under three or four people, it was really scary … it was absolutely sickening, you just thought, ‘this isn’t going to end until someone dies’.

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22 Interview with protest organiser A, 14 August 2009.
23 The MPS have confirmed that although handwritten minutes taken at this meeting exist, they are “unable to locate” them: FOIA 2000 response from the MPS to Joanna Gilmore, 17 November 2009.
24 Ibid.
25 Dossier of complaints submitted by STWC to the Commissioner of Police for the Metropolis, dated 9 February 2009.
26 Interview with Abbas (protester), 12 July 2009.
It was a dreadful situation, I have never felt so frightened on a demonstration in my life, you really did think, we are suddenly in open warfare with the police, the police have declared war on 5,000 protesters … they were behaving like there were no rules.27

Eventually a group of stewards were able to speak to a senior officer and persuade him to stop the baton charges and allow the demonstration out of the underpass.28

The march proceeded to the Israeli Embassy, which was guarded by several hundred police officers. Clashes between police officers and protesters broke out almost immediately.29 Zack, a student who had travelled to London to attend the demonstration, described his experiences outside the Embassy:

The thing I distinctly remember is being maybe five feet away from the front line of police officers. I’d just arrived and had just joined in the chant of ‘shame on you’, when the police officer directly opposite me came straight forward, lifted his baton over his head and smacked it down on my head. I fell to the floor instantly … I put my hand on my head and I was bleeding quite a lot … My brother had seen me fall down, and he came forward, and he was hit as well just trying to pull me back. He was hit across the face and he was cut on the eye.30

Zack was eventually taken to hospital where he received stitches to treat a two inch wound to his head. He was unable to identify the officer that caused his injuries as the officer had concealed his identification number.31

These experiences led to tension between police and protest organisers ahead of the national demonstration on 10 January 2009. The organisers predicted that that the demonstration would be significantly larger than that of the previous week, and conveyed this in the planning meetings with MPS officers that took place in the week leading up to the demonstration.32 The organisers intended the march to pass the Israeli Embassy and assemble in Hyde Park, however MPS officers attempted to

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27 Interview with Bilal (protester), 11 July 2009.
28 Interview with Carl (steward), 17 July 2009 and Brian (steward), 15 July 2009.
29 Fieldnote Diary A, supra, n.21.
31 Information derived from ibid. and the Affidavit prepared by Zack and his legal counsel in the course of his legal proceedings. In July 2010 Zack and his brother agreed with the MPS an out of court settlement of £12,500 each to compensate for their injuries (personal communication, 6 July 2010).
32 Information derived from interviews with Protest Organisers A (STW), B (PSC) and C (PFB) and a document titled ‘Minutes of meeting held at 11.50 hrs in room 713 in relation to Stop The War March’, included in a FOIA 2000 response from the MPS to Joanna Gilmore, 27 October 2009.
persuade them to divert the protest along an alternative route, as one of the
organisers recalls:

There were lots of discussions and some arguments about where to take the
demo. Basically from the start, we felt that we should definitely demonstrate
to the Israeli Embassy … we felt that it would be wrong to do anything else,
which obviously the police didn’t like. My impression was that they had
tried to make it practically difficult, rather than confronting that argument
head on.33

A compromise was eventually reached whereby the march would pass the Embassy
and assemble for a closing rally a few hundred yards along the road. In order to deal
with the large numbers expected a number of arrangements were agreed between the
protest organisers and the MPS. This included an agreement that barriers outside the
Israeli embassy could be moved to prevent a crush from developing and that side
roads would remain open to allow protesters to disperse following the closing rally.34

On 10 January 2009, an estimated one hundred thousand people took part in a
demonstration in central London.35 The march started with a rally in Hyde Park,
where thousands of protesters stood in freezing temperatures to listen to the
speakers.36 Protesters had travelled from across the country to attend the
demonstration. There were delegations and banners from a wide range of groups and
individuals including trade unions, faith groups, community campaigns and political
organisations, as one of those attending the protest recalls:

Many people there had never been to a demo before, and it was a very
carnival-like atmosphere that day. It was freezing cold, and we were so
surprised to see so many people, we were just shocked by the numbers.
People came with their buggies and their kids, all wrapped up, to keep
warm. People were dancing, everyone was pleased to be there.37

Following the opening rally, the march moved along High Street Kensington
towards the Israeli Embassy. As the crowd surged past the Embassy grounds some
protesters threw shoes at the gates, in a symbolic echo of the Iraqi journalist who

33 Interview with Protest Organisers A (STW), 14 August 2009.
34 Supra, n.32.
[Online, 10 January, available at <http://www.guardian.co.uk/world/2009/jan/10/gaza-london-protest-
march>, accessed 6 January 2011. I attended the protest as a participant observer.
36 The protests took place during the coldest January since 1997: see <http://news.bbc.co.uk/weather/hi/uk_reviews/newsid_7869000/7869750.stm>, accessed 24 January
2013.
37 Interview with Saqib (steward), 20 July 2009.
threw his shoes at former US-President George W. Bush.\textsuperscript{38} Although the road was already narrow, the police had further reduced the amount of space available for protesters by assembling barriers along the edge of the pavement, forcing the march into a ‘bottleneck’ outside of the Embassy gates. As the march became more condensed, protesters found it increasingly difficult to move and the march began to slow down:

We went down the road and it seemed fine, but then it kept seeming to slow down, and as we got towards the embassy the stewards kept telling people ‘keep moving, keep moving’ and we were just shuffling forwards, we weren’t really walking at a normal pace as there were just too many people. Then the barriers appeared at the sides, which meant you couldn’t walk on the pavement any more so access to shops and side-roads were cut off. We were penned in and it just kept getting tighter and tighter ... I was trying to get away and I moved to the side, to try to find a way out ... I got to the barrier and I couldn’t move forward or back, there wasn’t anywhere to go ...

There was this air of panic and no-one really knew what was going on, but people could tell something was going to happen. It was really scary.\textsuperscript{39}

In order to relieve the situation, a group of stewards formed a line and encouraged people to continue to march towards the closing rally. Despite earlier agreements with the police that barriers would be moved in the event of a crush, Adam, one of the stewards on the day, recalled that the police refused the stewards’ request to move the barriers to create additional space:

It was very slow moving, there was a big back-up behind, and some of the parents of families were a bit concerned about this … so we asked the police if they would remove the crash barriers from that side of the road, opening up the space to allow people to file through. However, the police officer we spoke to wasn’t really willing to engage with any stewards who proposed that. They wouldn’t really talk to us.\textsuperscript{40}

As the march began to slow down, several lines of riot and mounted police who had assembled inside the Embassy grounds charged into the crowd. Protesters described fears of meeting a “Hillsborough-style death”\textsuperscript{41} as police tried to hold up the metal barriers to prevent people escaping onto the side streets:

There was a sudden panic, a big swell, all the crash barriers got knocked over, people fell to the floor. People began to panic, especially people with


\textsuperscript{39} Interview with Sophie (protester), 4 November 2009.

\textsuperscript{40} Interview with Michael (steward), 15 July 2009.

\textsuperscript{41} Dossier of complaints submitted by STWC to the Commissioner of Police for the Metropolis, dated 9 February 2009.
children … The police did a charge and then pulled back, and then did another charge and pulled back, just intimidating people. People were just standing around, totally disorientated and worried for their safety. 42

People were looking for escape routes, and the police could see how bad it was, it got really out of control … Thousands of people were pushing in every direction. I said to [the police] ‘why don’t we take the barriers away and let people go?’, but they wouldn’t … There were people crying as they had lost their children…they needed to give reassurance when people couldn’t find their children, but instead they were very macho and were shouting at people ‘stop doing that! Don’t go that way!’ … it started to get very violent, the police were hitting the protesters, it got really bad … police officers ran in and started beating people up, blood was coming out from people, it was really mad. 43

As the closing rally came to an end, thousands of men, women and children were held indiscriminately in freezing temperatures inside police cordons, where they were subject to periodic baton charges by police officers. In response, some protesters threw placards and bottles towards the gates of the Embassy and the windows of a Starbucks café were broken. As scuffles broke out between police and protesters, seventy-nine year old Reg from South Wales found himself caught at the front of the demonstration facing a line of police officers. Reg described what he recalls about his experiences:

I was ever so pleased when the organisers of the march said that the march would be peaceful and that they had an agreement that the march would stop outside the Embassy and those people who wanted to throw their shoes as a mark of anger towards the Embassy would be allowed to do so. I thought this march was going to be a model of non-violence and tolerance. That’s what was in my mind when I set out on the march, and it was peaceful and well stewarded, you couldn’t wish for anything better, and everything was going along tidy until we came to a part that was right opposite the Israeli Embassy. There, everybody started taking their shoes out of their rucksacks and started throwing them towards the Embassy. Immediately the police donned riot gear and came out with their shields. I shouted to them that the shoes were not for them, they were for the Embassy, but they just shouted obscenities at me. They were getting really angry and coming right up to the barrier and poking their shields at some of the protesters. The protesters were getting quite angry as they were penned in, I didn’t want to be there but I was jammed in tight up against the barrier. I couldn’t get out to save my life. No-one could get out. There were some little kids who couldn’t get out … Some people at the back of the crowd were pushing their way to the front who were so angry at what they were seeing, at least four people had been jammed badly with their shield and they were bleeding profusely. There was a lot of anger building up from the crowd, which was understandable, and I was trying my best to keep it cool, to keep it calm.

42 Interview with Rabia (protester), 22 July 2009.
43 Interview with Waqas (steward), 20 July 2009.
They could see that I was an elderly man trying to pacify the crowd. I went up to try to talk to them and a police officer jabbed his shield at me and I just managed to get out of the way in time. I kept saying to the police, ‘for goodness sake, look at the situation you’ve caused, why can’t you go back out of the way? Why can’t you let the protesters throw their shoes and let them go on?’, but before I could get any more words out he said ‘fuck off back amongst that shit you’ve just come from, the lot of you are scum’ and with that I lost consciousness because someone battered me over the head and I landed on the floor. According to observers I was struggling to get up and they jabbed the shield under my hand and blood spurted out of my hand. As I started moving away they jabbed a shield in my face as people were trying to pick me up and drag me back out of the way because I was in a bit of a mess.44

Despite initial attempts by police officers to clear the area outside the Embassy, many individuals and families caught up in the confrontation were prevented from leaving the area:

People were going up to the police lines saying ‘how can I leave? How can I leave?’ which they weren’t able to do. Some groups of young people then started pulling crash barriers across the road to try to make a barrier between themselves and the police … Whenever someone pulled a barrier across, twenty or so police officers would charge out, smashing their shields, and they would grab the barrier and remove it from the scene. I remember an incident where two elderly Muslim women and their daughters or granddaughters were walking across quite an isolated spot right in front of the police, just walking across the road, and [the police] suddenly started shouting at these protesters and hammering their shields. They were just trying to get out of the kettle and it just seemed unnecessary and intimidatory.45

There was much confusion amongst the crowd. Some were crying. People were on their mobiles trying to find friends. No-one seemed to take charge and no-one knew which way to go. The police made no effort to address this confusion.46

Protesters were eventually released on the condition that they provide their name, address, date of birth and have their photograph taken by police officers:

You were stopped, you had your photograph taken, they said they wanted your name, address and date of birth. You were photographed and you had to say to a camera what your details were. And then you got marched away by the same two policemen and then got patted down and had your bags looked through.47

44 Interview with Reg (protester), 4 October 2009.
45 Interview with Rabia (protester), 22 July 2009.
46 Dossier of complaints submitted by STWC to the Commissioner of Police for the Metropolis, dated 9 February 2009.
47 Ibid.
Several protesters and journalists attempting to film police actions were detained under Section 44 Terrorism Act 2000.\textsuperscript{48} Twenty people were arrested during the protest.\textsuperscript{49} One of those arrested was Jalil, a British-born Muslim who was arrested while attempting to leave the demonstration on suspicion of assaulting a police officer – an alleged crime for which he was subsequently acquitted. Jalil described what he recalls about his arrest:

I was jumped on, kicked, punched, thrown on the floor and handcuffed. I was in complete shock … [The police officer] was pulling the handcuffs to make me feel pain and when I complained about the pain he said, ‘I’ll teach you about pain, I’ll teach you a lesson you prick, I know your kind’ … One of the police officers started taunting me and asking me questions like ‘where were you born’ and I said ‘I’m British’, but he said, ‘you’re not British, you don’t have respect for this country, you don’t understand the laws of this country’, I said ‘I told you I’m British’, and he said ‘this is the Queen’s country and you should obey our rules.’\textsuperscript{50}

3.2 “Thugs and louts who simply want to cause trouble”: The aftermath

The media reporting of the Gaza protests differed markedly from the account given by protesters. Although some of the broadsheet newspapers reported allegations of brutality on the part of the police\textsuperscript{51}, the indignation of tabloid journalists was reserved exclusively for the actions of protesters. Many of the reports repeated verbatim the official police account of the demonstrations, describing scenes of “chaos and bloodshed” on the streets of London.\textsuperscript{52} The Daily Mail blamed the disorder on “extremists”, consisting of “coachloads of Muslim youths with Pakistani origins” who had been “driven from Yorkshire and the Midlands” to cause “anarchist

\textsuperscript{48} Fieldnote diary, ‘Stop Gaza massacre’ protest, 10 January 2009. Film footage of a journalist being subjected to a Section 44 stop and search on the 10 January demonstration was screened on Newsnight (2010) BBC2, 2 April.
\textsuperscript{49} Figures derived from the MPS Press Bureau via telephone conversation, 10 July 2009.
\textsuperscript{50} Interview with Jalil (protester), 23 February 2010.
mayhem”, while the *Evening Standard* described a violent “rampage” by an “angry mob” who had “ransacked businesses” causing “hundreds of thousands of pounds of damage”. As Jonathan Evan, head of MI5, warned that anger over the Israeli incursion could have repercussions for national security by giving extremists in Britain “more ideological ammunition”, the *Sun* predicted a “violent Islamic backlash in Britain” as a direct result of the conflict. According to *Daily Mail* columnist Richard Littlejohn, the protests represented an attempt by “the hard-Left and militant Islamists” to “bring the Gaza war to the streets of London”. Contrasting the “mayhem” outside the Israeli Embassy with the “restrained, dignified pro-Israeli rally” taking place in Trafalgar Square, Littlejohn claimed:

This has less to do with the Palestinian cause and everything to do with the global jihad and Iranian-sponsored terrorism aimed at wiping Israel off the face of the Earth ... It’s the usual crowd of Trotskyite boot boys, Saddamites and bussed-in wannabe jihadists, spoiling for a fight and an excuse to kick a few coppers.

On 22nd January 2009 the MPS issued a press release appealing for information to help trace over forty people suspected of involvement in “violence and aggression” during the Gaza demonstrations. According to Commander Bob Broadhurst, then head of the force’s public order unit, those wanted by police consisted of a “small hardcore” who acted as “antagonists” during the demonstrations, “attacking police and smashing shop windows” and “stirring up others within the crowd”. Broadhurst claimed that his officers had “worked hard to facilitate the march to keep participants safe” while the embassy and police officers came under “sustained attack” from an unruly crowd:

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The Met will not tolerate attacks on officers under the guise of protest. Our right to protest is an important one and should never be undermined by thugs and louts who simply want to cause trouble.\textsuperscript{59}

Included in the press release were six CCTV images of individuals who were “wanted” in connection with the police investigation. These images were given wide-scale publicity when they were printed on the front pages of a number of local and national newspapers, which reproduced the police account of the protesters as violent and the police response as proportionate.\textsuperscript{60}

The publicity led to the arrest of one hundred and sixty-nine people – the largest number of people arrested in connection with a political demonstration in London since the Poll Tax riots of 1990.\textsuperscript{61} Of the one hundred and forty-eight offences charged, one hundred and twenty-six were for ‘Violent Disorder’\textsuperscript{62}, a broadly-drafted public order offence introduced in the wake of the 1984 miners’ strike carrying a maximum sentence of five years imprisonment.\textsuperscript{63} Some sixty-seven per cent were aged twenty-one or under at the time of the demonstrations (the youngest was twelve) and all but four were male. The majority had no previous convictions and had been attending their first political demonstration.\textsuperscript{64} Having been warned by police that a request for legal advice would substantially increase their time held in custody, some of those arrested agreed to be interviewed in the absence of a solicitor. Although none were formally arrested in connection with terrorism offences, many were questioned extensively on their political and religious beliefs.\textsuperscript{65} The police demanded the names of any friends and family members who had accompanied them to the demonstrations, some of whom went on to be arrested in subsequent raids.\textsuperscript{66} In February 2009, the Association of Chief Police Officers confirmed that groups involved in the Gaza war protests had been targeted by the secretive ‘Confidential

\textsuperscript{59} Ibid.
\textsuperscript{61} According to MPS figures, 340 people were arrested during the Poll Tax demonstration that took place on 31 March 1990. 113 people were injured, 45 of whom were police officers: Figures derived from FOIA 2000 responses to Joanna Gilmore from the MPS, 20 February 2013.
\textsuperscript{62} Public Order Act 1986, s.2. See Chapter Six.
\textsuperscript{63} Figures derived from FOIA 2000 responses to Joanna Gilmore from the MPS, 17 February 2010 and 17 January 2011 and Crown Prosecution Service, 14 February 2011.
\textsuperscript{64} Information derived from court observations and interviews with protesters and their legal counsel and data recorded on Defence Monitoring Forms.
\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid.
Intelligence Unit’, established in 1999 to coordinate surveillance and infiltration of ‘domestic extremists’.

For the vast majority of the arrested protesters and their lawyers, it was not until the cases finally reached the packed West London courthouse in October 2009 and defendants were one at a time called before the District Judge to enter their plea that the scale of the policing operation became apparent. The majority of those charged appeared individually and were represented by separate lawyers, only a small minority of whom had significant experience of handling serious charges of public disorder. Acting on the advice from lawyers that an early guilty plea would be likely to result in a non-custodial sentence, seventy-two per cent of those charged pleaded guilty to the serious indictments against them. When lawyers were eventually granted access to the footage relevant to their client’s case, they were asked to sign an undertaking that they would not disclose any of the footage to anyone other than their client. This initial segregation of protesters, who were arrested and charged individually following night-time raids and represented by over thirty different law firms, appeared to contribute to the reluctance of defendants to take their cases to trial. This led some defence solicitors to conclude that this was a deliberate strategy on the part of the police:

People were raided individually, it was very isolating, and it was kept quiet … Normally the police are very proud of the number of arrests they make and are shouting out about it, but they were very clever here, it was a very planned operation of individual arrests … There were individuals who were young, Muslim, and who did not have a clear connection with an organization being picked off, often not represented [by a lawyer]. This leads to confessions through fear and isolation in the courts.

As the hearings came to an end, the District Judge concluded that these cases had an “international element” and imposed bail conditions which required protesters to surrender passports and not apply for travel documents without the leave of the Court. Although almost all of those charged were British citizens, protesters were

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68 Information derived from court observations, interviews with protesters and their legal counsel and data recorded on Defence Monitoring Forms.

69 Interview with Alan (solicitor), 6 July 2010 and Bob (solicitor), 6 July 2010.

70 Interview with Alan (solicitor), 6 July 2010.

71 Fieldnote diary, West London Magistrates Court, 29 and 30 October 2009.
indiscriminately served with immigration notices stating that they could be deported depending on the outcome of the criminal proceedings.\textsuperscript{72} When those convicted of offences eventually appeared before the Crown Court to court to receive their punishment\textsuperscript{73}, friends and family who had packed into the court’s public gallery broke down in tears as the Judge announced that he had decided to pass lengthy sentences of imprisonment. Judge Denniss said that these sentences would serve as a “deterrent” to others, citing as authority the precedent set in the Bradford riot cases of 2001.\textsuperscript{74} Relying almost exclusively on the carefully edited CCTV footage presented by police, the judge disregarded the advice of the Probation Service in their Pre-Sentence Reports, who recommended without exception a non-custodial sentence as an appropriate level of punishment.\textsuperscript{75} Sarah, a Probation Officer, recalled the very clear advice she gave to the Court in relation to one of the convicted protesters:

I recommended that he be given a community order with unpaid work. It was his first offence … he didn’t cause any harm to any person, I don’t think his behaviour put anyone at risk of serious harm, he doesn’t have any previous convictions, he had no criminogenic needs, nothing that would make us think that he would reoffend … there were no public protection issues, he is not a risk to the public and he had a stable pro-social lifestyle … I certainly didn’t recommend that he needed to go to prison.\textsuperscript{76}

In a judgment that echoed much of Judge Gullick’s infamous ‘tariff setting’ statement in the Bradford cases, Judge Denniss concluded:

Although the Court must have regard to the individual defendant’s personal characteristics and actual involvement, the sentence must also reflect the effect of the violent disorder on the public who would have been caused real anxiety and distress. It is not just the individual conduct of a single offender which is important, it is the nature of the offending as a whole. Every individual who takes part by their deed or encouragement is guilty of an

\textsuperscript{72} Ibid.
\textsuperscript{73} Cases took on average one year and two months from the protest date to conclude.
\textsuperscript{74} Fieldnote diary, Isleworth Crown Court, 8 January 2010. Following the Bradford riots of 2001, 307 people were arrested and 256 charged with offences. Of these, 231 people were convicted and 187 sent to prison for an average of four years and six months. Most were charged with the more serious offence of Riot (Public Order Act 1986, s1). For a detailed discussion of criminal charges brought following the Bradford riots. See Carling et al. (2004) Fair justice for all?: The response of the criminal justice system to the Bradford disturbances of July 2001 (Bradford: University of Bradford, Programme for a Peaceful City, in association with The Joseph Rowntree Charitable Trust).
\textsuperscript{76} Interview with Sarah (Probation Officer), 19 May 2010.
offence. Everyone who takes part does so at their peril a deterrent sentence
is necessary. The public are entitled to look to the law for protection.77

Those wearing over their faces the Palestinian ‘Keffiyeh’ scarf, a powerful symbol
of resistance for opponents of the conflict, were handed down increased sentences as
punishment for their attempts to “conceal their identity”.78 Two boys, both aged
sixteen when the protests took place, received twelve month sentences for their part
in causing damage to a Starbucks café79 while two women aged eighteen and
nineteen were sent to prison for fifteen months.80 A twenty-one year-old student was
given a twelve month jail term for throwing a single bottle towards the gates of the
Israeli Embassy81, while a seventeen year-old boy was sentenced to thirty months in
a Young Offenders Institution for throwing “missiles” (consisting of wooden
placards and plastic bottles) towards police lines.82 In total, fifty-four people were
convicted and twenty-nine sent to prison for between two months and two and a half
years.83 Almost all had entered guilty pleas at the earliest available opportunity and
most had no previous convictions.84 None were alleged to have caused any direct
injury to a police officer or member of the public.85 Ninety four per cent of those
convicted were from black and minority ethnic groups.86

In March 2010 the protest organisers called a public meeting in Parliament to discuss
how to respond to “the shocking sentences” that had been handed out to those who
had been convicted following the protests.87 The meeting was attended by over two
hundred people and resolved to demand the immediate release from prison of all
convicted protesters and that the charges be dropped against those who were still

77 Fieldnote diary, Isleworth Crown Court, 8 January 2010, 18 January 2010. 12 February 2010, 19
78 Ibid., 12 February 2010.
79 Ibid., 19 February 2010.
80 Ibid., 18 January 2010.
81 Ibid., 19 February 2010.
82 Ibid., 12 February 2010.
83 Figures derived from court observations and FOIA 2000 response from the MPS dated 11 February
2011 and CPS, 14 February 2011.
84 Fieldnote diary, Isleworth Crown Court, 8 January 2010, 18 January 2010. 12 February 2010, 19
85 Ibid.
86 According to CPS figures based on self-defined ethnicity, 32 of those convicted were recorded as
‘Any Other Asian Background’, 9 were recorded as ‘Pakistani’, 4 as ‘Any Other Ethnic Group’, 3 as
‘White British’, 3 as ‘African’, 1 as ‘Caribbean’ and 1 as ‘Any Other White Background’. Figures
derived from FOIA 2000 response from the CPS, 14 February 2011.
87 See <http://www.palestinecampaign.org/index7b.asp?m_id=1&l1_id=4&l2_id=24&Content_ID=1142>,
facing trial. The following week, a national defence campaign was formed to coordinate liaison between lawyers, offer support for defendants and their families and generate public awareness of cases. The campaign launched a public petition which went on to receive over two thousand signatures and organized protests outside some of the remaining court hearings. The campaign generated considerable media attention. The protesters that were supported by their lawyers to challenge the evidence against them were remarkably successful; fifteen of the seventeen cases where not guilty pleas were maintained resulted in acquittal. Many of the cases collapsed following persistent requests from lawyers for the disclosure of police material. In March 2010 a twenty-three year-old protester was acquitted after his lawyer discovered undisclosed police footage that had recorded him beaten to the ground by police officers in an unprovoked attack. The case raised serious questions about the validity of the police’s account of protesters as the instigators of violence and the reliability of the testimony of individual officers. Between March and July 2010, fourteen of the twenty-nine cases where custodial sentences had been imposed were taken to the Court of Appeal. The first appeal saw a nineteen year-old woman immediately released from prison in the “interests of justice and mercy”. During the following hearings, one twelve month sentence was quashed while two others were reduced to the time already served in custody. The remainder of the sentences were reduced by between three and eighteen months. The Court, however, steadfastly refused to condemn the trial judge’s decision to impose deterrent sentences and the majority of the appellants remained in prison.

Those singled out by the police as criminal suspects were pursued with a rigour that was in stark contrast to the way allegations of criminal wrongdoing on the part of the

89 Ibid.
91 Figures derived from court observations and FOIA 2000 response from the MPS, 11 February 2011 and the CPS, 14 February 2011.
92 Interview with Alan (solicitor), 6 July 2010 and Bob (solicitor), 6 July 2010.
96 R v Alhadded and Others [2010], *ibid*. at 16.
police were handled by the authorities. Despite the severity of the thirty three official complaints about the policing of the demonstrations, none were fully investigated by the IPCC and all of those referred back to the MPS for local investigation were subsequently dismissed. Dissatisfied with the police handling of the official complaints, at least five of the injured protesters decided to pursue civil actions against the police. This included Zack and his brother Michael, who in July 2010 each received an out of court settlement of £12,500 for injuries sustained during the protest on 3 January 2009. In May 2011 79-year old Reg was awarded an out of court settlement after pursuing a civil action for assault against the CPM. These complaints were initially dismissed by the MPS on the grounds that the officer that caused the injuries could not be identified from the surveillance footage as he or she had concealed their identification number. In December 2011 the High Court awarded £14,300 in an action against the CPM to a female protester who suffered a serious fracture to her arm during the Gaza protests. The judge found that the officer involved had used force that was “neither reasonable nor proportionate”, thereby causing injuries that were “entirely avoidable”. According to figures obtained under the FOIA 2000, no officers were arrested or charged with criminal offences or faced any disciplinary action following allegations of police misconduct during the policing of the Gaza protests.

These events have had a lasting impact on the people affected by them. Many have sworn not to attend a political demonstration again. Those attempting to secure jobs and university places on release from prison have predictably found a conviction for violent disorder and lengthy jail sentence to be a significant barrier. The impact has gone far beyond those arrested and imprisoned. Following the release from prison of

97 It is likely that the number of people that experienced improper behaviour on the part of police officers was significantly higher than this figure. Only a small proportion of those protesters I interviewed that described such conduct decided to make an official complaint. See Smith, G. (2009) ‘Why don't more people complain against the police?’, European Journal of Criminology 6(3): 249-266.
98 Figures derived from FOIA 2000 responses to Joanna Gilmore from the MPS, 24 November 2009 and the IPCC, 10 November 2009.
100 Personal correspondence, 11 May 2011.
101 Affidavit prepared by Zack and his legal counsel in the course of his legal proceedings.
103 Ibid., at 687.
104 FOIA 2000 response to Joanna Gilmore from the MPS, 13 February 2013.
his son, Kabir, a father described the devastating effect the case has had on his entire family:

The atmosphere changed in the house completely. My wife was crying all the time, depressed all the time … it was so stressful. She didn’t want to cry in front of him but at night she cried … I used to smile a lot but not now. People at work asked me what was wrong, but at first I was ashamed to say that my son had been to court and put in prison, so I didn’t tell anybody at the beginning. The stress affected my daughters also – my eldest daughter had to take a year out of her studies because she couldn’t sleep. There were a lot of arguments in the family because of the stress. You can see that there is a sense of unhappiness in the family, a sense that a disaster has happened, a disaster that needs settling. And although [Kabir] is out now, still not everything is settled, we are still thinking about the future. Of course we are not used to this so it upset us a lot. Also for me, it was the sense of injustice hurting me, I feel a lot this sense of injustice, about why this should happen to him. Usually you would not be put in prison for this – why was he? Is it because he is Muslim? That is hurting me a lot.¹⁰⁵

3.3 Conclusions

The purpose of this chapter has been to present a narrative account of the regulation of public protest from the standpoint of protesters. This case study is not intended to be a representative example and it is not possible to generalise the findings to all public protests. Rather, the aim of the chapter has been to examine people’s experiences of public order policing and the impact these experiences have had on their lives. It is submitted that the events analysed in this chapter indicate that the death of Ian Tomlinson in April 2009 was an entirely foreseeable event. Yet despite the scale and intensity of the Gaza protests, these events have been largely absent from the political debate triggered by the G20 protests. The following chapter considers the official response to the crisis of legitimacy in public order policing. In doing so, it seeks to highlight how protesters’ experiences have been marginalised in legal, academic and policing-policy discourses.

¹⁰⁵ Interview with Kabir’s father, 11 June 2010.
4. Policing protest: A view from above

Balancing the rights of protesters and other citizens with the duty to protect people and property from the threat of harm or injury defines the policing dilemma in relation to public protest … Presently, the police are required to act as arbiter, balancing the rights of protesters against the rights of the public, business and residents.¹

The setting up of official inquiries, tribunals and commissions has long been an important method used to remedy threats to the State’s legitimacy.² For example, Lord Scarman’s extensive reports into the 1974 Red Lion Square protests³, the 1977 Grunwick dispute⁴ and the 1981 Brixton disorders⁵, followed widespread condemnation of repressive policing tactics and urgent calls for reform. Burton and Carlen suggest that such practices reflect an “official discourse” which is both pedagogic, in that it is determined by a need to remedy a legitimation deficit for the state, and repressive, in that it serves to justify and reproduce the state’s authoritarian ideological apparatus.⁶ The construction of official discourse relies heavily on “techniques of discursive affirmation” which, despite claims to objectivity and the pursuit of impartial analysis, seek to ensure that official explanations which are acceptable to the state are likely to be predominant.⁷ Official discourse is therefore an exercise in legitimation which is central to the exercise of state power: “The officially approved version has to confront, incorporate and suppress the alternative, un-official version”.⁸ Scraton⁹ has further argued that royal commissions,

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⁷ Ibid., p.51.
departmental committees and tribunals of inquiry are inconsistent and arbitrary, with those heading public inquiries likely to be “plumbed into the ideological ‘ways of seeing’ and political ‘ways of doing’ that constitute the routine expressions of civil service practice”10. For Rolston and Scraton, the construction of official discourse is central to the formulation of state policy and proclamation of state legitimacy: “As responses to social and political conflict or to settling disputes generated by competing interests, official inquiries cannot be isolated from these processes.”11

In March 2009 the JCHR published Demonstrating respect for rights - an extensive report which considered the human rights implications of existing measures to restrict protest in the UK.12 The purpose of the report was to make a series of recommendations “aimed at ensuring that the rights to freedom of assembly and expression are fully respected”, in light of “serious concerns” from its predecessor Committee and members of the public that the restrictions on protest were excessively onerous.13 Following a year-long review which took evidence from over sixty individuals and organisations, the Committee concluded that there were “no systematic human rights abuses” in the way protests are policed, though highlighted a number of concerns which could be addressed through “legal and operational changes”14. Less than a month after the Report was published, Ian Tomlinson, a forty-seven year old newspaper vendor, died after being struck from behind by a member of the MPS Territorial Support Group (TSG) at the G20 protests.15 These events triggered a wave of public criticism and were swiftly followed by a plethora of official inquiries and reports tasked with investigating the suitability of public order policing methods and the associated mechanisms of accountability. In light of

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9 Ibid.
10 Ibid, p.47.
13 Ibid., p.1.
14 Ibid., p.v.
“very disturbing” evidence of repressive policing tactics at the G20 protests\textsuperscript{16}, the JCHR reopened their inquiry and on 14 July 2009 published a second, follow-up report.\textsuperscript{17} The report was accompanied by a parallel inquiry by the HAC\textsuperscript{18}, tasked with investigating “some of the wider concerns which have been raised over the policing of large-scale public protests”.\textsuperscript{19} Further reports were also published by the Metropolitan Police Authority (MPA) Civil Liberties Panel\textsuperscript{20} and the IPCC, who received a record number of complaints following the G20 protests.\textsuperscript{21} Responding to the release into the public domain of video footage that appeared to show incidents of indiscriminate violence by police, the CPM asked HMIC to conduct a review of public order policing tactics.\textsuperscript{22} The subsequent report, published on 7 July 2009\textsuperscript{23}, is the most extensive review of public order policing in the Inspectorate’s history. As Deborah Glass (Deputy Commissioner of the IPCC), writing in the \textit{Policing} journal, acknowledged, “The British police have taken a bit of a battering in the past year over their handling of public protest.”\textsuperscript{24}

A summary of the terms of reference and key recommendations of the major inquiries can be found in Table 4.1. It is notable that despite some divergence in their discrete focus, the reports display remarkable consistency in their underlying assumptions, framework of analysis and proposals for reform. In this chapter it is argued that in a process similar to that described by Scraton and others, the official reports have provided an opportunity to set the terms of the ensuing debate, legitimise existing practices and justify a further expansion of the legal regime. Through a critical analysis of the reports and exploration of academic literature, this chapter seeks to analyse the official protest policing discourse. In doing so, it considers how official interpretations of public protest and human rights have served to abrogate and marginalise the experiences of protesters.


\textsuperscript{19} Ibid., p.3.

\textsuperscript{20} MPA (2010) \textit{Responding to G20} (London: MPA).

\textsuperscript{21} Lewis, P. (2009), supra, n.16.

\textsuperscript{22} HMIC (2009a) \textit{Adapting to Protest} (London: HMIC).

\textsuperscript{23} A revised edition of the report was published by HMIC in on 25 November 2009: HMIC (2009b) \textit{Adapting to Protest – Nurturing the British Model of Policing} (London: HMIC).

4.1 The official reports: key themes

In this chapter three central elements of the official response to the crisis of legitimacy in public order policing will be identified. First, the reports reflect what I have termed the ‘new age’ of protest discourse, whereby protest in the current era is presented as qualitatively and quantitatively different from that which has gone before. Second, the reports adopt a liberal conception of balancing rights, whereby the police are presented as neutral arbitrators between conflicting interests. Third, the reports are premised on the assumption that communication and dialogue between police and protesters is a facilitating mechanism towards free assembly. It is my contention that these three assumptions play an essential role in legitimising not only the G20 policing operation but also the continuing escalation of coercive policing in response to the latest wave of austerity-driven protest. I further argue that in accepting this discourse uncritically, much recent academic work has done little to challenge this authoritarian trend and has instead served to further entrench the legitimising narrative of the state.

4.1.1 A ‘new age’ of protest

The official reports start from the premise that the recent intensification of public order policing is a direct response to the changing nature of protest activity. It is suggested that protest is evolving not just in scale but in the very tactics adopted by protesters, the methods of organisation and the demographic and motivations of those involved. Describing the context of the G20 policing operation, HMIC’s interim report, Adapting to Protest, referred to the MPS Public Order Operational Command Unit (CO11) assessment that “protest in London is undergoing not just a resurgence but a reinvention with new allegiances being formed and the old foes are now working together” [emphasis added].\(^{25}\) HMIC’s second report went even further, describing the G20 protests in the context of a “new world of protest” – one which is globalised, technologically advanced and with “religious and cultural overtones”:

\(^{25}\) HMIC (2009a), supra, n.22, p.42.
in recent decades, Northern Ireland has been unique in the United Kingdom in having to confront the harsh reality of parades and protests involving thousands of people in contested spaces. Increasingly, this is occurring on the streets of our cities throughout Britain.

These changes have given rise to what HMIC described in a follow-up report published in February 2011 as “a new period” of public protest, one which is “faster moving and more unpredictable” than similar waves of protest in the past. The report sets out in the opening paragraphs just what is new about the new age of protest:

The character of protest is evolving in terms of: the numbers involved; spread across the country; associated sporadic violence; disruption caused; short notice or no-notice events, and swift changes in protest tactics.

The Inspectorate’s assumptions reflect comments made by head of the ACPO Sir Hugh Orde in an interview with Prospect magazine in January 2011, where he described a “new age” of protest in Britain involving “a whole new dimension to public order”. Echoing the conclusions of HMIC, Orde claimed that protest is becoming more spontaneous, mobilised online rather than through traditional structures, making it difficult for the police to keep track of planned protest activity. Technological advances have also given rise to what Orde describes as a new generation of “cyber terrorists”, such as the internet hacking group ‘Anonymous’, whose targeted online campaigns - the “biggest threat to the country’s economic wellbeing in the future” - make the police look like “complete amateurs”. Policing tactics therefore have to “change continually to meet the new tactics of demonstrators”. The new age of protest discourse suggests that the UK is entering a period in which public protest is both quantitatively and qualitatively different from that which has gone before. Echoing Tony Blair’s now infamous declaration after the

26 HMIC (2009b), supra, n.23, p.27.
28 Ibid, p.3.
30 Ibid.
31 Ibid.
London bombings of 7 July 2005 that “the rules of the game are changing”\(^{32}\), the CPM Sir Paul Stephenson in the aftermath of the student protests of 2010 leaves no room for doubt: “We are into a different period I am afraid. We will be putting far more assets in place to ensure we can respond properly. Essentially the game has changed.”\(^{33}\)

The ‘new age’ of protest inevitably requires a ‘new age’ of public order policing. As the revised ACPO guidance on public order – *Keeping the Peace* – puts it, “the world of protest has changed and public order and practice must change with it”.\(^{34}\) In a similar vein HMIC asks, “How best should the police as a service adapt to the *modern day demands* of public order policing while retaining the core values of the British model of policing? [emphasis added]”\(^{35}\) The report argues that the original British policing model, “with its approachable, impartial, accountable style of policing based on minimal force”, is “in danger of being undermined” unless it adapts to “modern crowd dynamics”.\(^{36}\) The report’s title, *Adapting to Protest*, reflects its underlying assumption that policing tactics must adapt to qualitative changes in protest activity:

> The police have found it hard, at times, to keep pace with the changing dynamics of protest and the expectations of the public. The police as a service needs to modernise its approach and be more inventive in using new technologies to engage with hard to reach or resistant communities.\(^{37}\)

The ‘new age of protest’ discourse is reflected in the views of academic writers in the area. Innes, for example, has argued that orthodox public order policing doctrine has become outdated and unable to control the new “fluid, mobile and networked groups practising guerrilla rioting tactics”.\(^{38}\) The solution, according to Innes, is the development of

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35 HMIC (2009b), *supra*, n.23, p.5.
36 Ibid.
37 Ibid, p.31.
new, more “asymmetric” public order policing, designed to track and disrupt mobile groups ... Social media create leaderless and networked forms of collective disorder. The reason that police struggled to grip the problem in London was that they brought 20th-century understanding and tactics to a 21st-century riot.39

4.1.2 Balancing rights

A second recurrent theme in the official reports is that the analysis is framed within a liberal discourse of balancing rights. The reports start from the premise that individuals now enjoy positively enforceable legal rights to engage in public protest and that the state is under a positive obligation to ‘facilitate’ those rights that are protected under the ECHR. The HAC emphasised that the positive duty on the part of the state to facilitate peaceful protest should be an overarching consideration in any public order policing operation:

Above all, the police must constantly remember that those who protest on Britain’s streets are not criminals but citizens motivated by moral principles, exercising their democratic rights. The police’s doctrine must remain focused on allowing this protest to happen peacefully.40

According to HMIC, this “starting point” of facilitating peaceful protest should be integrated into the curriculum of public order policing training. The Inspectorate recommended a complete overhaul of public order training at a level of both operation and command to include a fuller understanding of the human rights obligations of the police.41 The centrality of rights as a guiding principle has, apparently, filtered through to public order policing at an operational level. Writing in the Guardian in May 2011, Sir Hugh Orde claimed that protest policing has been “strengthened by a growing understanding of human rights obligations”.42

39 Ibid.
40 HAC (2009), supra, n.18, p.25. In evidence to the Committee Sue Sim, the ACPO Lead on Public Order, told the inquiry: “police officers and our manuals talk about the fact that human rights is at the very foundation of our democracy … it is a fundamental right, and police officers are taught the human rights articles. Specific emphasis is placed on Article 10 and Article 11 in relation to public order policing.” (Q.230)
The reports emphasise that the right to protest is not absolute, but must instead be balanced against the competing rights of other individuals and the “wider community”. According to the JCHR, public protest is something which “invariably involves groups of people with competing interests, including protestors, the individuals and organisations that are protested against, the police, journalists and bystanders.” The aim of the Report, therefore, is to “consider the balance struck in law and in practice” between the rights of these different groups involved in peaceful protest. In a similar vein, HMIC maintained that it is necessary to “strike a fair balance” between the rights of individuals to peaceful assembly and the rights of others:

Balancing the rights of protesters and other citizens with the duty to protect people and property from the threat of harm or injury defines the policing dilemma in relation to public protest … Presently, the police are required to act as arbiter, balancing the rights of protesters against the rights of the public, business and residents.

4.1.3 Communication

The conception of rights adopted in the official reports is a legalistic one, recognising the existence of a contractual rather than a universal right. HMIC, for example, refers to “the rights and duties of protesters,” claiming that communication “is a two way process”, requiring “a constructive approach by both parties” in order to facilitate a proportionate response from the police. In adopting a liberal conception of human rights, the police are presented as neutral arbitrators whose task it is to reconcile the various competing rights and interests of protesters and the ‘wider community’. In the new age of protest this task is increasingly problematic, with spontaneous and unpredictable protests making it difficult to decide what would be the proportionate response in any given situation. This leads to a third central theme running throughout the official reports: that increased communication between police and protesters would serve as a facilitating mechanism towards free assembly. The JCHR’s first report emphasised the need for

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43 See e.g. HMIC (2009b), supra, n. 23, p.12.
44 JCHR (2009a), supra, n.12, p.41.
46 HMIC (2009b) supra, n.23, pp.41-2.
47 HMIC (2009a), supra, n. 22, p.5.
48 Ibid., p.66.
the police and protesters to engage in effective dialogue, calling for a policy of “no surprises” in the policing of protest events: “no surprises for the police, no surprises for protesters and no surprises of protest targets”.\(^{49}\) This conclusion was based on an unquestioned proposition put forward by the police that the avoidance of ‘trouble’ by mutual collaboration between police and protest organisers is a primary policing aim in public order situations. In written evidence submitted to the JCHR, the ACPO claimed that:

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\text{the vast majority of protests are undertaken with collaboration between the police and organisers where the two parties work together to ensure that the event occurs in a reasonable and safe manner. More controversial events normally involve individuals who do not wish to cooperate or consult with authorities and, at times, actively seek or encourage confrontation.}\(^{50}\)
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The “biggest challenge”, according the MPS, arises “as a result of us not having dialogue with the organisers because they refuse to have dialogue with us”.\(^{51}\) Following the conclusions of the JCHR, the post-G20 reports were unanimous in the finding that a lack of advance communication between police and protesters was a central justification for the repressive methods used to police these events. Accepting uncritically the police’s claim that the protesters’ lack of organisational structure served as a catalyst for violent confrontation\(^{52}\), the JCHR’s second report found that a lack of communication based on “mutual distrust” between police and protesters led to “a more heavy handed approach … than would otherwise have been the case”.\(^{53}\) According to the HAC, it was “no coincidence” that groups who did not fully communicate their intentions to the police were those which experienced the greatest use of force: “It is the relationship between the protesters and police which defines the success of the protest from a public safety perspective and we are not convinced that all protesters did everything they could to strengthen this relationship”\(^{54}\). The Inspectorate’s report went even further, highlighting a number of

\(^{49}\text{JCHR (2009a), supra, n. 12, p.56.}\)
\(^{50}\text{Ibid., p.291.}\)
\(^{51}\text{Ibid., Q.205.}\)
\(^{52}\text{In oral evidence to the HAC, for example, Bob Broadhurst, Gold Commander at the G20 demonstrations, claimed: ‘in the vast majority of protests/demonstrations/marches that we deal with, we have organisers who come to us, they tell us what they want to do, we negotiate and then we facilitate whatever it is. Generally, they go exceedingly well ... Where we have issues are where we have nobody to talk to’: HAC (2009), supra, n. 18, Q.398.}\)
\(^{53}\text{JCHR (2009b), supra, n.17, p.8.}\)
\(^{54}\text{Ibid., p.12.}\)
“critical distinctions” between various “types” of protest activity. First “organised declared protests”, consisting of around 95% of protest activity, are notified to the police in advance of a protest taking place. The benefit of advanced notification, according to the Inspectorate, is to provide:

a means of communication between the police and organisers, and enables the police to work with protest organisers to agree the scale, location or route and timing of the demonstration or protest, ensure the safety of the protesters and plan an appropriate policing operation to facilitate the protest event. On the day of the protest, the organisers will appoint (non-police) stewards to supervise the protest and maintain control and order. This often enables the policing operation to be reduced, adjusting policing responses to the majority of protesters who are peaceful and self-polic ed by stewards.

In contrast, ‘non-declared’ protests pose particular challenges to the police:

With no identifiable organisers or representatives willing to engage with the police on behalf of the protesters, the police are unable to gain accurate information regarding the intentions of the protesters, the location or route of the protest or demonstration, likely protester numbers and timing of the event. This hampers the ability of the police to ensure the safety of the protesters and to plan an appropriate policing operation to facilitate the protest. In addition, these types of protests rarely include stewards to supervise the protest and maintain order. With no stewards and no individuals or group with overall responsibility or control of the protest, the risk for potential disorder increases. This in turn impacts on the nature, size and planning of the policing operation, as the police have to respond to the heightened risk of disruption, damage, disorder or threat to life.

Protest, according to HMIC, will be inherently more difficult to facilitate where there is no constructive dialogue between protesters and the police: “This may result in the use of police tactics which are more restrictive than would otherwise be the case”. Developing this argument, HMIC’s second report pointed to the experiences of the Police Service of Northern Ireland (PSNI) and Stockholm Police Department (SPD), who have both developed more “cooperative” styles of public order policing.

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56 Ibid., p. 21.
57 Ibid.
58 Ibid., p.9.
59 The report noted that the PSNI have developed a human rights-focused approach to the policing of contentious parades in order to avoid the sectarian violence that had tarred such events in the past. According to HMIC, these experiences show how “continuous and meaningful engagement” with communities and protest groups “is essential to allow for more intense engagement at critical times” (ibid., p.78).
60 The SPD developed a communication-led model of public order policing following anti-capitalist protests at the European Union summit in Göteborg in June 2001. The policing of these protests
policing in response to concerns about existing practices. Responding to criticism from protest groups that dialogue between police and protesters was unlikely to work in practice “except as a means to exert control” because of the “significant imbalance of power” between the two parties, the JCHR proposed the use of “independent negotiators” (with a similar role to ACAS in industrial disputes) to facilitate dialogue between police and protesters “where the parties encounter difficulties in communicating directly.” Writing in the Guardian, Sir Hugh Orde outlined the importance of communication in balancing the rights of protesters and the wider community: “Communication between protesters and police remains the key to getting the most appropriate approach in each unique situation.”

4.2 The official reports reconsidered

The three assumptions discussed above underpin the official protest policing discourse. Taken at face value, they would appear to go some way to legitimise the recent intensification of public order policing. Each of these assumptions will now be considered in turn. The implications of the official discourse for the regulation of public protest will be analysed throughout the remainder of the thesis.

4.2.1 A ‘new age’ of protest?

Arguments that public order policing must respond to the changing tactics of protesters have long been used to justify coercive policing practices. As discussed in the following chapter, the broad pre-emptive powers introduced under the POA 1986 were justified by a greater willingness on the part of protesters “to resort to

attracted widespread international condemnation after officers opened fire on protesters and arrested 459 people, leading to a series of policy reforms including the use of ‘dialogue police’ to act as a communication link between demonstrators and police. (Ibid., p. 76). For a critical analysis of these developments in the Swedish context, see Wahlstrom, M. (2007) ‘Forestalling violence: Police knowledge of interaction with political activists’, Mobilization 12(4): 389-402, p.396.

61 HMIC (2009b) supra, n. 23, pp.73-81.
63 JCHR (2009b), supra, n. 17, p.9.
violence”.

Official claims that public protest has changed significantly in recent years are arguably unfounded. Writing about the mass movements of the 1960s, for example, Harman noted that spontaneity and lack of structure characterised the initial “explosive” involvement of large numbers of students: “As they took to the streets and occupied buildings they … did not worry unduly about strategy, tactics and organisation.”

Furthermore, although the recent wave of protests have seen a proliferation of online campaigning as a mobilising tool, the role of social media in organising protests may be overstated. A joint analysis by the Guardian newspaper and the London School of Economics found that contrary to claims from the Prime Minister that the 2011 riots were “organised via social media”, websites such as Facebook and Twitter were not used by those taking part in the riots in any significant way.

It is notable that the new age of protest rhetoric mirrors what a number of academics have characterised as the new terrorism discourse. According to this analysis, terrorism in the modern age has changed into an inherently new form characterised by decentralised networks, politically vague, ideological motivations, the skilful use of the internet and other new technologies and a desire to cause maximum civilian casualties. Burnett and Whyte have described how this characterisation of political violence in the modern era represents an attempt to establish “a homogenised grand narrative of terrorism” which has legitimised the rapid expansion of counter-terrorism policing powers and resources and their use against a growing category of ‘suspect’ populations:

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67 HC Hansard 11 August 2011 c1053.
The idea of the ‘new terrorist’ in so far as the risk of terrorist attack is now said to be global, indiscriminate, and incorrigible, creates the rationale for a new counter-terror precautionary principle: a strategy that excuses the most extreme responses from state agencies and from the wider body politic.\textsuperscript{72}

Jackson\textsuperscript{73} has further argued that the new terrorism discourse functions to expand the hegemonic power of the state. By locating the source of contemporary terrorism in religious ideology, the discourse operates to deny and obscure its political origins and the possibility that political violence is a response to neoliberal policies. I argue that in a similar process, the new age of protest rhetoric represents an attempt to depoliticise protest and legitimise coercive policing. Like ‘new terrorism’, ‘new protest’ is globalised, non-hierarchical, technologically advanced, politically ambiguous and increasingly prone to violence. As will be discussed in the following chapters, ‘new protest’ is also considered less amenable to traditional forms of control for the purpose of legitimising the pre-emptive regulation of protest. Since the duty to facilitate protest applies only to ‘peaceful’ protest\textsuperscript{74}, the new age of protest discourse allows the police to obfuscate their responsibilities under the HRA 1998.

\textit{4.2.2} Balancing rights?

The rhetoric of ‘balancing rights’ has long been central to the official discourse surrounding protest policing.\textsuperscript{75} The underlying assumption is that public protest is something which exists in direct conflict with the interests of the wider community. For example, justifying the reforms introduced under the POA 1986\textsuperscript{76}, former Home Secretary Leon Brittan referred to the ‘threat’ to society posed by public protest:

\begin{quote}
We must and shall continue to preserve the basic and crucial right to freedom of speech and freedom of assembly … but people also have the right to protection against being bullied, hurt, intimidated or obstructed,
\end{quote}

\textsuperscript{72} \textit{Ibid}, p.7.
\textsuperscript{74} See Chapter Two.
\textsuperscript{75} In his report into the 1974 Red Lion Square disturbances, for example, Lord Scarman maintained: “A balance has to be struck, a compromise found that will accommodate the exercise of the right to protest within a framework of public order which enables citizens, who are not protesting, to go about their business and pleasure, without obstruction of inconvenience.”: Lord Scarman (1975) \textit{The Red Lion Square Disorders of 15 June 1974}, Cmnd. 5919 (London: HMSO), paras.5-6.
\textsuperscript{76} The POA 1986 is considered in detail in Chapters Five and Six.
whatever the motive of those responsible may be, whether they are violent
demonstrators, rioters, intimidatory mass pickets or soccer hooligans. 77

As Percy-Smith and Hillyard’s statistical analysis of the miners’ strike demonstrates, official claims concerning the extent of criminal violence committed by pickets were not upheld by the analysis of the arrests, prosecutions or convictions. 78 Nevertheless, the equation of political protest with violence and disruption became a central feature in the government’s justification for the far-reaching proposals contained in the Act. As Scraton 79 noted at the time, rather than defining and protecting the basic right to demonstrate, the reforms started from the premise that demonstrations are disruptive to the ‘normal’ routine of daily life. ‘Balance’, Scraton suggested, had become a key word in neoliberal philosophy, used to give an appearance of equivalence and reciprocity to situations that are inherently contradictory. 80 It is precisely this argument that characterises recent official discourse on protest policing.

As discussed in Chapter Two, the rhetoric of ‘balancing rights’ allows the rights of protesters to be set against an almost infinite list of competing interests. The lack of clarity on the nature and status of competing rights allows the ‘rights of others’ rhetoric to be invoked to conceal what might otherwise be regarded as arbitrary decision-making. The decision to ban protests from Whitehall during a visit to London by former US President George W. Bush (discussed in Chapter One), for example, was justified on the grounds that the right to protest had to be balanced against “protecting the interests of the President”. 81 As discussed in the following chapters, the right to protest has at various times been trumped by the right for MPs to access Parliament unhindered 82, the right for the public to enjoy Parliament Square 83 and “the right for people to go about their everyday business”. 84 Moreover,

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77 HC Hansard 16 May 1985 c508.
80 Ibid.
82 See Chapter Five.
83 Ibid.
protesters’ rights have been weighed against private property interests that are assumed to have an almost equivalent status.\textsuperscript{85}

4.2.3 Communication?

The official protest policing discourse assumes that the police actively seek to facilitate protesters’ rights through constructive dialogue with protest organisers. This response reflects what has been identified in a number of recent academic studies as a move towards a more consensual style of protest policing, favouring “cooperation and communication between police and protestors” in order to “reduce the likelihood of violence”.\textsuperscript{86} Criminological research into public order policing has traditionally focused on its repressive and increasingly militaristic function.\textsuperscript{87} However, a growing body of academic literature charts a progressive shift from an approach based on coercion and the threat of force prevalent in the 1970s and early 1980s to a more proactive consent-based approach which utilises techniques of ‘communication’, ‘dialogue’ and ‘negotiation’.\textsuperscript{88} Departing from what P.A.J. Waddington has described as an “orthodoxy” in public order policing research\textsuperscript{89}, these analyses suggest that protest policing is becoming increasingly open and democratic, with the police actively seeking to de-escalate potentially confrontational situations through consensually negotiated solutions. Protest policing

\textsuperscript{85} See Chapter Six. Tushnet noted a similar process with the US Supreme Court’s treatment of First Amendment rights, describing how in a series of cases the Court ruled that protesters’ claims that they were entitled to access shopping centres for protest or organisational activity had to be weighed against the private property interests of shopowners: Tushnet, M. (1984) ‘An essay on rights’, Texas Law Review 62: 1363, p.1373.


is seen to have taken what Reiner has described as a “postmodern turn”, with a series of social and cultural changes in the latter part of the twentieth century diffusing both the political significance of protest and the perception of police as repressive guardians of the status quo. Writing in the context of the US, McPhail et al describe this shift as a move from escalated force to negotiated management. They suggest that the latter is characterised by a greater respect for protesters’ human rights, a more tolerant approach to community disruption, an increasingly collaborative approach to protest organisers and a reduced tendency to make arrests and resort to the use of force. As in the UK, this “softer” community-led approach to public order policing in the US followed the recommendations of a series of government-sponsored commissions, established in response to a crisis of legitimacy in protest policing during the 1960s and 70s. Research by Noakes et al found that the police operating under a negotiated management model would regularly under-enforce the law. Rather than resorting to repressive tactics, the police would encourage negotiation with protest organisers in advance in an attempt to establish mutually agreeable terms and conditions under which the protests would be held.

Researchers have charted a similar trend across Europe, with public order policing styles becoming increasingly sensitive to the ‘rights’ of protesters. della Porta and Reiter, for example, have identified a number of significant tactical trends characterising protest policing throughout Europe during the 1990s. In common with their US counterparts, they describe a general trend toward a more lenient policing style, characterised by an under-enforcement of the law and tolerant attitude towards protest behaviour. The combined effect of these two trends, the researchers suggest, is an increased attempt on the part of the police to avoid as much as possible the use of coercive and inflammatory practices of public order policing. Writing in...

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92 Ibid.
a British context, P. A. J. Waddington’s 1994 research into public order policing in London charts the development of an increasingly co-operative attitude towards protest organisers, characterised by the development of complicated, bureaucratic and formalised procedures of negotiation.96 During the policing of the Poll Tax demonstrations on 1991, for example, Waddington suggests that police “employed both coercion and accommodation” and were “anxious to defend what they perceived to be the democratic rights of protestors”.97 For Waddington, rather than exercising their discretionary powers in an arbitrary or repressive manner, the police offered assistance to protest groups in an attempt to “win over” protest organisers and marginalize militant factions. Waddington is thus critical of those who view public order policing as one which is based on coercion and arbitrariness on the part of the police: “Given the sensitivities and the political pressures that surrounded all three events, what is remarkable is that the police did not take more robust action.”98

Negotiated management strategies depend upon protest organisers engaging in dialogue with police and sharing information about intended protest actions. Waddington99 claims that the “conspicuous occasions” that coercive policing methods are utilised are distinguished by their lack of “institutionalisation”: “The more institutionalised a public gathering is, the more policing practice facilitates it.”100 What motivates senior officers, Waddington suggests,

is the avoidance of ‘trouble’... By avoiding confrontation and ‘winning over’ organizers they hope to escape both ‘on the job trouble’ in the guise of disorder and the ‘in the job trouble’ of inquiries and allegations of heavy-handedness and provocation.101

In a similar vein, Gorringe and Rosie102 have highlighted the limits of the negotiated management approach in the context of direct action and other protest groups privileging decentralised organisational forms: “Where protestors have no

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97 Ibid, pp.378-9
98 Ibid.
101 Ibid., p.379.
identifiable or willing ‘leadership’ with whom to negotiate, then accommodation is impeded and established modes of police/protestor interaction cease to be viable [emphasis in original].”\textsuperscript{103} In their research into the policing of anti-capitalist protests in Seattle, Gillham and Noakes\textsuperscript{104} noted that negotiated management practices failed in the case of the protest groups who were unwilling to cooperate with police. While cooperative or “contained” protesters sought authorisation from police and negotiated the terms of the march, “transgressive” or uncooperative protesters refused to engage with police negotiators and sought creative ways to resist police attempts to dictate the limits of the protest. Rather than returning to escalated force, the police responded to transgressive protesters with a technique of “strategic facilitation”. This included the use of increased surveillance and information sharing, the strategic use of arrests and disruption of the preparations of transgressive protesters and the control of public space through physical barriers and other strategies of containment. Such “bloodless” techniques of incapacitation ensured that the activities of transgressive protesters were suppressed whilst avoiding the backlash associated with the escalated force era “that threatened the legitimacy of the police and publicized the cause of protesters”.\textsuperscript{105}

Following the publication of the official reports, there have been attempts to integrate negotiated management strategies into public order operational practice. One of the most notable developments has been the use of Protest Liaison Officers (PLOs) to liaise with protest groups prior to, during and after protest events.\textsuperscript{106} The purpose of PLOs is to “help build relationships” between protest groups and the wider community, since: “If protestors share their intentions with us beforehand, this enables us to put the right measures in place to facilitate a safe environment for groups and provide a proportionate policing presence.”\textsuperscript{107} These developments have been welcomed by a growing body of academic writers in the area. McSeveny and

\textsuperscript{103} Ibid., p.195.
\textsuperscript{105} Ibid., p.352.
\textsuperscript{106} PLOs were originally temporary policing roles created for the purpose of a particular public order event. In September 2012 Sussex Police introduced a permanent team of PLOs “to work alongside groups who wish to protest peacefully, always balancing the needs of the wider community.” See <http://www.sussex.police.uk/policing-in-sussex/your-community/protest-liaison-officers>, accessed 28 January 2013.
\textsuperscript{107} Ibid.
Waddington\textsuperscript{108}, for example are positive about the use of PLOs, arguing that their use by South Yorkshire Police has improved the effectiveness and legitimacy of tactical operations. Gorringe \textit{et al}, are also optimistic about the benefits of improved dialogue between police and protesters, describing the initiatives as “some of the most progressive developments to the policing of public order in the UK since the 1980s”.\textsuperscript{109} According to this analysis, negotiated management is a democratic and progressive alternative to more repressive forms of public order policing, including mass arrest and the use of distance weaponry.\textsuperscript{110} Instances of violence and coercion on the part of the police are dismissed as a digression from what is otherwise a legitimate attempt on the part of the police to transform public order policing into a “new era” based on consent, mutual collaboration and an overarching respect for protesters’ human rights.\textsuperscript{111}

However, in focusing on communication as a causal explanation for the level of force deployed by police, this analysis conceals the reality that many of the protests that have triggered the most repressive styles of policing have been organised, declared and notified according to the typology idealised in the Inspectorate’s report. As noted in Chapter Three, the Gaza protests, which led to serious confrontations between police and protesters, were not spontaneous or undeclared. Rather, the protest organisers engaged in extensive dialogue with police during the planning stages, as one of the organisers recalls:

\begin{quote}
We had always tried to approach the police and demonstrations in a constructive way, facilitating demonstrations … we want to make sure that our protesters feel safe when they’re on demonstrations and we don’t want a situation where they feel that they are worried about getting arrested or any other problem like that, so for us it’s very important that we maintain a safe demonstration that everyone can participate in.\textsuperscript{112}
\end{quote}


\textsuperscript{110} \textit{Ibid.}.

\textsuperscript{111} \textit{Ibid.}.

\textsuperscript{112} Interview with Protest Organiser A, 15 July 2009.
When asked whether more could have been done to communicate their intentions to the police in advance, the organiser responded:

I don’t think there was anything that we could have changed … we’d already had contact with the police before demonstrations to plan things, to let them know what we were proposing to do, so there wasn’t anything more we could do. We’d always been cooperative.\textsuperscript{113}

The protest organisers ensured that the protests were stewarded by a team of experienced stewards, official contacts were appointed to liaise with the police and representatives of the five organisations responsible for the protest attended a serious of extending planning meetings at the MPS headquarters. They highlighted the stark contrast between the way they were treated by police during the planning stages and the dismissive or overtly hostile treatment they received on the day:

There is this very strange thing where you go into the negotiations, and sometimes the negotiations are really tough, and sometimes they just back off, especially after we proved that they couldn’t stop us … But then you would get on the demonstration itself and they would try to mess you around and treat you completely differently. It is almost as if you are a nobody, often only two days after you have had these formal negotiations with them they would treat you like scum … They were dismissive, if you raised anything they would try to bat you away because they are not in a room with an agenda and are probably not being recorded, and there are no minutes being taken.\textsuperscript{114}

The negotiated management thesis assumes that the police can actively seek to diffuse potentially confrontational public order situations by engaging in constructive dialogue with protest organisers. This approach appears to overlook the extensive research into police culture which makes clear that whom the police choose to target and those they do not is largely, if not exclusively, determined by the exercise of police discretion.\textsuperscript{115} Despite recognition that waves of protest have historically had an important impact on the nature of policing in Western democracies,\textsuperscript{116} empirical research on the relationship between the police and protesters is relatively rare. What research does exist has highlighted the extent to

\textsuperscript{113} Ibid.
\textsuperscript{114} Interview with Protest Organiser B, 17 July 2009. A similar pattern can be noted in relation to the student demonstrations of 2010 and anti-fascist protests in Bolton (2010) and Bradford (2011), where advanced communication between police and protest organisers did not translate into more democratic styles of policing.
\textsuperscript{115} See Chapter Two.
which police reaction to protesters has important consequences on the relationship between the state and particular social groups.\textsuperscript{117} Certain aspects of police culture have been found to facilitate repressive attitudes towards protesters. Benyot\textsuperscript{118}, for example, in his research into the Brixton riots, found that a macho culture among rank-and-file officers meant that police tended to privilege crime fighting over peacekeeping. Similarly, Lipset found that any authoritarian traits police officers bring from their social backgrounds are likely to augment through the experiences of policework, where officers are required “to be suspicious of people, to prefer conventional behaviour, to value toughness”.\textsuperscript{119} Studies into police culture have also indicated the existence of police stereotypes about the types of people implicated in public disorder. Police officers commonly develop a “shorthand” by which they identify groups and individuals with whom they anticipate difficulty.\textsuperscript{120} This shorthand may consist of generalizations about people with certain hair length or clothing style, or from particular ethnic backgrounds.\textsuperscript{121}

More recent research has indicated a complex and selective police image of protesters, with a legitimation of some protest groups and the stigmatization of others.\textsuperscript{122} This distinction between ‘good’ and ‘bad’ protesters frequently coincides with police stereotypes about groups deemed likely to be implicated in social disorder, including young people, immigrants and other disadvantaged socio-economic groups.\textsuperscript{123} The police often draw on these negative stereotypes about political activists in order to discredit protesters and their causes in the eyes of the public.\textsuperscript{124} Focusing on the ‘violent’ behaviour of a ‘hard-core’ minority of protesters, the police attempt to both legitimise and redirect attention away from their own violent behaviour.\textsuperscript{125}

\textsuperscript{121} \textit{Ibid}.
\textsuperscript{122} della Porta, D. and H. Reiter (1995), supra, n.117.
\textsuperscript{125} \textit{Ibid}, p.204.
Writing in the context of Australia, McCulloch notes how protests the police viewed as illegitimate were violently policed despite protesters working hard to develop good relations with police including appointing PLOs and operating an “open door policy” with local police during the planning stages. Describing the violent policing of protests in response to a college closure in Richmond, Victoria, McCulloch suggests that the presence of a number of individuals the police viewed as “non genuine” was sufficient to render the entire protest illegitimate and thus “ripe for preventive police violence”. Thus for McCulloch, although the police might pay “lip-service” to the right to protest, “they reserve the right to determine who are legitimate protesters and what are legitimate protests”.

The purported move towards negotiated management, which adopts conciliatory rather than coercive approaches to policing, draws on a developing tradition of ‘community policing’, which emphasises communication and interpersonal skills over more physically direct aspects of law enforcement. Gordon has highlighted the realities of community policing in the UK as “a reactive attempt at disguised police surveillance and control”. He argues that rather than offering an alternative to unwelcome police practices and strategies, community policing is instead part of an intensification of the disciplining process of society by the state. For Gordon, the development of community policing reflected recognition on the part of the state that “open control” in the form of overt coercion can be counterproductive. Community policing was thus a technique used to engineer consent for an intensification of repressive state practices, rather than a progressive response to widespread demands for greater public accountability in policing. Writing in 1996, King and Brearley, described a complex transformation of public order policing occurring in the UK. They suggested that following an initial drift towards

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126 Ibid. p.196.
127 Ibid., p.204.
128 Ibid.
paramilitarisation triggered by the industrial conflicts of the 1970s and 80s, the police had begun to exhibit a more lenient approach akin to the practices of their American counterparts.\textsuperscript{133} The ability of the police to respond coercively did not, however, weaken during this period. Instead, public order policing was witnessing a parallel shift “towards pre-emptive and pro-active investigation and prediction, whilst at the same time developing a more flexible … highly trained and mobile public order force”.\textsuperscript{134} This reversal of the trend towards overt coercion followed a realisation on the part of the police that such tactics were both uneconomical and damaging to police legitimacy. As one of their respondents put it, “The image is now of a more caring cop on the street in view of the public, with reserves all tooled up and ready to go in the backstreets”.\textsuperscript{135}

Despite clear evidence of increasingly authoritarian policing tactics, much recent academic work appears to accept uncritically the idea that the police are moving towards a more consensual style of protest policing. Krasa and Kappeler\textsuperscript{136} note a similar pattern in the US. They describe a fixation among academics on the professed shift towards community policing while little research has been directed towards the growth of military-style policing units: “While transfixed on the ‘velvet glove’ few have inquired into the possibility of a simultaneous strengthening of the ‘iron fist’ as a type of backstage phenomenon”.\textsuperscript{137}

4.3 Conclusions

The official protest policing discourse presents the police as neutral arbitrators who, through advance communication with protest organisers, seek to facilitate the right to ‘peaceful’ protest whilst at the same time upholding the competing rights of the ‘wider community’. This characterisation of public order policing does not correlate with the protesters’ experiences presented in Chapter Three. The remainder of this thesis considers the pedagogic and repressive role official interpretations of public

\textsuperscript{134} Ibid., p.100.
\textsuperscript{135} Quoted in ibid, p.78.
\textsuperscript{137} Ibid, pp.2-3.
protest and human rights have had in legitimising coercive policing. It will be argued that in contrast to the presumed consensual approach underpinning the official response and reflected in much of the academic literature, the relationship between the police and protest groups is based upon grossly unequal power. They do not stand before the law as equals. Whilst those who engage in protest activity are subject to increasing criminalisation, the police in public order situations act with relative legal impunity. This disparity has intensified in recent years by a rapid expansion in the coercive policing powers used to regulate protest. In the first of two chapters considering statutory framework surrounding public protest, Chapter Five considers the regulation of protest through measures of ‘prior restraint’\textsuperscript{138} - including broad pre-emptive powers to limit or prevent protests taking place in advance. Measures of ‘subsequent restraint’\textsuperscript{139} - including powers of arrest and prosecution for public order offences, are considered in Chapter Six.


\textsuperscript{139} Ibid.
### Table 4.1: The official reports: Terms of reference and key recommendations

<table>
<thead>
<tr>
<th>Report</th>
<th>Purpose of Inquiry / Terms of Reference</th>
<th>Key Findings / Recommendations</th>
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<tr>
<td>JCHR (2009) Seventh Report of 2008–09, <em>Demonstrating respect for rights? A human rights approach to policing protest</em>, HL Paper 47-1, HC 320-1. (Published 3 March 2009).</td>
<td>To consider: 1. the proportionality of legislative measures to restrict protest or peaceful assembly; 2. existing powers available to the police and their use in practice; and 3. reconciling competing interests of public order and protest.</td>
<td>• The Government should protect and facilitate peaceful protest; • There are no systematic human rights abuses in the policing of protest; • Existing concerns can be addressed through legal and operational changes: Legal changes: • Amend s.5 POA 1986 to remove reference to “insulting words or behaviour”; • Counter-terrorism powers should never be used against peaceful protestors; • SOCPA 2005 provisions should be repealed and POA 1986 Act amended to deal with protest around Parliament. Operational changes: • Improved dialogue between police and protestors: policy of “no surprises policing”; • Regular human rights training integrated into policing training; • Protestors should engage with the police at an early stage.</td>
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<td>JCHR (2009) Twenty-second Report of 2008–09, <em>Demonstrating respect for rights? Follow-up</em>, HL Paper 151, HC 522. (Published 14 July 2009).</td>
<td>Follow-up inquiry to hear further evidence in light of: 1. G20 protests; 2. Tamil protests; and 3. Ratcliffe-on-Soar Power Station pre-emptive arrests.</td>
<td>‘No surprises’: • Enhanced advanced discussions between police and protestors, including a widely advertised nominated point of contact within the police; • Use of independent negotiators to facilitate dialogue and to resolve disputes between police and protestors. Kettling: • Can be lawful, but only where it is proportionate and necessary to do so; • Police need to take more account of the circumstances of individuals and should make efforts to allow people to leave as soon as possible; • Toilets, water and medical facilities must be easily accessible to people contained. Police accountability: • There should be a legal requirement for police officers to wear ID numbers; • Exaggerated and distorted reporting in the media should be countered quickly and authoritatively by police.</td>
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<td>HMIC (2009) <em>Adapting to Protest</em>, London: Her Majesty’s Inspectorate of the Constabulary. (Published 7 July 2009)</td>
<td>To conduct a review of the public order tactics deployed in response to significant protests involving disorder or the threat of disorder. <strong>Objectives:</strong> 1. Assess the effectiveness and impact of public order tactics deployed in response to significant protests involving disorder or the threat of</td>
<td>The police should: • Facilitate peaceful protest; • Improve dialogue with protest groups where possible; • Improve communication with the public; • Moderate the impact of containment when used; • Improve training to equip officers to deal with the full spectrum of protest activity; • Wear clear identification at all times.</td>
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| 2009). | **disorder, specifically (i) containment (ii) use of force (iii) liaison with media and (iv) communication with public and protesters;**
|  | 2. Identify difficulties and barriers to the successful implementation of those tactics;
|  | 3. Examine the overall direction of public order goals, strategies and tactics in dealing with such protests and demonstrations, against the acknowledged principles of British policing;  
| HMIC (2009) **Adapting to Protest – Nurturing the British Model of Policing**, London: Her Majesty’s Inspectorate of the Constabulary. (Revised version published 25 November 2009). | **The report asks the question, “How best should the police as a service adapt to the modern day demands of public order policing while retaining the core values of the British model of policing?”**
|  | **Recommendations to “strengthen and reinforce the core values of the British policing model” include:**
|  | • Revised guidelines on the use of force;
|  | • Codification of public order policing;
|  | • Public order training that is more directed, more focused and more relevant to the public order challenges facing the police;
|  | • A no surprises communication philosophy with protesters, the wider public and the media;
|  | • Clarification of the legal framework for the use of overt photography by police during public order operations and the collation and retention of photographic images;
|  | • Review of the status of the ACPO to ensure transparent governance and accountability structures;
|  | • Common guidelines for police authorities on monitoring public order policing to protect the public interest without compromising police operational independence;
|  | • A body must have responsibility at the national level for sustaining and supporting the British model of policing.  
| HAC (2009), Eighth Report of the Session 2008-09, **Policing of the G20 Protests**, HC 418. (Published 23 June 2009). | **To investigate some of the wider concerns which have been raised over the policing of large-scale public protests and the application of “kettle” tactics. The inquiry focused on:**
|  | • Police relations with the media;
|  | • Communications between police and protesters and the level of leadership displayed by both parties during the protests themselves;
|  | • The use of close containment both as a question of ideology and application;
|  | • The use of force by the police.  
|  | • The policing of the G20 Protests was “a remarkably successful operation”;
|  | • The use of containment and controlled use of force against protesters are legitimate but should form the basis of “a wide-ranging discussion” on public order policing;
|  | • Police communications with the media and the protesters must improve;
|  | • Urgent action must be taken to ensure that officers have the resources to display identification at all times; those officers found to be consciously removing their identification numbers “must face the strongest possible disciplinary measures”;
|  | • Untrained, inexperienced officers should not be on the front-line of a public protest.  

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CHAPTER FIVE

5. ‘I predict a riot’: The pre-emptive regulation of protest

There is this very strange thing where you go into the negotiations, and sometimes the negotiations are really tough, and sometimes they just back off … But then you would get on the demonstration itself and they would try to mess you around and treat you completely differently. It is almost as if you are a nobody, often only two days after you have had these formal negotiations with them they would treat you like scum.¹

The use of law to restrict public protest has a long history in Britain.² Bunyan’s historical analysis of the modern police suggests that such powers have played an important role in legitimising state repression in response to popular campaigns for social and political reform.³ The Tumultuous Petitioning Act 1661, for example, introduced following popular demonstrations during the civil war, limited the presentation of a petition to Parliament or the Crown to a maximum of ten people.⁴ Civil unrest during the early eighteenth century led to the passing of the Riot Act of 1714, which made participation in a ‘riot’ a treasonable offence and authorised the use of deadly force in response to gatherings of twelve or more people where an order to disperse had been ignored.⁵ Growing protests over food shortages towards the end of the eighteenth century triggered the introduction of the Seditious Meetings Act 1795, which prohibited meetings of over fifty people without the permission of the local magistrate.⁶ The radical movements of the early nineteenth century led to

¹ Supra, n.114.
⁵ The Act provided that if twelve or more people ‘tumultuously assemble’ and create a ‘public disturbance’, an officer may command them to disperse by reading the proscribed proclamation, and they must disperse within the hour. By the early nineteenth century, the Riot Act had become the most frequently relied upon authority for the suppression of public disorder: see Munger, F. (1981), supra, n.2.
⁶ Smith, N. (1986), supra, n.4. See also Bunyan, T. supra, n.2.
the passing of the 1817 ‘Gagging Acts’\(^7\), which required prior notice to the local magistrate of all public meetings specifying the time, place and purpose of the gathering.\(^8\) These powers were strengthened following the birth of the Luddite movement and the 1819 Peterloo Massacre\(^9\), when the notorious ‘Six Acts’ declared all meetings for radical reform “an overt act of treasonable conspiracy”.\(^10\)

Public order law in England and Wales is principally located in the Public Order Act 1986 (POA 1986). The POA 1986 is divided into two parts. Part I, considered in Chapter Six, established a statutory regime of public order offences. Part II in contrast created a new framework of pre-emptive public order policing powers.\(^11\) The first part of this chapter will examine the regulatory regime under Part II of the POA 1986. The second part of the chapter will chart a shift to a more targeted regime which empowers the police to impose onerous restrictions on protest within particular geographic locations. This will include a discussion of the now repealed provisions of the Serious Organised Crime and Police Act (SOCPA 2005) which restricted protests within a “designated area” around Parliament and powers introduced under the Police Reform and Social Responsibility Act 2011 (PRSRA 2011) to control protest in Parliament Square. The chapter will consider the impact of the HRA 1998 on the legal regulatory framework and attempt to locate these developments in their social and political context. The significance of the official discourse in legitimising these developments will also be considered.

### 5.1 The Public Order Act 1986: A new regulatory regime

Part II of the POA 1986 created a cumbersome statutory framework for the policing of public protest that far exceeded the powers available under the existing legal

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7 Seditious Meetings Act 1817 and Treasonable and Seditious Practices Act 1817.
8 Webber, F. (1981), *supra*, n.2.
9 In 1819, eleven people were killed and hundreds injured when troops charged into a peaceful meeting of cotton-weavers protesting in support of universal male suffrage in St Peter’s Field, Manchester. See Hernon, I. (2006) *Riot!: Civil insurrection from Peterloo to the present day* (London: Pluto), pp.28-38.
regime. The Act was the culmination of a number of substantive reports published in the aftermath of over a decade of industrial and urban unrest. The most comprehensive of these reports, published by the Law Commission in 1983, found that public order law was in need of “a more coherent structure”. The Law Commission suggest that the overlapping array of common law and legislative provisions should be updated and codified into one framework piece of legislation. As enacted, the reforms went much further than the Law Commission’s recommendations. The POA 1986 extended the multiplicity of public order offences already in existence and provided the police with a much enhanced discretionary power in public order situations.

As Scraton noted at the time, the reforms were a direct response to the perceived inadequacies in the legal powers available to the police to prosecute pickets during the 1984-5 miners’ strike. The significance of the strike in the development of a militarised, nationally coordinated policing response to political unrest has been documented extensively elsewhere. Characterised by violent confrontations between police and pickets, the strike became a de facto testing ground for the use of mobile police squads and paramilitary style public order policing tactics in Britain. These profound changes in police tactics that had developed during this period were

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14 Ibid., para.2.15.


not discussed in the White Paper that preceded the 1986 Act. Instead, its conclusions, heavily influenced by the police, were explicitly directed towards “criminal offences committed daily on the picket-line” by striking miners and their supporters. The reforms also drew on proposals put forward in a 1980 Government Green Paper published in response to violent clashes between anti-fascist protesters and the police in Southall, West London. The policing of the protest triggered public condemnation after thirty-three year old schoolteacher Blair Peach died following a blow to the head during a police charge. Disregarding widespread evidence of unjustified violence on the part of the police, the Green Paper proposed the introduction of new powers to allow the police to act pre-emptively to deal with the apparent “greater willingness” on the part of protesters “to resort to violence”. The proposals included formalising the requirement that protest organisers give advance notice to police of processions and extend it “to at least some static forms of public demonstration”, as well as giving police “a more flexible power” to impose conditions on both types of events.

Perhaps the most significant of the Part II provisions is Section 11, which introduced for the first time a national requirement to give advance notice to the police of most public processions. The move followed a request from the CPM, who in evidence to the HAC in 1980 claimed that such a requirement would allow the police to make “proper and efficient arrangements” as well as instilling “a legal responsibility” on organisers “to preserve the peace and maintain the law”. Under Section 11, the “organisers” of a march must give six clear days written notice to the police, before the date it is intended to be held to the police in the relevant police area. Failure to

20 HC Hansard 16 May 1985 c510.
23 See ibid.
24 Home Office (1980), supra, n.13112, para.4
25 Ibid, paras.120-121.
27 The term ‘organiser’ is not defined in the Act.
28 POA 1986, ss.11(4)-(6). Processions which are “commonly or customarily held in the police area” and “funeral processions” are exempt (s.11(2)). The requirement of advance notification is limited to situations where it is “reasonable practicable” to do so (s.11(1)). The ECtHR have criticised states which do not allow spontaneous processions (see e.g. Bukta v Hungary 25691/04 [2007] ECHR).
comply with the notice requirement is a criminal offence. The organisers will also be liable if the march deviates from the date, time or route specified.

Moreover, new powers to impose conditions on assemblies as well as processions were introduced under Sections 12 and 14 of the POA 1986. The situations triggering the imposition of conditions were extended from those where there is evidence that a planned demonstration might cause “serious public disorder” to those where there is an apprehension of “serious damage to property” or “serious disruption to the life of the community”. The conditions imposed can include restrictions on the size, location and duration of a planned assembly or, the case of marches, any condition thought necessary to prevent “disorder, damage, disruption or intimidation”, including changes to a march route or a prohibition on entering a particular public place. To support these powers the Act specifies that anyone who knowingly fails to comply with a condition or who “incites another” to do so is guilty of an offence.

Although the ECHR had not at that time been incorporated into domestic law, the reports that preceded the POA 1986 did consider the human rights implications of the reforms. None of the reports found the sweeping new powers to represent any inconsistency with the Convention rights. Instead, in clarifying the acceptable limits of public dissent, the reforms were presented as giving positive recognition to the rights of free speech and peaceful assembly in domestic law. The Law Commission,

29 Ibid., s.11(7).
30 Section 11(8) provides a defence where the organiser can prove that he or she was unaware and had no reason to believe that the notice requirements were not complied with. Section 11(9) provides a further defence where the accused can prove that any departure from the details in the notice arose from something beyond his or her control. The Act further provides that a senior police officer may apply to the local council or district (or in the case of the Metropolitan Police and City of London districts the Secretary of State) for an order prohibiting all public processions (or any class of procession) for a period of up to three months (ss.13(1)-(4)). A member of the march or a person who organises it knowing of the ban will commit an offence subject to a maximum sentence of three months imprisonment: ss.13(7)-(10).
31 The POA 1936 (POA 1936) granted powers to impose conditions on processions only (POA 1936, s.3(1)).
32 POA 1986, s.3(1).
33 Ibid., s.2(1)(a) (in relation to processions) and s.14(1)(a) (in relation to assemblies).
34 Ibid., s.12(1)(b). The Anti Social Behaviour Act 2003 (ASBA 2003) reduced the minimum number of participants needed to impose conditions on static assemblies to two.
35 Ibid., ss.12(5)-(6) (in relation to processions) ss.14(5)-(6) (in relation to assemblies). Section 12(5) provides a defence where the accused can prove that the failure to comply arose from circumstances beyond his control.
for example, in their 1983 report, claimed that in penalising acts that go beyond “legitimate means of public expression”, such measures do not represent any encroachment on civil liberties “but are, rather, one means of giving effect to them.”

The Law Commission’s conclusions echoed those of HAC. Responding to calls from the National Council for Civil Liberties (NCCL) for the introduction of a statutory right to protest, the Committee claimed that a legal requirement of advance notification “would in effect recognise a limited right to march. In other words, legal standing is confirmed for a march by the requirement and acceptance of notice”. The Committee claimed that a requirement of advance notification would not be tantamount to a requirement to have a permit to march, but would instead “serve as the formal trigger” for negotiations between police and protest organisers designed to establish the “ground rules” for the march.

The reforms were therefore justified not as a punitive measure, but as a means of providing mutually beneficial assistance to police and protesters. Compulsory advance notification was presented as a mechanism by which police and protest organisers could freely negotiate mutually acceptable terms and conditions for a march, with the police serving as neutral arbitrators between the interests of protest organisers and the competing interest of the ‘wider community’. Given the wide ranging powers already available to the police, it is unlikely that any further powers were needed; as Driscoll pointed out at the time, it had already become the general practice for the organisers of demonstrations to give advance notice to the police and to discuss with them the proposed route of the march. The 1980 Green Paper claimed that such a requirement would merely serve to formalise existing practices of negotiation between the police and protest organisers in order to “give the police more time to take action designed to prevent disorder”. Section 11 was, however, no mere formalisation of existing practice. Although some local authorities had already introduced a notification requirement prior to the introduction of the 1986 Act, the majority had not adopted a formal procedure, and where a notice period was

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36 Law Commission (1983), supra, n.13, para.2.3.
37 HAC (1980), supra, n.13, para.36.
imposed, it was generally between twenty-four and thirty-six hours.\(^{41}\) The minimum six day notice period also greatly exceeded the recommendation of the HAC, who concluded that a period of seventy-two hours would be sufficient.\(^{42}\) Earlier calls from the police for a legal requirement of advance notification had moreover been considered and rejected as “unnecessary” by Lord Scarman in his inquiry following the 1974 Red Lion Square protests.\(^{43}\) In transforming what had formally been an accepted practice into a legal requirement backed up by criminal sanctions, such measures strengthened significantly the coercive apparatus of the state.\(^{44}\)

### 5.2 Pre-emptive regulation and the Human Rights Act 1998

The regulatory regime introduced under Part II of the POA 1986 marked a radical expansion of the pre-emptive powers of the police to control protest. Against a backdrop of social unrest and class conflict, public protest was presented as something inherently linked to violence and criminality. Constructions of pickets and protesters as a pervasive ‘enemy within’ provided the backdrop for the redefinition of what were assumed democratic rights as illicit activities that must be regulated and authorised by the state.\(^{45}\) The spurious notion of ‘balance’ enabled such powers to be legitimised as a human rights compliant strategy.

The ‘constitutional shift’ that was forecast at the introduction of the HRA 1998 provided an opportunity to re-assess the legitimacy of these powers. Indeed, as noted in Chapter One, it was predicted that public order legislation would be a major point of impact of the HRA 1998.\(^{46}\) Yet over ten years after the Act came into force, the Part II provisions remain in force. Moreover, the regulatory regime has been significantly expanded with the introduction of sweeping new preventative powers.

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\(^{41}\) HAC (1980), \textit{supra}, n.13, Appendix 1, Annex B. Prior to 1986, there were no reported prosecutions for failure to comply with a statutory notice requirement: see Driscoll, J. (1987), \textit{supra}, n.39, p.283.

\(^{42}\) HAC (1980), \textit{supra}, n.13, para.38.

\(^{43}\) Lord Scarman commented that the enactment of a notification requirement would “force upon the law a largely unnecessary requirement, which can at times be an embarrassment to law abiding citizens”: Lord Scarman (1975), \textit{supra}, n.15, para.129.


that impose onerous restrictions on protest. Two of the most controversial provisions - those contained under the SOCPA 2005 and the PRSRA 2011 - will be the focus of the second part of this chapter.

5.2.1 The Serious Organised Crime and Police Act 2005

In April 2005 the provisions of the Serious Organised Crime and Police Act 2005 (SOCPA 2005) came into force in the UK. The main focus of the Act was the formation of the Serious Organised Crime Agency – a national policing unit established to prevent and detect organised crime.47 Included in the legislation were a set of unrelated provisions under Part 4 relating to “Public order and conduct in public places etc.” The provisions received very little opposition in either the House of Lords or House of Commons.48 Yet they became some of the most controversial public order measures of the past quarter of a century. Although now repealed, the SOCPA 2005 provisions marked a significant shift in the regulation of public protest in the UK. The story of why and how these measures were introduced, and the social and political forces which led to their repeal, are highly significant to the current analysis. The provisions will therefore be examined in detail.

It is essential that the SOCPA 2005 provisions are located in their social and political context. The measures were introduced on the back of a crisis of legitimacy for the political establishment following the British Government’s controversial decision to support the US-led invasion of Iraq in 2003. As discussed in Chapter One, Britain’s involvement in the war triggered some of the largest protests ever seen in Britain. Up to two million people marched on the streets of London on 15 February 2003 and regular protests were held at the Cenotaph war memorial on Whitehall. At the outbreak of the invasion, anti-war campaigner Brian Haw established a permanent ‘peace camp’ in Parliament Square. The area soon became a focal point for protest and a visible reminder of the scale of opposition to the war. The publicity surrounding Haw’s camp and the longevity of protests in Parliament Square became

a growing embarrassment for pro-war MPs from across the political divide. According to Conservative MP Sir Patrick Cormack, the lives of MPs, the police and Parliamentary staff were being “made intolerable by those people baying away … merely repeating themselves ad nauseam.” The concerns triggered a consultation by the House of Commons Procedure Committee, who were asked to consider whether existing powers to control protest around Parliament remained appropriate. In evidence to the Committee, Hazel Blears MP, then Home Office Minister, stated that the policy of the Government was one of trying to “strike the right balance” between the rights of protesters and MPs:

As in so many of these areas where we are seeking to reconcile a whole range of different and competing interests … What we have here, in relation to the demonstrations and the need to ensure access, is for me a very sharp example of where some of those rights and interests have come into conflict in recent times.

For Blears, although the right to protest is enshrined under Articles 10 and 11 of the ECHR, these rights are outweighed by “the rights of democracy to continue”. Whilst not necessarily unlawful, the activities of protesters cause MPs “incredible annoyance and inconvenience”, preventing them from carrying out their work effectively. Concerns were also raised that the protests could be used to conceal a terrorist bomb. CMP Sir John Stevens claimed that the terrorist threat in London was the highest of its kind. Police powers to protect Parliament and other significant sites therefore needed “some teeth”. In light of these concerns, the Committee recommended that existing powers to control protest around Parliament be extended.

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49 HC Hansard 7 February 2005 cc1289-1290.
50 Home Office Minister Caroline Flint MP claimed that noise from protesters had “health and safety” implications for those working within the vicinity of Parliament which it was the duty of the House to address: Ibid.
51 See House of Commons Procedure Committee (2003) Sessional Orders and Resolutions, Third Report of session 2002-03, HC 855 (London: HMSO). Prior to the introduction of SOCPA 2005, the area around Parliament was governed by a Sessional Order that required the Metropolitan Police to ensure that MPs are not hindered in attending Parliament. The Act did not, however, give the police any additional powers of arrest in order to enforce the Order. The Order is reproduced in ibid, p.3.
52 Ibid, Ev.18, Q.105.
53 Ibid, Q.105.
The solution came in the form of Sections 132-138 of the SOCPA 2005, which outlawed all unauthorised “demonstrations” taking place within a “designated area” outside Parliament. The provisions marked a significant expansion of the existing regime. As noted in the previous section, the police under the POA 1986 have no authority to ban static assemblies, other than static trespassory assemblies under Section 14A Public Order Act 1986. According to the 1985 White Paper which preceded the 1986 Act, open-air assemblies are “so fundamental to free speech and the right to protest that … it would be quite wrong to confer any power to ban them”. Under Section 133 of the SOCPA 2005, any person seeking authorisation to hold a demonstration within the designated area was required to provide written notice to the CPM at least six days in advance, specifying the date, time, location and duration of the planned protest and the name and address of the protest organiser. In contrast to Section 11 of the POA 1986 which provides that notification must be given “unless it is not reasonably practicable” to do so, the SOCPA required that notification be given “not less than 24 hours before the time the demonstration is to start”, thus outlawing all spontaneous demonstrations within the vicinity of Parliament.

The exclusion zone was much greater than the area outside Parliament. It included other symbolic locations including Whitehall and Downing Street as well as the Home Office and New Scotland Yard. The SOCPA 2005 also added weight to the criminal offences available to enforce the notification requirement; Section 11 of the POA 1986 specifies that only the protest organiser can be liable for an offence following a failure to notify, the SOCPA 2005 provided that any person who “organises a demonstration”, “takes part in a demonstration” or “carries on a

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57 The meaning of ‘demonstration’ was left undefined in the Act.
58 Under Section 138, the “designated area” may be up to “one kilometre in a straight line from the point nearest to it in Parliament Square”. The area is designated by statutory instrument under the SOCPA 2005 (Designated Area) Order 2005.
59 Home Office (1985), supra, n.13, para.5.4. According to then Home Secretary Leon Brittan, “I doubt whether it would be right for either the police or the Government to be empowered to pick and choose which demonstrations were permissible and which were not, either in relation to the nationality of those concerned or the subject about which they were demonstrating”: HC Hansard 1 May 1984 c197.
60 POA 1986, s.11(1)(c).
61 SOCPA 2005, ss.133(2)(a)-(b).
62 In contrast, Section 11 POA 1986 permits spontaneous demonstrations where prior notification “is not reasonably practicable”: s.11(1).
demonstration by himself”\textsuperscript{63} in a public place in the designated area will be guilty of an offence punishable by up to fifty one weeks imprisonment and a £2,500 fine if prior authorisation had not been obtained.\textsuperscript{64} The punishment far exceeded the maximum penalty for failure to notify under Section 11 of the POA 1986, which is limited to a £1,000 fine.\textsuperscript{65} The situations triggering the imposition of conditions were extended to include those thought necessary to prevent a safety or security risk or to prevent a hindrance to access or the “proper operation” of Parliament\textsuperscript{66} and the conditions imposed could include restrictions as to the size and number of banners and placards and the “maximum permissible noise levels” in addition to location, time, duration and size of the demonstration.\textsuperscript{67} The use of loudspeakers within the designated area except by those in various positions of authority was outlawed under Section 137. The SOCPA 2005 also imposed a blanket ban on protests within defined areas outside of the designated area by making it a criminal offence to trespass on any “designated site”.\textsuperscript{68} Under Section 128, the Home Secretary has the power to designate any land or buildings belonging to the Crown or certain members of the royal family or where it appears to them to be “appropriate … in the interests of national security”. The list of designated sites includes military bases and nuclear facilities as well as various government and parliamentary buildings and royal properties.\textsuperscript{69}

Despite the constitutional shift that was predicted at the introduction of the HRA 1998, the courts were unwilling to challenge the provisions on human rights grounds. In \textit{Blum and others v Director of Public Prosecutions}\textsuperscript{70}, the Divisional Court found that the powers of arrest under the SOCPA 2005 did not constitute an unlawful interference with liberty under Article 11(1) ECHR. The Court relied upon the ECtHR’s judgment in \textit{Zillerberg v Moldova}\textsuperscript{71}, where an authorisation procedure was held to be Convention compliant if its purpose is to enable the authorities “to

\textsuperscript{63} For the purpose of the POA 1986, an “assembly” consists of twenty or more people: POA 1986, s.16.
\textsuperscript{64} SOCPA 2005, s.132. The maximum penalty for participants is a £1,000 fine.
\textsuperscript{65} POA 1986, s.11(10).
\textsuperscript{66} SOCPA 2005, ss.134(1)(a)-(f).
\textsuperscript{67} \textit{Ibid.}, s.134.
\textsuperscript{68} \textit{Ibid.}, s.128.
\textsuperscript{69} SOCPA 2005 (Designated Sites under Section 128) Order 2007.
\textsuperscript{70} [2006] EWHC 3209.
\textsuperscript{71} Application No. 61821/00 of 4 May 2004.
ensure the peaceful nature of a meeting”.\textsuperscript{72} The High Court held that since the authorisation procedure was itself Convention compliant, any punitive sanctions imposed for failure to obtain an authorisation would not fall foul of Article 11(1) ECHR.\textsuperscript{73}

With politicians the judiciary apparently unwilling to challenge the provisions, opposition to the SOCPA 2005 came from below. The first conviction under the Act led to anti-war campaigner Maya Evans receiving a conditional discharge after she read out the names of British soldiers killed in the Iraq war at the Cenotaph without prior authorisation.\textsuperscript{74} In the absence of a definition, what constituted a “demonstration” for the purpose of the Act was left entirely to the discretion of the police. Whilst a man dressed in a Charlie Chaplin costume and holding a banner containing the words “Not Allowed / Aloud” without prior authorisation was arrested under SOCPA 2005, Conservative Party activists dressed in Father Christmas costumes who unveiled a large banner outside of Parliament were not.\textsuperscript{75}

Whilst an event to mark the unveiling of a Nelson Mandela statue in Parliament Square, including speeches by Prime Minister Gordon Brown, did not constitute a ‘demonstration’ requiring prior authorisation, an event to celebrate the life and work of Mandela where the Prime Minister’s exact same speech was read by activists did.\textsuperscript{76} When asked by the JCHR to explain the difference between a ‘demonstration’ to which the SOCPA 2005 exclusion would apply and a ‘publicity stunt’ to which it would not, Vernon Coaker MP, Home Office Minister of State for Policing, Crime and Security, struggled to make the distinction:

\begin{quote}
The key difference is that Nelson Mandela and Gordon Brown, when they were unveiling the statue or whatever they were doing, were not demonstrating in Parliament Square. With others, even if it was a publicity stunt, people were looking as to whether they were demonstrating. Was it a publicity stunt or a demonstration? That is where you start dancing on the
\end{quote}

\textsuperscript{72} \textit{Ibid.} at 11. See also \textit{Aldemir v Turkey}, App. No. 32124/02, 18 December 2007, where the ECtHR ruled that notification requirements would not to constitute an unlawful interference with an individual’s rights under Article 11, as long as such does not represent a “hidden obstacle” to freedom of assembly (at 46–47).
\textsuperscript{73} \textit{Supra}, n.70 at 29.
\textsuperscript{74} \textit{Ibid.} at 8.
\textsuperscript{76} \textit{Ibid.}
head of a pin. I personally see lots of things as publicity stunts and they are quite amusing. You would not stop them because that is part of the life blood of democracy, to use humour and caricature in order to make a political point. That has been done through the centuries. It is a perfectly reasonable thing to do. Are we saying somebody is using that to demonstrate or simply as a publicity stunt?  

Efforts to challenge the law through non-compliance were accompanied by a series of creative attempts to undermine the restriction and highlight the uncertainty surrounding the term ‘demonstration’ as a trigger incident, including anti-war carol services and picnics and events declaring support for the British Legion and Comic Relief. A series of lone protests requiring separate licences sought to test the limits of police bureaucracy. In 2007 comedian Mark Thomas made it into the Guinness Book of World Records after taking part in the most protests in a single day – a total of twenty protests within the SOCPA zone for which he obtained separate authorisations from police. The 2007 Turner Prize was awarded to Mark Wallinger, who had recreated Brian Haw’s Parliament Square protest in Tate Britain. Wallinger claimed that part of the exhibition was within the SOCPA exclusion zone and therefore technically in defiance of the legislation. The exhibition opened four days before Brian Haw’s protest camp was dismantled by police.

In the face of growing opposition to the prohibition, Prime Minister Gordon Brown announced in July 2007 that the Government intended to reassess the provisions in

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77 Ibid., Q.310.  
80 JCHR (2009a), supra, n.75, p.32.  
82 Brian Haw’s peace camp was subject to a lengthy legal battle. In R (Haw) v Secretary of State for the Home Department and another [2006] QB 359, the High Court held that the SOCPA 2005 provisions did not apply to demonstrations which began prior to the commencement of the Act. The decision was subsequently overturned by the Court of Appeal: [2006] EWCA Civ 532. On 23 May 2006, seventy-eight police officers were deployed to remove the camp. The heavy-handed raid, which reportedly cost the MPS £7,200, was heavily criticised by the MPA: Muir, H. (2006) ‘Met criticised over raid on demo’, Guardian, 26 May, p.13. Subsequent litigation to remove Haw’s camp were unsuccessful: DPP v Haw [2007] EWHC 1931; Mayor of London (on behalf of the Greater London Authority) v Hall and others [2010] EWHC 1613, [2011] EWHC 585. Haw’s camp remained in place until his death in June 2011.
order to balance “the need for public order with the right to public dissent”. Three
months later the Government published a consultation document, Managing Protest
Around Parliament, in which it reaffirmed its commitment to explore “an
alternative framework that better upholds and facilitates protest, while giving the
police the appropriate powers to keep the peace”. Rather than rolling back the
SOCPA 2005 provisions, the Government recommended the expansion of public
order legislation to bring the general powers more in line with those currently limited
to the designated area. The Paper noted that the MPS and ACPO had “formally
raised practical concerns” about the different provisions governing marches and
assemblies, claiming that bringing into line the conditions that can be imposed on
assemblies with the powers available in relation to marches would give the police
greater discretion to prevent serious public disorder. The draft Constitutional
Renewal Bill published the following year proposed the repeal of the SOCPA 2005
provisions that restricted protest outside Parliament, although room was left for
similar provisions to be reintroduced in the future.

5.2.2 The Police Reform and Social Responsibility Act 2011

The resurgence in protest during the first months of 2009 provided the momentum
for new powers to restrict protest around Parliament. Within days of the G20
demonstrations in the City of London, protesters mobilised largely from within
Britain’s Tamil diaspora began a seventy-three day occupation of Parliament
Square. At the same time repeated attempts to end Brian Haw’s peace camp
through arrest and court proceedings had so far failed, and Haw was joined by a

83 Home Office (2007) Government consultation on sections of the Serious Organised Crime and
(London: HMSO).
85 Ibid., p.8.
86 Ibid., p.9. The proposals were supported by the JCHR in their 2009 Report into protest policing,
which called for a repeal of the SOCPA provisions but proposed that there should be an amendment
to Section 14 POA 1986 to give the police greater powers to restrict protest around Parliament: JCHR
(2009a), supra, n.75, para.137.
87 Constitutional Renewal Bill 2008, c.1; Ministry of Justice (2008) The Governance of Britain:
Constitutional renewal, Cm.7342-I (London: HMSO).
88 Ibid., paras.27-29.
90 Supra, n.82.
In evidence to the JCHR, Assistant Commissioner of the MPS Chris Allison claimed that the protests highlighted the need for the police, MPs and members of public to have “a clear understanding” about the acceptable limits of protest in the vicinity of Parliament, “so that, again, we can have this ‘no surprises’ debate”. Describing the Tamil demonstrations as “one of the most challenging protests that I have had to deal with in my policing career”, the Assistant Commissioner claimed that further powers were needed in order:

to enable us to manage what is a very challenging environment for us, because lots of things go on in this environment and we need to be able, once again, to balance the competing rights of different individuals who work here.

In May 2009 the Speaker of the House of Commons called an emergency meeting between the Minister for Security, Counter-Terrorism, Crime and Policing, the Mayor of London’s Office, Westminster Council and the MPS, in order to consider how demonstrations in Parliament Square can be “better regulated”. The solution came in the form of the Constitutional Reform and Governance Bill, which sought to repeal Sections 132 to 138 of SOCPA 2005 while enabling amendments to be made to the POA 1986 that would provide the police with greater powers to impose conditions on protests outside Parliament. With the fall of the Labour Government the Bill remained incomplete, however Sections 132-138 of the SOCPA 2005 were eventually repealed by the Coalition Government when the provisions of the Police Reform and Social Responsibility Act 2011 (PRSRA 2011) came into force on 15 September 2011. The Act creates a new legal regime to respond to the growing number of protests in Parliament Square and its immediate vicinity, “which aims to prevent encampments and other disruptive activity”. Although limited to a more

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91 Taylor, J. (2009) ‘3,000 days and counting... The lonely life of Brian: His body is weak, but Brian Haw’s spirit is still willing - even after eight years of protesting’, The Independent, 19 August, p.14.
93 Ibid., Q.177.
94 HC Hansard 13 May 2009 cc857-8.
95 Constitutional Reform and Governance Bill 2009, Part 4.
96 In R (on the application of Gallastegui) v Westminster City Council and others [2013] EWCA Civ 28 the High Court found that the PRSRA 2011 provisions did not constitute an unlawful interference with rights of free speech and peaceful assembly under Articles 10 and 11 ECHR.
97 Police Reform and Social Responsibility Bill Explanatory Notes, p.3.
tightly defined “controlled area” than the far wider “designated area” under the previous regime, the provisions give the police significantly broader discretionary powers to control the activities of protesters within the area. The PRSRA 2011 powers are also extended to “authorised officers” which, under Section 148, includes anyone who is authorised in writing by the Greater London Authority or Westminster City Council for the purposes of the Act. Under Section 143, a constable or authorised officer who has reasonable grounds for believing that a person is or is about to engage in a “prohibited activity” within the controlled area may direct the person to cease to do the activity or “not to start doing that activity”. The specified prohibited activities include, “operating any amplified noise equipment, erecting or using any tent or structure designed or adapted for the purpose of “facilitating sleeping or staying in a place for any period”, or placing, keeping or using any “sleeping equipment” for the purpose of sleeping in the area overnight. A person who fails to comply with a direction is guilty of an offence, punishable by a fine of up to £5,000. The fine far exceeds the penalty under the SOCPA 2005 regime, when higher level penalties were limited to the “organisers” of a prohibited demonstration. Section 145 gives a constable or authorised officer the power to confiscate a prohibited item if it appears to them that it is being or has been used in connection with the commission of an offence under Section 143. The power to confiscate is not limited to the controlled area: where it appears to a police officer that an offence under Section 143 has been committed, they may seize the item “on any land outside of the controlled area” and they may use “reasonable force” in order to do it. There is no requirement that the actions of the constable or officer be based on any objectively reasonable grounds of suspicion.

The ban on loudspeakers remains in force. Under Section 147, anyone wishing to operate any “amplified noise equipment” within the controlled area must make an

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98 Under Section 142, the “controlled area of Parliament Square” includes “the central garden of Parliament Square” and “the footways that immediately adjoin the central garden of Parliament Square”.
99 This issue is explored further in Chapter Five.
100 PRSRA 2011, ss.143(1)(a)-(b).
101 Ibid., s.143(2)(a).
102 Ibid., ss.143(2)(b)-(c).
103 Ibid., ss.143(2)(d)-(e).
104 Ibid, s.143 (8).
105 Ibid., s.145(2).
106 Ibid., s.145(4).
application to the responsible authority for permission. The person making the application may be required to pay a fee in order for their application to be considered. The authority must give notice in writing of their decision within twenty-one days, where they may refuse permission or provide an authorisation which may be subject to conditions. If an authorisation is granted, it may be varied or withdrawn at any time.

In an attempt to avoid the political backlash triggered by the SOCPA 2001 prohibition, the PRSRA 2011 criminalises activities associated with protest rather than outlawing protest per se. The Act has served as a template for new preventative prohibitions in a growing number of sites outside of the original SOCPA zone. In October 2011, protesters in London set up a protest camp on an area of land jointly owned by St Paul’s Cathedral and the Corporation of London in solidarity with the ‘Occupy Wall Street’ protests in New York. The protest was situated outside the PRSRA “controlled area”, and an attempt by the Corporation of London to secure an injunction under private law to evict the protesters from the land was, although eventually successful, subject to costly delays. In December 2011 Westminster Council announced that they were running a consultation of proposed new byelaws in response to the growing occupy protests which would “safeguard the interests” of the area. The Council was concerned that the limited geographical scope of the PRSRA provisions would fail to prevent the “displacement” of the existing camp and the “increasing threat” of similar protests in other parts in the City. If enacted, the provisions would extend the ban on the erection and use of tents or “similar structures” and the powers of arrest and seizure under the PRSRA 2011 to a broader ‘designated area’ which would include an extended area around Parliament Square not included in the PRSRA 2011 and sections of the precincts of Westminster Abbey. The proposals would also amend a 2001 byelaw dealing with noise in the

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107 Ibid., s.147(3)(c).
108 Ibid., ss.147 (4)-(5).
109 Ibid., s. 47(6).
110 City of London Corporation v Samede and others [2012] EWHC 34.
112 Ibid.
street and public places to enable the seizure of amplified noise equipment which would cause “reasonable cause for annoyance”.

This latter power would apply to the whole of the City of Westminster. There are reports that legislation based on the Westminster byelaws will spread to other areas.

5.3 Creeping authoritarianism or civil libertarian pessimism?

The last quarter of a century has witnessed a dramatic increase in state control over the manner in which protests are organised and conducted. Table 5.1 demonstrates how such measures have become normalised and expanded over time. The POA 1986 Act introduced for the first time a national requirement to notify the police at least six days in advance of most public processions. The SOCPA 2005 extended the requirement to include all “demonstrations” within the designated area and the notification period was extended under the PRSRA 2011 to twenty-one days in an expanded “controlled area”. The information that must be provided by organisers has also extended from the “date, time and proposed route” of the procession under the POA 1986 to “any information” the responsible authority requires in connection with an application under the PRSRA 2011. A similar pattern can be noted in relation to the powers of the police to impose conditions (see Table 5.2). Under the POA 1936 (POA 1936) the imposition of conditions was limited to situations where there was an apprehension of “serious public disorder”. This was extended under the POA 1986 to include situations where there is an apprehension of “serious damage to property” and “serious damage to the life of the community”. The SOCPA 2005 extended these triggers to include any apprehended disruption to the life of the community, as well as any “security” and “safety” risks or causing a “hindrance” to MPs. Under the PRSRA 2011, the responsible authority has the power to impose “any conditions” on the use of amplified noise equipment which may be varied “at any time”. These requirements have been reinforced by the threat of increasingly punitive sanctions for those who fail to comply with the requirements.

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113 The previous Byelaw was limited to a power to request a person to desist from their activities: City of Westminster Byelaws for Good Rule and Government (No. 2) 2001, Byelaw 3. The new Byelaw, in contrast, would enable an officer to seize a “prohibited item” and use “reasonable force” in order to do so: Draft Byelaws 2011, 4A.

114 Ibid.

Supporters of these developments have argued that the expanded legal regime has not necessarily translated to an erosion of civil liberties. In his 1994 research into the policing of protest in London, for example, P. A. J. Waddington found that the police routinely under-enforce the law, noting that the broad statutory public order powers under Part II of the POA 1986 are rarely invoked.\textsuperscript{116} Waddington therefore criticises the “civil libertarian pessimism” that he suggests characterises the critique of modern liberal democracies, claiming that the HRA 1998 has, in fact, “strengthened the position of protesters and expanded freedom of speech and assembly into areas previously denied to them.”\textsuperscript{117} Waddington’s observations are reflected in the official account put forward by the police. In evidence to the JCHR in 2008, for example, Deputy Chief Constable Sue Sim, the ACPO lead on public order, claimed that conditions on processions and assemblies were used “sparingly and only when necessary.”\textsuperscript{118}

The extent to which the police rely on their statutory powers is unclear. The ACPO’s evidence to the JCHR was contradicted by witnesses to the inquiry who claimed that the use of police powers had intensified in recent years, with conditions frequently imposed on the day without recourse to POA 1986 provisions.\textsuperscript{119} Where the powers are relied upon, their use appears to be incredibly arbitrary; in the aftermath of the August 2011 riots, for example, Home Secretary Theresa May approved a banning order prohibiting all public processions within five London Boroughs for a period of thirty days, under the auspices of prohibiting a planned march by the far-right English Defence League (EDL) in the London Borough of Tower Hamlets. The ban included an area much wider than the site of the intended protest, including the City of London - the target of recent anti-capitalist protests - on the grounds that the planned EDL march might ‘spill over’ into other areas.\textsuperscript{120}

\textsuperscript{118} DCC Sim claimed that fewer than seventy notices under sections 12 and 14 POA 1986 issued in 2008 by the thirty-eight police forces for which figures were available: JCHR (2009a), \textit{supra}, n.75, para.47.
\textsuperscript{119} See e.g. \textit{ibid.}, Q.129.
Waddington’s critique, moreover, fails to acknowledge the important role the expanding statutory regime has played in legitimising the use of more informal and extra-legal coercive practices. Driscoll, for example, notes how the POA 1986 was introduced in the context of a period of militarisation of policing, including the use of road blocks and check points, increased reliance on paramilitary equipment and the development of a nationally coordinated response to public disorder – developments largely ignored in the plethora of official reports which accompanied the reforms. The expanded powers not only gave the police far greater powers to restrict protest than ever before but also legitimised existing coercive practices that had developed extra-legally during this period.

5.4 Conclusions

The move towards ‘negotiated management’ policing has been backed up by an extensive legal regime that places onerous restrictions on the activities of protesters. As discussed in Chapter Four, the official protest policing discourse presents such measures as less repressive in that they reduce the likelihood of the police having to resort to more forceful tactics. According to HMIC, the purpose of advanced notification is to allow the police to take “reasonable and appropriate” measures in order to guarantee the “smooth conduct” of a protest event. There is thus “no conflict” between a notification requirement and the right to freedom of assembly under Article 11; rather than presenting a hidden obstacle to protest organisers, notification requirements serve to facilitate the exercise of free assembly rights.

Fernandez has charted the expansion of pre-emptive measures in the US, noting how such measures are not used to facilitate protest but are instead a control mechanism used by the police to suppress and pacify protest movements. Fernandez describes such practices as the “bureaucratic regulation of protest” – a process whereby behaviour is regulated through internalization and manufacturing consent rather than

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124 Ibid.
overtly forceful practices.\textsuperscript{126} Indeed the two countries HMIC looked to as a template for negotiated management policing have both been backed up by onerous regulatory regimes. As documented on Table 5.1, the development of ‘dialogue policing’ in Northern Ireland has been reinforced by the Public Processions (Northern Ireland) Act 1998 (PPNIA 1998), which requires a twenty-eight day notification period for all “public processions” and fourteen days for “protest meetings”, specifying information including the date, time, route, location, number of persons likely to take part, the “arrangements for its control” and any other “such matters as appear to be necessary”.\textsuperscript{127} The imposition of conditions includes any conditions considered “necessary”, and liability is up to six months imprisonment and a £5,000 fine for anyone who knowingly fails to comply with a condition, or who “incites another to do so”.\textsuperscript{128} The Northern Ireland Public Assemblies Bill 2010 attempted to go even further. The Bill proposed a thirty-seven days notification requirement for any “public assembly”, “parade”, or “protest”, specifying the date, time, and duration, as well as identifying any “categories of person (including participating groups) expected to attend”.\textsuperscript{129} Whilst popular opposition to the reforms has so far prevented the Bill from making it onto the statute book, these developments set a worrying precedent for the move to ‘no surprises’ policing in England and Wales. Wahlstrom notes a similar pattern in Sweden, where the SPD’s ‘dialogue model’ has been reinforced by an extensive legal regime that provides the police with a broad discretion to curb the activities of protesters.\textsuperscript{130}

Though there have been recent calls for a policy of ‘no surprises’ in the policing of political demonstrations, there is no legal requirement on the police to inform protest organisers of the details of their planned public order policing operation. In contrast protest organisers face an abundance of legal barriers which have the overall effect of severely limiting the freedom to protest. Where protesters exceed the boundaries of what is lawfully authorised, the use of more forceful measures is legitimised. As noted in Chapter Three, there is little redress for protesters when police officers

\textsuperscript{126} \textit{Ibid.}, p.81.
\textsuperscript{127} PPNIA 1998, ss.6(4) and 7(4).
\textsuperscript{128} \textit{Ibid.}, ss.8(7) and (8).
\textsuperscript{129} Northern Ireland Public Assemblies Bill 2010, c.13.
exceed the bounds of the agreement. It is therefore suggested that rather than seeing negotiated management as a way of ‘protecting protestors’ ... human rights’\textsuperscript{131}, negotiated management techniques are utilised as methods of controlling, criminalising and pacifying dissent.


<table>
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<td>Date, time, duration categories of person (including participating groups) expected to attend and any other information required (c. 13(3)).</td>
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CHAPTER SIX

6. ‘I fought the law - and the law won’: Processes of criminalisation in the age of human rights

I was jumped on, kicked, punched, thrown on the floor and handcuffed. I was in complete shock … [The police officer] was pulling the handcuffs to make me feel pain and when I complained about the pain he said, ‘I’ll teach you about pain, I’ll teach you a lesson you prick, I know your kind’.¹

The HRA 1998 was predicted to transform public order policing in the UK, providing a “powerful legal framework” that would make the police accountable for their actions.² The previous chapter noted how, conversely, human rights principles have been invoked to legitimise an expansion of the discretionary powers of the police to regulate protest. This chapter will develop this argument by identifying two interrelated trends – criminalisation and privatisation – that characterise the contemporary framework of protest law in England and Wales.

6.1 The criminalisation of public protest

The term ‘criminalisation’ describes a process by which certain types of behaviour are designated as prohibited acts carrying specific penalties.³ Derived from the work of social interactionists and labelling theorists who focused on the social construction of crime as a means of achieving social control⁴, critical criminologists have sought to locate political, economic and patriarchal relations as central to an analysis of the process by which certain acts become labelled as criminal.⁵ This body of research has demonstrated how criminalisation can occur not because certain behaviours are inherently illegitimate, but as a political response to political and social protest. The criminalisation of particular forms of conduct both legitimises its control within the criminal justice system and secures public support for state action.

¹ Interview with Jalil (protester), 23 February 2010.
against those groups deemed to be linked to criminal activities. The criminalisation of public protest can thus serve an important function for the state in neutralising social movements – providing a mechanism by which inherently political activities are constructed as depoliticised problems of crime control and security.

In the first section of this chapter it will be argued that the criminalisation of public protest is reflected in three inter-related developments. First, criminalisation has taken place as a result of a proliferation of public order offences and the construction of a wide range of oppositional activities as illegitimate. Normalisation, a process whereby criminal offences and coercive policing tactics introduced to deal with specific and uncommon forms of behaviour become increasingly integrated into the ordinary criminal justice landscape, is also at the core of the criminalisation trend. The criminalisation process has been augmented by a drift to summary justice - a process whereby the use of informal punishment through arrest, ‘de-arrest’, cautions and penalty notices has significantly displaced the court as a site of decision making.

6.1.1 Proliferation of offences

The rhetoric of ‘communication’ and ‘negotiation’ central to the official discourse analysed in Chapter Four present the police and protest groups as free and equal contracting parties. In the previous chapter it was noted that this characterisation obscures the reality that the relationship between the police and protest groups is based upon grossly unequal power. This disparity has intensified in recent years by a rapid expansion in the scope of coercive laws available to the police to regulate protest. As noted in Chapter Five, Part I of the Public Order Act 1986 created a new regime of public order offences that were much broader in scope than the common law offences they replaced. The first and most serious of the new offences, Riot, carries a maximum sentence of ten years imprisonment and covers situations when twelve or more people gathered in a public or private place use or threaten unlawful

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8 Although the maximum sentence for riot under the common law was life imprisonment, the common law offence was limited to the actual use of force.
violence against person or property. In contrast to the common law offence which was limited to the actual use of force, Section 1 of the POA 1986 merely requires that there is an actual or inferred ‘common purpose’ in the actions of the accused, such that would cause a ‘reasonable’ (real or hypothetical) person to fear his or her personal safety. Violent Disorder under Section 2 carries a maximum sentence of five years imprisonment and mirrors the more serious offence under Section 1 except that the number of persons involved can be as low as three and there is no need to establish a ‘common purpose’ in their actions. Affray under Section 3 is punishable by up to three years imprisonment and includes actions committed by individuals. None of the offences require that a person actually be put in fear of their safety, nor that any third person was actually present at the scene. The 1986 Act also created a new offence under Section 4 of using “threatening, abusive or insulting words or behaviour” likely to cause another to apprehend actual or provoked “immediate unlawful violence”. Section 5 makes it a summary offence to use “threatening, abusive or insulting words or behaviour”, “disorderly behaviour”, or “displays any writing, sign or other visible representation which is threatening, abusive or insulting” and which is likely to cause another person “harassment, alarm or distress”. In criminalising behaviour that would previously not have been punishable as a crime, the reforms provided a much enhanced discretionary power to the police in public order situations.

The two decades since the introduction of the POA 1986 have seen a frantic wave of legislative activity in the field of public order. The expansion of public order law has developed in the context of a broader intensification of criminal law and police powers.

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9 POA 1986, s.1.
10 Field v Receiver of Metropolitan Police [1907] 2 K.B. 853 at 860.
12 POA 1986, ss.1(4), 2(3) and 3(4). None of the offences require proof of any actually occurring damage or injury, basing their definition instead on actual or threatened ‘violence’ to person or property: POA 1986, s.8.
the creation of thousands of new criminal offences and a dramatic rise in the prison population. New Labour embraced many aspects of the previous administration’s thinking on crime and criminal justice, leading to a number of striking continuities in public and penal policy. Labour’s “punitive turn” was legitimised by what Tonry has described as “the most hyperbolic anti-crime rhetoric of any [government] in Europe, language that elsewhere characterises xenophobic right-wing fringe parties”. This period of relentless criminalisation has been characterised by a radical shift from reactive to preventative criminal law and justice. Zedner has characterised this trend as a move from a “post-crime” to a “pre-crime” society, one in which the focus is less on investigation, crime and punishment, but instead on the “the pursuit of security”. These developments have been reflected in the architecture of public order law in England and Wales. The Criminal Justice and Public Order Act 1994 (CJPOA 1994), for instance, inserted a new Section 4A into the POA 1986, making it an offence to use “threatening, abusive or insulting words or behaviour or disorderly behaviour” or display “any writing, sign or other visible representation which is threatening, abusive or insulting”. Mirroring the controversial offence under Section 5 of the POA 1986 which was limited to a £1,000 fine, the new offence carries a punishment of up to six months imprisonment and a £5,000 fine where intent to cause “harassment, alarm or distress” can be


22 CJPOA 1994, s.154.
established. As noted in Chapter Five, the preventative regime under Part II of the POA 1986 and the PRSRA 2011 is supported by new criminal offences to punish those who exceed the boundaries of authorised protest.

6.1.2 The normalization of exceptional measures

Alongside the expansion of dedicated public order law, a range of criminal offences and policing powers justified at their introduction as dealing with very different forms of behaviour have been applied as a mechanism to restrict public protest. One such measure is the hybrid criminal-civil preventative Anti Social Behaviour Order (ASBO) introduced under the Crime and Disorder Act 1998 (CDA 1998). ASBOs can be issued by a Magistrates’ Court on the application of the police or a local authority against anyone who has acted “in a manner that caused or was likely to cause harassment, alarm or distress”. Although the procedure for obtaining an ASBO is a civil process and may, therefore, be based solely on hearsay evidence, breach of an ASBO is a criminal offence subject to up to five years imprisonment. ASBOs thus allow for behaviour that would not otherwise constitute a criminal offence to be subject to criminal sanction. The provisions were introduced in the context of moral panics surrounding ‘hooded yobs’ and ‘neighbours from hell’, and have since been interpreted to encompass protest activity. In 2005, for example, animal rights activist Heather Nicholson was given a five-year ASBO banning her from taking part in protests at animal research laboratories and the Ministry of Defence have attempted to initiate ASBO proceedings in order to prevent anti-war activists protesting at military sites. With the heightened security around the 2012 Olympic Games, ASBOs were used to enforce a de facto protest exclusion zone

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23 CDA 1998, s.1.
25 CDA 1998, s.1(10).
around the Olympic site. According to the *Guardian* newspaper, ASBOs were issued against known activists prohibiting them from approaching any Olympic venue or activity or taking part in “any activity that disrupts the intended or anticipated official activities of the Olympic Games”.29

Exceptional powers of stop and search introduced in the context of growing fears around violent crime and terrorism have also become routine in the policing of political protests. Section 60 of the CJPOA 1994 allows a senior police officer to authorise officers to stop and search individuals within a defined area in order to search for offensive weapons or dangerous instruments in anticipation of “serious violence”. Introduced in the context of a moral panic around ‘knife culture’30, searches under Section 60 of the CJPOA 1994 can be carried out without needing to establish reasonable grounds for suspecting the individual searched is carrying a prohibited article.31 Together with the (now repealed) powers under Section 44 of the Terrorism Act 2000 to carry out suspicionless searches for “articles of a kind that could be used in connection with terrorism”, these powers have been used in connection with lawful political protest. In 2003, for example, 995 stop and searches were carried out under Section 60 of the CJPOA 1994 and Section 44 of the TA 2000 against anti-war protesters demonstrating outside a US air-base in Gloucestershire, hours before the base was to be used to launch bombing raids in Iraq.33 Powers introduced under the Anti-terrorism, Crime and Security Act 2001 (ATCSA 2001) to allow officers to order the removal of disguises and seize any items which could be used to conceal a person’s identity within an authorised area34, and provisions under the Counter Terrorism Act 2008 (CTA 2008) which can be used to criminalise the photographing of police officers and military and security

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30 HC Hansard 5 February 1996 cc28-111.
31 The authorisation may be given where the senior officer reasonably believes that individuals are carrying these items within the area without good reason, that incidents involving serious violence may take place within that area and that the authorisation is expedient to prevent their occurrence. The authorisation can last for a period of up to twenty-four hours, after which it can be renewed: CJPOA 1994, ss.60(1)(a) and (b). Powers were introduced under the CDA 1998 to allow officers to retain and dispose of items seized under Section 60: CJPOA 1994, s.60A (inserted by the CDA 1998, s.26).
32 These provisions are considered in Chapter Eight.
33 HC Hansard 28 April 2003 c219W.
34 CJPOA 1994, s.60A. Inserted by Anti-terrorism, Crime and Security Act 2001, s.94.
personnel\textsuperscript{35}, have added to the arsenal of powers available to the police in public order situations.\textsuperscript{36}

These developments reflect what Hillyard and others\textsuperscript{37} have described as a process of ‘normalisation’, whereby coercive policing tactics initially justified by their ‘exceptional’ nature have become integrated into the ‘ordinary’ criminal justice landscape. Charting the development of a ‘dual’ system of criminal justice in the context of the Northern Ireland conflict, Hillyard describes how exceptional measures such as the curtailment of the right to silence, the admission of closed material as evidence in criminal proceedings and exceptional stop and search powers eventually became entrenched within the criminal justice system. The concept of normalisation has been developed more recently by Flyghed\textsuperscript{38}, who notes how extraordinary measures are often subject to a “slippery slope” process, whereby coercive legislation initially introduced in order to deal with specific forms of criminality become employed in connection with very different types of behaviour. Such measures gradually become institutionalised over time as part of the accepted powers of the state.\textsuperscript{39} The process of normalisation has empowered the police with remarkable discretion in public order situations. Public protest is now subject to what Lacey \textit{et al} have characterised as a “legislative kaleidoscope”\textsuperscript{40}, with existing offences and preventative powers supplemented by new and overlapping statutory

\textsuperscript{35} The 2008 Act inserted a new Section 58A into the Terrorism Act 2000 which makes it an offence, punishable by up to ten years imprisonment, to elicit or attempt to elicit information about a member of the army, intelligence services or police “which is of a kind likely to be useful to a person committing or preparing an act of terrorism”. Although the offence does not limit the photographing of police officers \textit{per se}, the National Union of Journalists have criticised the use of the powers for these purposes (see Joint Committee on Human Rights (2009a), Seventh Report of 2008–09, \textit{Demonstrating respect for rights? A human rights approach to policing protest}, HL Paper 47-1, HC 320-1, pp.54-56). The MPS have subsequently issued guidance indicating that the photographing of police officers is not a crime (see \url{http://www.metpolice.uk/about/photography.htm}, accessed 18 June 2013).

\textsuperscript{36} \textit{Ibid.}, p.14


\textsuperscript{39} \textit{Ibid.}, p.31

provisions introduced to deal with a range of perceived social ills. These developments have severely undermined the right to protest and assemble in the UK.

6.1.3 The drift to summary justice

The proliferation of criminal offences and policing powers has conferred on the police a broad discretion to criminalise protesters and delegitimise their activities in the eyes of the public. Such controls reinforce existing powers of the police to criminalise protest, such that the architecture of public order law is far more extensive than that which existed prior to the introduction of the HRA 1998. Significantly, in expanding police powers of arrest and detention, these developments have also strengthened the coercive powers of the police to contain activists’ activities without having to establish evidence of criminal wrongdoing. As Louise Christian has argued, criminalisation may be seen as most effective when “a final determination of guilt or innocence can be avoided”, noting that the criminal courts have been more useful as agents for outlawing certain activities en masse and legitimising police actions, rather than judging an individual’s guilt or innocence.41

Choongh’s ‘social disciplinary model’ of criminal justice helpfully explains how summary justice in the form of arrest and detention are used to subordinate sections of society viewed as “anti-police” or “innately criminal”.42 Choongh distinguishes “criminal cases”, where arrest and detention are used to invoke criminal justice sanctions, from “police cases”, where they are used to maintain police authority and reproduce social control. Support for Choongh’s model comes from an analysis of national arrest statistics between 1981 and 1997 by Hillyard and Gordon43, who chart a radical shift from a formal and public system of criminal justice towards an informal and closed system. The researchers found that whilst there has been a sharp

increase in the number of arrests in England and Wales, the number of people proceeded through the courts has been declining progressively.\textsuperscript{44}

The drift to informal justice has significantly displaced the court as a site of decision making, opening up the activities of protesters to summary punishment.\textsuperscript{45} Indeed, the police have at times been remarkably cavalier about their abuse of arrest powers for these. Following the controversial arrest of 138 UK Uncut activists outside the Fortnum and Mason luxury goods store in March 2011, Lynn Owens, Assistant Commissioner to the Metropolitan Police, told the HAC,

\begin{quote}
... the fact that we arrested as many people as we did is so important to us because that obviously gives us some really important intelligence opportunities ... We do need to improve the intelligence picture, but our ability to arrest over 200 people at the weekend gives us a very good starting point in terms of building that picture.\textsuperscript{46}
\end{quote}

Furthermore, one of the most significant developments in this context has been an expansion of bail powers which have empowered the police to control the activities of protesters without having to establish sufficient evidence to warrant a criminal charge. Under the Bail Act 1976 criminal courts have the power to impose conditions on a defendant’s bail in order to secure that the defendant surrenders to the court at the appropriate time, does not commit an offence on bail or obstruct the course of justice.\textsuperscript{47} During the 1984 miners’ strike, bail was used as a strategy to ‘contain’ miners and their supporters, preventing them from taking any further part in picketing and discrediting the miners’ case in the eyes of the public.\textsuperscript{48} Striking miners brought before the courts were routinely subject to indiscriminate bail conditions which prevented them from attending further demonstrations – a practice upheld by the High Court in the Mansfield Justices case.\textsuperscript{49} Volger\textsuperscript{50} found a similar

\textsuperscript{44} Ibid.
\textsuperscript{47} Bail Act 1976, s.3(6).
pattern following the 1981 urban riots, when blanket bail conditions containing curfew requirements were imposed almost en mass including on defendants charged with minor offences.

Following a recommendation of the Royal Commission on Criminal Justice\(^5^1\), the CJPOA 1994 gave the police the power to attach most of the conditions to a suspect’s bail that a court can attach after charge.\(^5^2\) Officially justified as a measure to reduce the number of people held overnight in police custody\(^5^3\), the initial decision to impose bail was transformed from a judicial to an executive decision, opening it up to abuse as a form of summary punishment.\(^5^4\) The Police and Justice Act 2006 extended this power to allow the police to impose pre-charge bail conditions on suspects pending further investigations.\(^5^5\) As a result of these developments it is now possible for the police to impose conditional bail on a person who has been arrested in the absence of sufficient evidence to charge them with a criminal offence. Common conditions imposed by custody officers include residence requirements, curfews, exclusions from particular locations, restrictions on contact with certain people and weekly reporting at a local police station.\(^5^6\)

With the introduction of police powers to impose conditions pre-charge, the potential for bail to be used to curtail the activities of protesters has significantly increased. In a growing catalogue of cases the police appear to have used their bail powers as mechanism of summary punishment. In 2009, for example, ten climate change

\(^{53}\) Runciman, V. (1993), supra, n.51, p.73.
\(^{55}\) Police and Justice Act 2006, s.10 and Schedule 6.
\(^{56}\) Hucklesby, A. (2001), supra, n.54; Raine, J. and Wilson, M. (1995) ‘Just bail at the police station?’, *Journal of Law and Society* 22(4): 571-585. In *R (on the application of the Chief Constable of Greater Manchester Police) v Salford Magistrates’ Court and Paul Hookway* [2011] EWHC 1578, the High Court ruled that the maximum period a suspect could be placed on police bail was ninety-six hours, after which they should be charged or released. Following a recommendation from ACPO, the Government introduced emergency legislation in the form of the Police (Detention and Bail) Act 2011 (PDBA1998) in order to reaffirm the power.
activists arrested during an occupation of a power station were reportedly given bail conditions which prevented them from entering the whole of Oxfordshire.57

Following the 2010-11 student and anti-cuts protests, bail conditions preventing activists from attending protests within particular geographic locations (or in some cases throughout the whole of the United Kingdom) were issued routinely by police against arrested protesters, effectively banning known activists from attending future demonstrations including those organised in response to the 2011 Royal wedding.58

When used in conjunction with arrest for ‘conspiracy’ and other inchoate offences, the power to restrict the activities of protesters through the imposition of bail conditions becomes an arbitrary process. For example, following their arrest on suspicion of ‘conspiring to incite violent disorder’ at a counter-demonstration against the far-right English Defence League (EDL) in Bolton, two leading members of the anti-fascist organisation Unite Against Fascism (UAF) were subject to bail conditions which prevented them from attending “any UAF/EDL meeting or gathering” throughout the whole of the United Kingdom. Although neither went on to be charged with any offence, these conditions severely limited their ability to participate in their chosen campaigns.59 The HRA 1998 appears to have provided very little restraint on the development of police bail as a tool of informal punishment. The courts have hitherto given very little weighting to the human rights implications of the powers60 and the JCHR has concluded that the police bail is ECHR compliant.61

The criminalisation of protest undermines the progressive aspirations of the HRA 1998. The application of a criminal label to the activities of protesters delegitimises their activities and legitimises the use of forceful policing tactics. The following section will argue that the process of criminalisation has been compounded by the privatisation of public order policing.

6.2 The privatisation of public order policing

The jurisdiction of the police to uphold public order has traditionally been confined to activities taking place on public land.62 However, since the early 1980s, urban centres have been subject to a radical transformation, with public spaces, including educational establishments, shopping centres and civic spaces increasingly moving into private ownership.63 Coleman has described how under New Labour, urban regeneration through “public-private initiatives” - a key feature of the Government’s modernisation programme - directed the use of urban public space in particular ways which prioritises tourism and consumption, excludes problematic ‘anti-social’ populations, and strengthens enforcement powers of the police.64 By virtue of the state’s monopoly over the legitimate use of force, the police play a vital role in securing the interests of private property in these new quasi-public spaces65, leading to a blurring of the boundaries between public and private policing.66 The privatisation of public space has also led to a proliferation of private police, who play an increasingly important role in the regulation of new ‘public places’ located on private property.67 Research into the activities of public and private police suggests a complex interplay between the functions of both forms of policing, with

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62 See e.g. Wilson v Skeock (1949) 113 JP 294, Thomas v Sawkins [1935] 2 KB 249 provides authority for the police to enter and remain on private land in order to prevent possible future breaches of the peace.


67 Although precise estimates of the size of the private security industry are notoriously difficult to calculate due to the lack of reliable official data, in 2007 van Steden put the total number of private security personnel in the UK at 150,000: van Steden, R. (2007) Privatising policing: Describing and explaining the growth of private security (Amsterdam: Boom Juridische Uitgevers), p.73.
public police operating like a private security organisation⁶⁸ and private security personnel increasingly adopting a crime control function.⁶⁹

This section will consider the significance of what Bayley and Shearing have described as the rise of “mass private property” on the regulation of public protest.⁷₀

It is posited that the process of privatisation is reflected in three interrelated developments. First, a growing catalogue of legal powers authorise the police to enforce private property rights. Second, private law remedies are increasingly available to regulate the use of ‘public’ space, subjecting protesters to a dual process of criminalisation. Third, the use of hybrid civil-criminal controls has blurred the distinction between civil and criminal law, opening up activities not in themselves unlawful to criminal sanction. These developments reflect what Mead has described as “the privatisation of protest regulation”⁷¹ – a process through which the collective rights of protesters are surrendered to the private interests of property owners.

6.2.1 ‘Trespassers will be prosecuted’: Public policing and private property

Prior to the introduction of the POA 1986, the enforcement of landowners’ property rights was limited to bringing a civil action for possession and police powers of arrest were confined to situations where there was an anticipated breach of the peace or criminal damage.⁷² Trespass in the open air, a formally civil law matter, had historically never been a criminal offence.⁷³ In contrast, police powers to control protest on private land are today more extensive than those available to regulate the use of public space. Official concerns surrounding the Stonehenge “peace convoy” in June 1985⁷⁴ led the Conservative Government to include new power under Section 39 of the POA 1986 to allow police officers to order trespassers to leave private land.

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Refusal to abide by a police officer’s order constitutes a criminal offence punishable by up to three months imprisonment. These powers were extended when the CJPOA 1994 inserted a new section 14A into the POA 1986 which provided new powers to outlaw ‘trespassory assemblies’ of twenty or more people on private land. The provisions provide that where a senior officer has reasonable belief that an assembly that is intended to be held on private land without the permission of the occupier may result in “serious disruption to the life of the community” or significant damage to property of “historical, architectural, archaeological or scientific importance”, he or she may apply to the relevant local authority for a banning order prohibiting all assemblies within a five mile radius for up to four days. The prohibition was supported by new Sections 14B and 14C, which make it an offence to knowingly organise or participate in a prohibited assembly or to fail to comply with a police officer’s direction to stop and not proceed to a prohibited assembly. A power under Section 61 of the CJPOA 1994 allows the police to order the removal of trespassers from private land without needing to obtain a possession order and includes a power of arrest for those who failed to comply with a police officer’s direction. This power has been interpreted to include land that is popularly designated as public space. In November 2011, for example, protesters taking part in a demonstration as part of the global ‘Occupy’ movement in the grounds of Cardiff Castle were arrested under Section 61 after they refused an order to leave the land. The site is designated by the Royal Commission on the Ancient and Historical

75 POA 1986, s.39(2)(b).
76 DPP v Jones and Lloyd [1999] 2 All ER 240.
78 The Act provides that if a senior officer present at the scene reasonably believes that two or more people are trespassing on land and are there with the common purpose of residing there for any period, that reasonable steps have been taken to ask them to leave and either (i) that any of those persons have caused damaged to land or property or used threatening, abusive or insulting words or behaviour, or (ii) that they have between them six or more vehicles on the land, he or she may direct them to leave the land and to remove any vehicles or other property they have with them on the land (CJPOA 1994, s.60(1)).
Monuments of Wales as an “urban public park”. \( ^{80} \) Despite their remarkable breadth, the Section 61 provisions have been held to be compatible with the ECHR. \( ^{81} \)

More directly aimed at protesters is the offence of “aggravated trespass” under Section 68, which makes it an offence to trespass on land with the intention of intimidating, obstructing or disrupting persons engaging in a “lawful activity”. \( ^{82} \) The measure is supported by a power under Section 69 which empowers a police officer to order people to leave the land where they are believed to be committing or are about to commit an offence under Section 68, or where two or more people are trespassing with the “common purpose” of intimidating people so as to prevent them from carrying out a lawful activity. Further powers were created to allow the police to issue dispersal orders and seize vehicles and sound equipment \( ^{83} \) and to stop a person believed to be travelling towards a gathering of one hundred or more persons in the “open air” and direct them to proceed in a different direction. \( ^{84} \) In 2004 the offence was extended to include the disruption of activities taking place indoors as well as in open air. \( ^{85} \) Although aimed specifically at animal rights protesters \( ^{86} \), the aggravated trespass provisions have been used to criminalise a wide range of ‘direct action’ protests, including environmentalist \( ^{87} \), anti-war \( ^{88} \) and GM food activists. \( ^{89} \) During the campaign against the building of the Newbury bypass in 1996, aggravated trespass powers were used extensively to arrest and prosecute protesters who had occupied land designated for clearance, with some three hundred and fifty-six people arrested and two hundred and fifty-eight people prosecuted under the provisions. \( ^{90} \) In 2006, a group of students known as ‘the George Fox Six’ were convicted under Section 68 after they occupied a lecture theatre at Lancaster University in protest against the University’s corporate links. \( ^{91} \) More recently, the

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\( ^{81} \) R (on the application of Fuller) v Chief Constable of Dorset Police) [2002] 3 WLR 1133.  
\( ^{82} \) Mead, D. (2010), supra, n.71.  
\( ^{83} \) CJPOA 1994, ss.63-4.  
\( ^{84} \) Ibid., s.65.  
\( ^{85} \) ASBA 2003, s.59.  
\( ^{86} \) Michael Howard, Secretary of State for the Home Department, HC Hansard 11 January 1994 c29.  
\( ^{87} \) See e.g. Director of Public Prosecutions v Bayer and Others (2003) 167 JP 666; R v Berkshire [2011] EWCA Crim 1885.  
\( ^{88} \) See e.g. Swain v DPP [2006] UKHL 16.  
\( ^{89} \) See e.g. DPP v Tilly [2001] EWHC Admin 821.  
powers were used to criminalise 146 UK Uncut activists arrested after staging a peaceful sit down protest in the luxury goods store Fortnum and Mason that a police officer at the scene had described as “sensible” and “non-violent”. Indeed, Home Office research has confirmed that the powers have been used beyond their original scope, noting that their application to environmental protesters “has in fact been one of the most important areas in which they have been applied”.

6.2.2 ‘Eviction notice’: Private policing and public space

In addition to invoking criminal powers of arrest and detention, individuals protesting in quasi-public spaces are subject to regulation under private law. In January 2012 the High Court granted an order for possession and an injunction against protesters taking part in the ‘Occupy London’ protest camp in the City of London, claiming that the proposed interference with the protesters’ rights was “entirely lawful and justified” despite evidence of widespread public support of the camp. The same month, in response to the wave of student occupations over spending cuts to higher education, Birmingham University obtained a year-long injunction that prevented students from staging unauthorised “occupational protest action” on any land belonging to the University.

Engaging the powers of the state in conjunction with private land owners can have a particularly chilling effect on protest. In addition to the problems accessing legal advice and representation in the context of civil proceedings, the burden of proof in civil cases is lower than that needed to establish criminal wrongdoing. The use of civil over criminal proceedings may also invoke sanctions more onerous than the maximum penalty imposed for a relevant criminal offence. Breach of a civil

94 City of London Corporation v Samede and others [2012] EWHC 34 at 166.
97 Reforms introduced under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 have removed the entitlement to legal aid for the majority of civil cases. For an analysis of the impact of legal aid cuts on access to justice, see Robins J. (Ed.) (2011) Unequal before the law? The future of legal aid, Commission of Inquiry into legal aid (London: Solicitors Journal).
injunction carries a maximum sentence of up to two years imprisonment and in a number of cases the courts have been prepared to resort to civil remedies as a coercive measure. For example, in *Mayor of London (on behalf of the Greater London Authority) v Hall and Others*\(^{99}\), the High Court granted an injunction against protesters at the ‘Democracy Village’ protest in Parliament Square on the grounds that the maximum penalty for breach of the relevant byelaw prohibiting their activities (a £200 fine) was not sufficiently onerous. According to Williams J who gave the leading judgment: “Having witnessed the behaviour of some of the Defendants and of their supporters in court, I am confident that none will be deterred by prosecutions for breaches of the byelaws.”\(^{100}\) As the violent removal of protesters at the ‘Bank of Ideas’ in January 2012 demonstrates, private security personnel have been prepared to resort to repressive measures in order to enforce the private interest of property owners.\(^{101}\) Despite the threat to civil liberties posed by these developments, the ECtHR have held that the right to peaceful protest does not extend to protest held on private land.\(^{102}\)

6.2.3 *Blurring the boundaries: Regulating protest through quasi-criminal controls*

The regulation of public protest has also been shaped by a proliferation of quasi-criminal controls. The Protection from Harassment Act 1997 (PHA 1997) was originally introduced in response to a series of high profile stalking cases during the 1990s. Yet a Home Office study published in 2000 found that prosecutions for stalking under the Act were “relatively rare” and powers were instead being used “for a variety of behaviour … sometimes seen as more appropriate for civil proceedings”, including political protest.\(^{103}\) Sections 1 and 2 of the PHA 1997 make

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98 Contempt of Court Act 1981, s.14(1).
100 Ibid. at 143.
it an offence to pursue a course of conduct, consisting of at least two occasions\(^{104}\), which amounts to ‘harassment’ (including alarm or distress\(^{105}\)) of another person. The SOCPA 2005\(^{106}\) extended the scope of the definition to include one incident of harassment against two or more people where the purpose of the conduct is to deter any person from carrying out a lawful activity or to persuade any person to do something that they are not obliged to do - a definition potentially wide enough to embrace almost all forms of political protest. In 2001, anti-war protesters who had demonstrated outside a US intelligence base at Menwith Hill were found to have caused harassment to American servicemen by displaying a placard reading “George W Bush? Oh dear!”\(^{107}\)

Under Sections 3 and 3A of the PHA 1997 a company can obtain a civil injunction against protesters in order to prevent actual or apprehended harassment. Although the granting of an injunction is a civil process based on a lower standard of proof, breach of an injunction is a criminal offence punishable by up to five years imprisonment.\(^{108}\) In some cases the courts have granted ‘protest exclusion zones’ of a considerable size around the sites of potential protest targets, restricting the time, duration and location of any protests within the area as well as stipulating the type of permitted protest activity and the identify of those permitted or otherwise from taking part.\(^{109}\) In 2007, for example, energy giant Npower were granted an injunction that prevented the residents of an Oxfordshire village from protesting against the company’s plans to fill their local lake with waste ash.\(^{110}\) Despite recognising that the protests had been “conducted lawfully and peacefully”, the court nonetheless

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\(^{104}\) PHA 1997, s.7(3).
\(^{105}\) Ibid, s.7(2).
\(^{106}\) Ibid, s.1(1A), inserted by SOCPA 2005, s.125.
\(^{108}\) PHA 1997, s.3(9).
\(^{109}\) See e.g. EDO MBM Technology Ltd v Campaign to Smash EDO and others [2005] EWHC 837; Heathrow Airport Ltd and another v Garman and others [2007] EWHC 1957. See also Mead, D. (2010), supra, n.71, pp.279-284.
\(^{110}\) RWE Npower plc and another v Carrol and others [2007] All ER 254. In 2003, chemical and pharmaceutical testing company Huntingdon Life Sciences won an injunction which prevented animal rights protesters from approaching within 50 yards of employees’ homes: Huntingdon Life Sciences v Stop Huntingdon Animal Cruelty (Shac) and others [2003] EWHC 1967.
ruled that an order prohibiting protest within a 400 yard radius of the lake was proportionate.\textsuperscript{111}

Moreover, as discussed above, the hybrid civil-criminal ASBOs can be used to restrict the activities of protesters and there are signs that the Government intended to extend the reach of quasi-criminal controls to target protest directly. In the run up to the 2011 Royal Wedding, Home Secretary Teresa May announced that the Government were considering the introduction of ‘Protest Banning Orders’ (PBOs) in order to exclude “known hooligans” from demonstrations.\textsuperscript{112} The Home Secretary suggested that PBOs would be based on the international Football Banning Orders introduced under the Football (Disorder) Act 2000, which allow a magistrates’ court to ban an individual from attending domestic and international football matches, regardless of whether they have been convicted of committing a criminal offence.\textsuperscript{113} Home Office proposals introduced in the aftermath of the 2011 riots to create new powers to impose curfews in anticipation of ‘serious disorder’\textsuperscript{114} and recent moves to criminalise squatting\textsuperscript{115} fundamentally undermine the characterisation inherent within the official discourse of a balance of power between the police and protest groups.

\section*{6.3 Conclusions}

Notwithstanding the HRA 1998, the scope of law to restrict public protest is more extensive than ever before. Existing offences and preventative powers have been supplemented by new and overlapping statutory provisions introduced to deal with a range of perceived social ills. Moreover, the privatisation of public space has been

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{111} Ibid. at 13.
\item \textsuperscript{114} Home Office (2011) \textit{Consultation on police powers to promote and maintain public order} (London: HMSO).
\item \textsuperscript{115} The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.144 makes it an offence punishable by up to fifty-one weeks in prison and a £5,000 fine to enter a residential building as a trespasser and either live or intend to live there for any period. Prior to the introduction of the Act, ‘squatting’ was an exclusively civil matter. See Cullen, C. and Brown, R. (2012) ‘Trespassers will definitely be prosecuted ... maybe’, \textit{Journal of Housing Law} 15(2): 39-43.
\end{itemize}
\end{footnotesize}
underpinned by a series of pre-emptive laws which enable the police to control the movement of activists without needing to establish evidence of actual criminal wrongdoing. Privatisation has thus served as a proxy for criminalisation, producing criminality where it did not exist previously. Indeed Home Office research into the operation of the aggravated trespass provisions under the CJPOA 1994 concluded that the police would have been present at the kinds of situations covered by the research irrespective of the existence of the powers available to them under the Act. The existence of the provisions merely put the police in a “stronger legal position” than they would have otherwise been in. Fernandez has noted a similar process in the US, where law was used to construct criminality in the context of the anti-globalisation movement in order to control and pacify the movement. The HRA 1998 appears to have been of little value in restraining this punitive trend. Instead, protest has been constructed as a purely technocratic and depoliticised problem of control and security. As Hall and Scraton have argued, the process of criminalisation plays a vital role in legitimising a punitive response to social and political movements from state institutions:

In such circumstances, ‘criminalisation’ can provide the justification for political containment. ‘Criminalisation’ is a particularly powerful weapon, when used in this way, because it mobilises considerable popular approval and legitimacy behind the state. People are more likely to support state action against a ‘criminal’ act than they would the use of law to repress a ‘political’ cause.

A key feature of the legal powers presented in this chapter is the high degree of discretion involved. As noted in Chapter Two, the introduction of the HRA 1998, it was anticipated that the Act might challenge the judiciary’s traditional approach of extreme deference to executive decision making. Writing in the employment law context, Hepple predicted that the Act would represent a “turning point” whereby domestic law would be “redrawn in categories which reflect fundamental social

values.\textsuperscript{120} The following chapter considers how the courts have responded one of
the most contentious public order policing practices in the current era - the ‘kettling’
tactic.

\textsuperscript{120} Hepple, B. (1998) ‘Human rights and employment law’, \textit{Amicus Curiae} 8: 19-23, p.23.
CHAPTER SEVEN

7. “We were penned in and it just kept getting tighter and tighter”: The right to protest and the ‘kettling’ tactic

We were penned in and it just kept getting tighter and tighter ... I was trying to get away and I moved to the side, to try to find a way out ... I got to the barrier and I couldn’t move forward or back, there wasn’t anywhere to go ... There was this air of panic and no-one really knew what was going on, but people could tell something was going to happen. It was really scary.¹

The term ‘kettling’ entered into popular consciousness following the G20 protests of April 2009.² Its use in that context described the police’s decision to corral protesters into tightly enclosed cordons at the ‘Climate Camp’ and Bank of England protests in the City of London. However, the origins of the word are unclear. During the HAC inquiry into the policing of the G20 protests, the Committee spent a considerable amount of time attempting to locate the precise meaning of the term, only to conclude that they had “no idea” where it comes from.³ Moreover, kettling does not feature in policing vocabulary. In evidence to the HAC in 2009, the ACPO Lead on Public Order Sue Sim told the inquiry: “I do not understand the term ‘kettling’. Kettling is not a British policing public order tactic.”⁴ Although admitting that the practices to which the term applies do occur, Sim preferred to describe them as “containment”.⁵ Despite its ambiguous roots, ‘kettling’ is now firmly part of the public discourse in the UK.⁶ Indeed, the term has come to encapsulate some of the most contentious elements of public order policing. Kettling has been widely condemned as a human rights violation⁷ – something the vivid accounts of protesters’ experiences during the Gaza protests would appear to support. The tactic

¹ Interview with Abbas (protester), 12 July 2009.
² A search of UK newspapers using the Lexis Nexis database indicates only one use of the word in the context of public order policing prior to the G20 protests and 1,238 uses since: <www.lexisnexis.com>, accessed 16 February 2013.
⁴ Ibid, Ev.24, Q.228.
⁵ Ibid, Ev.24, Q.229.
⁷ See e.g. Stop Kettling Our Kids <http://stopkettlingourkids.wordpress.com/>. 154
is also one that has been subject to considerable judicial and academic scrutiny. Kettling therefore serves as an important case-study of the impact of the HRA 1998 on public order policing policy.

This chapter will be split into three parts; the first part of the chapter will chart the development of the kettling tactic, locating its use within the common law doctrine of ‘breach of the peace’ – a judicial creation which has historically provided the police with extensive powers to control the movement of protesters. The second part of the chapter will consider judicial responses to kettling through an examination of domestic and European case-law. The final part of the chapter will consider academic responses to the development of the controversial strategy. The purpose of the chapter will be to explore the role of official discourse in legitimising kettling and the processes by which protesters’ experiences have been marginalised.

### 7.1 A brief history of kettling

The origins of kettling are often traced back to the anti-capitalist protests of the late 1990s. In reality, however, the tactic has a much longer history in Britain. In evidence to the HAC in 2009, the ACPO Lead on Public Order Sue Sim admitted that the tactic had “been around since the [ACPO] manuals began”. Despite the existence of the extensive pre-emptive statutory regime examined in Chapter Five, ‘containment’ practices have historically been legitimised without resort to the

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statutory powers. Rather, the legal basis of kettling is grounded in an ancient and rather obscure common law doctrine which authorises the police to take preventative action, including arrest\textsuperscript{12} and entering property without warrant\textsuperscript{13}, on the apprehension of an imminent ‘breach of the peace’. The breach of the peace doctrine authorises a police officer to take action short of arrest to prevent a person from going in a particular direction\textsuperscript{14} or to detain them for such time as is necessary in the circumstances to prevent a breach of the peace from occurring or continuing.\textsuperscript{15} A police officer acting to prevent a breach of the peace is entitled to use reasonable force in doing so.\textsuperscript{16} Breach of the peace is not a criminal offence in itself and no criminal charges need to be brought for the exercise of the powers to be lawful.\textsuperscript{17} Refusal to comply with a police officer’s direction would amount to a criminal offence.\textsuperscript{18}

Critical commentators have long highlighted the threat these broad powers pose to freedoms of protest, movement and expression. A comparative study of public order law in England and the US published in the\textit{ Yale Law Journal} in 1938 noted:

Since there can be no objective standard for determining whether any particular conduct, if unchecked, will cause a breach of the peace, the initial judgment will be made by a policeman. Even if the charges he prefers are dismissed, the decision will have come too late; speech will have been prevented.\textsuperscript{19}

Although no statistical evidence is available on the extent to which the police rely on breach of the peace powers, it seems that they have shown clear preference for using

\textsuperscript{13} Thomas v Sawkins [1935] 2 KB 249.
\textsuperscript{14} Moss v McLachlan [1985] IRLR 76.
\textsuperscript{15} Albert v Lavin [1982] AC 546. A person whose conduct is deemed likely to cause a breach of the peace may be ‘bound over’ by a court to keep the peace for a specific period of time. See Steel v UK (1998) 28 EHRR 603 at 31–37.
\textsuperscript{16} Joyce v Hertfordshire Constabulary (1985) 80 Cr App R 298.
\textsuperscript{18} Obstructing a police officer contrary to Section 89(2) of the Police Act 1996. Breach of the peace was a constituent part of the now repealed offence of threatening behaviour under Section 5 Public Order Act 1936. The Law Commission’s 1983 report recommended against using the phrase in revised legislation, since “there is a margin of doubt as to what constitutes a breach of the peace which we think makes it unacceptable as a major element in any new statutory offence carrying heavy penalties”: Law Commission (1983) Criminal Law: Offences Relating to Public Order, Law Com No. 123 (London: HMSO), para.5.14.
them as opposed to the dedicated statutory powers. This is perhaps unsurprising given the extraordinary scope of the doctrine; although the most widely accepted definition of ‘breach of the peace’ refers to harm or fear of harm to person or property, the behaviour being prevented need not in itself be unlawful (at criminal or civil law). Moreover, the courts have historically been willing to expand the scope of the doctrine to include a broad spectrum of protest activity. In the early twentieth century case of Lansbury v Riley, for example, such behaviour was held to include speeches made in support of the suffragette movement that “advocated militancy”. In the 1930s case of Duncan v Jones the conduct in question consisted of addressing a meeting of unemployed workers. In Piddington v Bates it included picketing outside a factory during a print workers strike. More recently, in the run up to the 2011 Royal Wedding, organising street theatre was deemed conduct likely to cause a breach of the peace, justifying the pre-emptive arrest of those involved. The expandability of the doctrine is a key reason the Government decided against codifying the powers when the POA 1986 was introduced. Despite their remarkable breadth, breach of the peace powers have been found by the ECtHR to be Convention compliant. In McLeod v United Kingdom the ECtHR held that the doctrine is sufficiently well-defined to satisfy the requirement that any restriction must be “prescribed by law”.

The contemporary use of breach of the peace to encompass kettling can be traced back to the miners’ strike, when the powers were invoked to justify an extensive

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21 See R v Howell [1981] All ER 383 at 389: “there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.”
22 In R v Chief Constable of Devon and Cornwall (ex parte Central Electricity Generating Board) [1982] QB 458, a case concerning a protest by local residents against at the possible silting of a nuclear power station, Lord Denning offered a much broader definition: “There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it. He is entitled by law peacefully to go on with his work on his lawful occasions. If anyone unlawfully and physically obstructs the worker - by lying down or chaining himself to a rig or the like - he is guilty of a breach of the peace” (at 471).
23 [1914] 3 KB 229.
26 R (on the application of Hicks and others) v CPM and others [2012] EWHC 1947.
29 Ibid, para.38. See also Steel v UK (1998) 28 EHRR 603 at 31-37.
roadblock strategy that operated to restrict the movement of striking miners and their supporters. In a strategy developed at the highest levels of the police, mining communities found themselves under a virtual “state of siege”30, with freedom of movement outside of their immediate communities severely restricted.31 Research by East et al. found that during the first twenty seven weeks of the strike, in Nottinghamshire alone, some 164,508 “presumed pickets” were prevented from entering the county.32 They argue that such practices were an important tool used by police to prevent the formation of mass pickets and thus undermine the effectiveness of the strike.33 When some of the striking miners decided to challenge the legality of the police’s decision to routinely set up road blocks - something that at the time had never been considered by any government as a possible policing strategy outside of Northern Ireland34 - the tactic was approved by the courts. In Moss v McLachlan35 the High Court held that a decision to take action might be based on an apprehended breach of the peace that was close in time and proximity but not necessarily “about to happen”.36 The court’s rationale for upholding the use of these exceptional powers was a supposed inherent relationship between picket lines and criminal violence. The court found that the decision to take action to prevent a breach of the peace need not be based on the actual words or conduct of the person subject to the power, but instead on the police’s assessment of the potential for disorder based on “all they have heard and read”, including on television or in the press.37

As Percy-Smith and Hillyard’s statistical analysis demonstrates, official claims concerning the extent of criminal violence committed by pickets during the strike were not upheld by an analysis of arrests, prosecutions or convictions.38

31 Yvette Vanson’s film The Battle for Orgreave captures an early use of the kettling tactic as pre-meditated, militarised strategy, with miners charged by mounted police and forced away from their intended picket site into a field surrounded by police officers. The Battle for Orgreave (1985). Directed by Yvette Vanson. (London: Vanson Wardle).
33 Ibid.
35 [1985], supra, n.14.
36 Ibid., at 46.
37 Ibid. at 19.
38 An analysis of arrest and outcome data by Hillyard and Percy-Smith found that of the 5,653 cases brought before the courts, over a quarter ended in acquittals – a proportion considerably higher than would occur during the course of ‘ordinary’ criminal proceedings: Percy-Smith, J. and Hillyard, P.
Nevertheless, media portrayals of pickets and protesters as inherently violent, itself based on a narrative constructed by police, provided the justification for this exceptional strategy to become an established part of police practice. The reality of roadblocks as a technique of surveillance, criminalisation and control was excluded from an official discourse which legitimised the strategy as a necessary means of avoiding picket line violence. East *et al.* suggest that following the *Moss v McLachlan* ruling police practice at roadblocks continued to go far beyond the bounds of what was lawfully authorised. Striking miners continued to be turned away hundreds of miles from the coal fields and despite the conflict with the *McLachlan* definition, the action was approved by the courts. In the months following the coal dispute, road blocks were used routinely by police to prevent protesters from reaching their planned demonstrations, including at the Greenham Common demonstrations in Berkshire and at the site of the 1985 ‘Molesworth People’s Peace Camp’ at a cruise missile base in Cambridgeshire.

It was against this backdrop that kettling developed as a routine method of policing political demonstrations. During the early 1990s, mass protest returned to the streets of London. The Poll Tax riots of March 1990, triggered by the provocative policing of a demonstration in Trafalgar Square, represented some of the most serious confrontations between police and protesters since the mid-1980s. Two days after the riots, an editorial published in the *Times* newspaper called for the police to develop new strategies in order to “contain” protesters away from the target of their planned demonstration and from gaze of the wider public:

> Such demonstrations that might lead to violence should at very least be confined away from crowded streets in such open spaces as Hyde Park, where the police can adopt a more discreet presence. There may be little

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new about the London mob. Something new may be needed in order to contain it, including denying it the absolute freedom of London’s streets.\(^{43}\)

The pressure intensified following the mass demonstrations against the 1994 Criminal Justice and Public Order Bill. Representing widespread public opposition to the reforms, these protests culminated in significant confrontations between police and protesters in Hyde Park in October 1994.\(^ {44}\) Existing public order policing tactics came under further political scrutiny following the ‘Carnival Against Capitalism’ protests of June 1999, when protesters, inspired by a growing international anti-capitalist movement, occupied a number of financial centres in the City of London.\(^ {45}\) These protests were followed by calls for a review of crowd control tactics after the City of London police admitted that they had “lost control” of the demonstration.\(^ {46}\)

When the following year over six thousand heavily equipped police officers failed to prevent a small group of May Day protesters from defacing a statue of Winston Churchill, tabloid newspapers and politicians from both major parties attacked the police’s “softly softly” approach towards protesters and called for a “hard line” response to the “thugs” responsible.\(^ {47}\) Announcing that the Government would reassess how protests would be policed in the future, Prime Minister Tony Blair warned: “This kind of thing cannot happen again”.\(^ {48}\)

The police appeared to respond on cue. In September 2000, a group of around two thousand anti-capitalist protesters were corralled into an enclosed area outside Euston Station and charged repeatedly by police. Protesters were photographed by police intelligence gatherers and thirty-eight, some identified from the earlier protest, were arrested.\(^ {49}\) The following year, when anti-capitalist protesters planned a demonstration in central London to coincide with the annual May Day celebrations, the CPM and Mayor of London issued a press release that predicted violence at the

protests and warned people to stay away from the capital. The police on the day mobilized some six thousand officers to police the event, far outnumbering protesters in what was at that time the largest public order operation in the MPS’ history. Protesters claimed that the protest was largely peaceful, however following minor scuffles between police and protesters, three thousand members of the public, including passersby who were not participating in the protest, were forcibly detained in police cordons for over seven hours and denied access to food, water and toilet facilities.

7.2 Kettling, the Human Rights Act 1998 and the European Convention on Human Rights

The introduction of HRA 1998 in October 2000 provided an important opportunity to assess the human rights implications of the breach of the peace powers. Although the domestic courts had been historically unwilling to challenge their use, Fenwick foresaw a significant shift in judicial attitudes, predicting that the powers were likely to come into “domestic conflict” with Articles 10 and 11 ECHR.

7.2.1 R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary

The House of Lords were given the opportunity to test out a new human rights focused approach to public order policing in the 2006 case of Laporte. The Claimant in Laporte was one of 120 anti-war protesters who boarded coaches leaving London to take part in a protest at RAF Fairford in Gloucestershire in March 2003, hours before the base was to be used for bombing raids on Iraq. The police claimed to anticipate disorder at the protest, on the grounds that participants of the planned protest were expected to include “a hard core activist anarchist group” who had attended a protest the previous month where there had been an incursion into the

30 Austin and another v CPM [2009] UKHL 5 at 8.
34 R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55.
When the coach got within a short distance of the airbase, it was stopped by police and the driver was ordered to return to London under police escort. The protesters were denied access to breaks and toilet facilities, causing some to suffer “acute physical discomfort and embarrassment as a result”. Passengers attempting to leave the coach were physically prevented from doing so by police.

Ninety of those detained subsequently formed the campaign group ‘Fairford Coach Action’, which sought judicial condemnation of the actions of the police. A test case was brought in the name of Jane Laporte. In June 2003 Laporte was granted leave to apply for judicial review to challenge the legality of the actions of the Chief Constable of Gloucestershire in (i) preventing her from travelling to the demonstration and forcing her to leave the area and (ii) forcibly returning her to London and preventing her from leaving the coach. The High Court dismissed Laporte’s first complaint on the grounds that the degree of imminence required to justify action short of arrest or detention to prevent a breach of a peace was not as great as that which would justify arrest. The Chief Constable of Gloucestershire justified the action on the grounds that although a breach of the peace was not imminent at the time the coaches were stopped, in light of the “history” of some of the passengers, unidentified “intelligence sources” and articles seized from passengers on the coach, had the coaches been permitted to continue to the airbase a breach of the peace would have been imminent upon arrival. Although the Court accepted that the Claimant’s conduct and intentions were entirely peaceful, it nonetheless concluded that the police’s actions in preventing her from travelling to the demonstration were lawful. However, the Court upheld her second complaint on the grounds that the higher degree of imminence required to justify detention to prevent a breach of the peace had not been met. Laporte’s forcible detention on the coach therefore amounted to an unlawful deprivation of liberty contrary to Article 5 of the ECHR. The decision was upheld by the Court of Appeal, who endorsed the

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55 Ibid. at 5.
56 Ibid. at 12.
57 See <www.fairfordcoachaction.org.uk>, accessed 1 August 2011.
58 R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary [2004] 2 All ER 874.
59 Ibid. at 13.
60 Ibid. at 41.
61 Ibid. at 42.
High Court’s expansion of the ‘immediacy’ requirement in *Moss v McLachlan* to include apprehended breaches of the peace which are close in time and proximity but not necessarily “about to happen”.\(^{62}\)

The case eventually reached the House of Lords. In a landmark judgment handed down in December 2006, the House of Lords ruled unanimously in favour of the Claimant.\(^{63}\) The Law Lords upheld the Court of Appeal’s finding that Laporte was unlawfully detained when the coach was forcibly returned to London and departed from the finding that the decision to prevent the coach reaching Fairford was a lawful exercise of the common law power to prevent a breach of the peace. Lord Bingham, who gave the leading judgment, highlighted the importance placed on the rights of free assembly and expression by the ECtHR, citing the Strasbourg Court’s finding in *Steel and Others v United Kingdom*\(^ {64}\) that freedom of expression constitutes “an essential foundation of democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment.”\(^ {65}\) In order to uphold the freedoms guaranteed by the Convention, he reasoned, any measure which curtails freedom of expression “calls for the most careful scrutiny”.\(^ {66}\) The Lords found “little support in the authorities” for the proposition that action short of arrest may be taken to prevent breaches of the peace which are not sufficiently imminent to justify arrest. Should public interest require an extension of police powers to control demonstrations, this should be a matter for Parliament and not the courts.\(^ {67}\)

The ruling was celebrated by human rights campaigners as a “victory” for freedom of expression and a “wake-up call for democracy”.\(^ {68}\) Shami Chakrabarti, Director of the human rights group Liberty which was granted leave to intervene in the case, described the ruling as “an enormous victory for free speech … Once again,
democracy was in trouble and the Law Lords came to its rescue.”69 This enthusiasm was shared by several academic writers in the area; Fenwick, for example, regarded the judgment as “a much-needed check upon the broad police discretion and expressly recognised the ‘constitutional shift’ that the HRA has brought about in this context”.70

However, it is submitted that the Laporte judgment does not indicate any radical departure from the traditional approach of extreme judicial deference to police decision making in public order situations.71 Although critical of some of the reasoning of the Divisional Court in Moss v McLauchlan, the House of Lords chose not to overrule the decision. The case was instead distinguished on its facts as a situation “very different”72 from the present case. In the view of Lord Bingham, it was at least “plausible” that a breach of the peace would have been about to be committed had the “belligerent” striking miners been allowed to proceed to their planned destination.73 In contrast, there was “no hint of disorder” at the time Laporte’s coach was stopped and no reason to apprehend an immediate breach of the peace at the time the coach would have arrived at Fairford. Although a victory for the claimant, the Laporte judgment granted House of Lords approval of the controversial roadblock strategy.

Moreover, although celebrated as a victory for human rights, the Law Lords in fact chose not to address the question whether the police action constituted a deprivation of liberty contrary to Article 5 of the ECHR. Rather, they found the police action inconsistent with the common law authorities which require a higher degree of immediacy for preventative arrest and detention.74 As Ashworth has noted, had the police not been honest enough to admit that a breach of the peace was not imminent,

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72 R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55 at 128.
73 Ibid. cf. Lord Mance who was critical of the general approach taken in Moss v McLauchlan (at 150).
74 Ibid. at 47.
the court might have come to a very different conclusion.\textsuperscript{75} The Laporte judgment therefore rendered the lawfulness of a police action to prevent a breach of a peace dependent upon the police officer’s own assessment of the necessity of taking such action.

Furthermore, whilst the question did not arise for decision in the case, the House of Lords considered in obiter whether preventative action could be taken against “innocent third parties”\textsuperscript{76} who are not committing or reasonably apprehended of being about to commit a breach of the peace.\textsuperscript{77} The court referred to the nineteenth century Irish case of O’Kelly v Harvey\textsuperscript{78}, where actions to enforce the dispersal of a nationalist meeting in order to prevent a threatened attack by local Orangemen was upheld by the Court of Appeal in Ireland. They concluded that in exceptional circumstances police officers can take action against those who are not going to be actively involved in the apprehended breach where there are “no other possible means” of preserving the public peace.\textsuperscript{79}

7.2.2 Austin and another v Commissioner of Police of the Metropolis

With these caveats in mind, the House of Lords’ controversial decision in the later case of Austin should have come as no surprise. The Austin case concerned the MPS’s decision to kettle protesters during the 2001 May Day demonstrations discussed in the previous section. The two Claimants, Lois Austin, a protester, and Geoffrey Saxby, a passer-by who was caught up in the police cordon, had initially brought a claim for damages on the grounds of false imprisonment and also deprivation of liberty, contrary to Article 5 of the ECHR. The court at first instance rejected both elements of the claim.\textsuperscript{80} The court found that the common law claim of false imprisonment was negated by the defence of necessity and the Convention claim by the fact that the detention fell within one of the lawful exceptions under

\textsuperscript{76} Ibid. at 149.
\textsuperscript{77} Ibid. at 119.
\textsuperscript{78} (1883) 14 LR Ir 105.
\textsuperscript{79} R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55 at 123-127.
\textsuperscript{80} Austin and another v CPM [2005] EWHC 480.
Article 5(1)(c), being effected in order “to arrest and bring before a judge all those who [the police] reasonably suspected of having committed an offence”. For Tugendhat J, the case was “not about freedom of speech or freedom of assembly” but “about the right to liberty and public order”. The Court found that the police were “duty bound” to impose an absolute cordon to prevent the risk of injury to persons and property. The Claimants’ appeal was dismissed by the Court of Appeal, which ruled that Article 5(1) was not engaged on the facts.

The case eventually reached the House of Lords. In a controversial judgment decision handed down on 28 January 2009, the Law Lords unanimously dismissed the Claimant’s appeal. The Court went to great lengths to construct an interpretation of ‘deprivation of liberty’ which excluded from its ambit the Claimant’s experience of being detained against her will in a police cordon for over seven hours. Accepting that the detention was more than “merely transitory” and therefore in “general or colloquial terms” amounted to a deprivation of liberty, Lord Hope, who gave the leading judgment, drew a distinction between “deprivations of liberty” which are prohibited by Article 5 and mere “restrictions on movement” which are not. The court found that the difference between deprivation and restrictions of liberty for the purpose of Article 5 is a question of “degree and intensity” requiring “a more exacting examination of the relevant criteria”. Lord Hope distinguished the facts of this case with the “paradigm case” of close confinement in a prison cell. He argued that the case falls into a legal “grey zone” requiring account to be taken “of a whole range of factors, including the specific situation of the individual and the context in which the restriction of liberty occurs”. Although none of the Article 5(1) exemptions were held to apply, Lord Hope held that a balance must be struck between the individual’s right to liberty and

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82 Ibid. at 549.
83 [2008] 1 All ER 564.
84 [2009] UKHL 5.
85 Ibid.
86 R (on the application of Gillan and Quinton) v Commissioner of Police for the Metropolis and Secretary of State for the Home Department [2006] UKHL 12.
87 R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55 at 23.
88 Ibid. at 18.
89 Ibid. at 20-21.
the purpose of the restriction. He found sufficient authority in the Strasbourg case-law to favour a “pragmatic approach” which “takes full account of all the circumstances”.

Measures of crowd control, he reasoned, will fall outside the application of Article 5 so long as they are “not arbitrary”: “This means that they must be resorted to in good faith, that they must be proportionate and that they are enforced for no longer than is reasonably necessary”.

Underpinning the House of Lords’ decision was the police assessment that some of those caught up in the cordon were potentially violent. According to Lord Scott, the cordon was imposed:

for the purposes of protecting the physical safety of the demonstrators, including the appellant, and of protecting the neighbourhood properties from the violence that it was justifiably feared some of the demonstrators would perpetrate.

Despite no evidence to suggest that the Claimant herself had committed any criminal offence, Lord Scott cited the High Court’s finding that Austin was an experienced protestor who must have been “well aware” that the protest would end in serious violence. Whilst not unlawful, her behaviour was, in the view of the Court, “unreasonable” and the police were justified in detaining her against her will.

Moreover, whist there was no legal obligation on the protest organisers to notify the police of the assembly in advance, a lack of advance communication between police and organisers was cited as a relevant factor in the case. According to Lord Hope: “The organisers had deliberately given no notice to the police of their intentions. They had refused to co-operate with them in any way at all”.

The Austin judgment gave the kettling tactic an important veneer of legitimacy and was interpreted by police as a carte blanche power to contain protesters more

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90 Ibid. at 22.
91 Ibid. at 34.
92 Ibid. at 37. The House of Lords did not specifically address the issue of whether containment was lawful at common law, since it was accepted by both parties that if detention was an unlawful deprivation of liberty contrary to article 5(1) of the ECHR, the Court of Appeal’s finding that it was lawful at common law could not stand, and vice versa (at 11).
93 Ibid. at 39.
94 Ibid. at 8.
95 Ibid. at 4.
broadly than ever before. Just over two months after the judgment was handed down by the House of Lords, Ian Tomlinson died after getting caught on the wrong side of a police kettle at the G20 protests in London. Following the G20 protests, a number of legal challenges on the use of the tactic were lodged by protesters in the courts. The most significant challenge came in Moos, where the Court of Appeal were asked to consider the lawfulness of the police’s decision to contain and then forcefully disperse a group of protesters taking part in the ‘Climate Camp’ demonstration at the G20 protests in April 2009. The appeal, lodged by the police, followed an earlier ruling from the High Court that the police officer’s decision to contain the protesters was unlawful on the grounds that there was no risk of an imminent breach of the peace sufficient to justify the full containment of the camp and the “pushing operation” which followed. Allowing the appeal, the Court of Appeal held that rather than forming its own view as to whether a breach of the peace was, in fact, imminent, the court must limit their assessment to the reasonableness of the police’s own view of the imminence of the anticipated breach “in the light of the information available to him at the time”.

The decision to kettle protesters is, in the view of the Court, entirely a matter of police discretion:

an argument as to whether, in a particular case, the circumstances were extreme or exceptional enough, or ‘truly’ extreme and exceptional, is scarcely likely to assist those deciding at the time whether to contain, or those subsequently deciding whether the containment was justified.

7.2.3 Austin and others v the United Kingdom

99 R (on the application of Moos and another) v Commissioner of Police for the Metropolis [2012] EWCA Civ 12.
100 R (on the application of Moos and another) v Commissioner of Police of the Metropolis [2011] EWHC 957.
101 Ibid. at 93. The court accepted the police’s justification for kettling as a strategy to prevent contamination between ‘peaceful’ and ‘violent’ elements of the crowd, referring to the Gold Commander’s assessment on the day that although those inside the cordon were “relatively peaceful”, there was a danger of more violent groups “hi-jacking” the event if the two groups “were allowed to mix” (at 18).
102 Ibid. at 96.
The *Austin* case was eventually taken to the ECtHR, which ruled by 14-3 that on the facts of the case there was no deprivation of liberty within the meaning of Article 5(1).\(^{103}\) The Court found that where the police impose a cordon as the least intrusive means “to isolate and contain a large crowd, in volatile and dangerous conditions” that would not amount to depriving someone of their liberty.\(^{104}\) The Strasbourg Court held that in considering whether there has been a deprivation of liberty, the court should take into account “a whole range of criteria” including the “type, duration, effects and manner of implementation of the measure in question”\(^{105}\). On the facts of this case, the containment of protesters without food, water and access to toilet facilities for over seven hours did not amount to a deprivation of liberty, but was instead akin to the mere “restrictions on movement” imposed on football crowds or motorway traffic following an accident, which are generally accepted by the public as legitimate.\(^{106}\)

The ECtHR’s judgment was heavily influenced by the police assertion that kettling developed as a necessary response to qualitative changes in protest activity. The Court emphasised that the Convention is a “living instrument” which must be interpreted in the light of “present day conditions”\(^{107}\), noting that:

> by 2001, advances in communications technology had made it possible to mobilise protesters rapidly and covertly on a hitherto unknown scale. Police forces in the Contracting States face new challenges, perhaps unforeseen when the Convention was drafted, and have developed new policing techniques to deal with them.\(^{108}\)

The Court did not take issue with the fact that the decision to contain protesters at the May Day protest was based on police intelligence that protesters were “intent on violence”, rather than on the actual behaviour of the crowd.\(^{109}\) The ECtHR quoted a Special Branch assessment that the May Day demonstration would involve “one of the most serious threats to public order ever seen in London”, bringing with it “a real risk of serious injury and even death … if they did not effectively control the

\(^{103}\) *Austin and Others v United Kingdom* [2012] ECHR 459.

\(^{104}\) *Ibid.* at 66.

\(^{105}\) *Ibid.* at 57.

\(^{106}\) *Ibid.* at 59.

\(^{107}\) *Ibid.* at 53.


crowd”. The court found that police officers must be afforded a “degree of discretion” in such cases, since they have access to intelligence not available to the wider public. Kettling is therefore a regrettable but necessary response to new, sporadic and increasingly violent forms of protest, without which the police:

would be obliged to prepare alternative methods of dealing with violent demonstrations … which might be far more dangerous for all concerned, such as the use of tear gas or rubber bullets.

The Court emphasised that the objective of Article 5 is to guard against arbitrary treatment of individuals. Yet they found that kettling will be a legitimate tactic where its use is “unavoidable as a result of circumstances beyond the control of the authorities”, “necessary to avert a real risk of serious injury or damage”, and “kept to the minimum required for that purpose”. In other words, the legality of its use is entirely a matter of police discretion.

The ECtHR’s judgment in *Austin* has been criticised by legal commentators in the area. Mead, for example, has noted that the decision appears to be vastly out of line with the Strasbourg Court’s own jurisprudence. In particular, the majority judgment made no reference to Court’s own previous decision in *Gillan and Quinton v United Kingdom*, where a stop and search for less than half an hour was found to be more than “merely transitory” and thus could constitute a deprivation of liberty.

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110 *Ibid.* at 18. The ECtHR emphasised that the police must be afforded a degree of discretion in taking operational decisions: “Such decisions are almost always complicated and the police, who have access to information and intelligence not available to the general public, will usually be in the best position to make them” (at 56).
112 *Ibid.* at 42.
113 *Ibid.* at 56.
for the purpose of Article 5 ECHR. Mead suggests that the Court’s decision in 
*Austin* may have a political basis, noting that the EtCHR’s endorsement of the 
kettling strategy came at a time when the Court’s influence over domestic law had 
come under a sustained attack from British politicians and the popular press. The 
judgment was handed down only two months after the ECtHR’s ruling in *Othman v 
United Kingdom* that ‘terror suspect’ Abu Qatada should not be deported to 
Jordan on the grounds that he risked being tried on evidence obtained by torture. 
Described by David Cameron as an “immensely frustrating” decision, the Prime 
Minster claimed that the case highlighted the need for reforms to the ECtHR to make 
it respond in a more “proportionate way” in future.

The legal threshold for the imposition of a police cordon is now lower than that 
established under domestic common law – neither the HL nor the ECtHR required 
the risk of injury or damage be “immediate” for containment to be considered 
lawful, only that the police actions are “not arbitrary” and based on “a real risk.” Writing in the *Guardian* newspaper, human rights lawyer Mike Mansfield 
potently summarised the flaws in the judicial response:

> Quite what level of actual or perceived violence triggers a need to impose 
> containment is indeterminate. Quite what the threshold is that has to be 
> crossed to convert a restriction into a deprivation of liberty is entirely 
> unclear. Quite how officers on the cordons are to ascertain who to release, if 
> anyone at all, is totally arbitrary and confused. Quite how anyone among a 
> crowd of thousands is informed about duration and exit strategy is left to 
> chance. Quite how the distress, anxiety and humiliation caused to ordinary 
> citizens is balanced against the risk of disorder or damage caused by others 
> cannot be readily calibrated.

Kettling, which was once a controversial tactic of dubious legal authority, has now 
received official sanction as a human rights-compliant policing strategy.

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118 This point was noted in the joint dissenting opinion of Judges Tulkens, Spielmann And Garlicki (*supra*, n.103, at 13).
120 HC Hansard 18 January 2012 c748.
121 [2009] UKHL 5 at 34.
7.3 An authoritarian consensus

The judicial endorsement of kettling stems from an historical failure on the part of both the domestic and European courts to challenge the official police narrative on public order policing. Reflecting the official discourse examined in Chapter Four, the police have presented kettling as a proportionate response to an increased willingness on the part of protesters to resort to violence. The arbitrary distinction between ‘peaceful’ and ‘violent’ protesters inherent within the ECHR has enabled the police to draw on negative stereotypes of protesters in order to deny protesters’ human rights and justify the use of coercive policing practices. As the distinction between peaceful and violent protest is an arbitrary one, so too is the exercise of these powers.

Unfortunately, much recent academic work displays the same degree of deference to police decision-making as the courts. In an article published in the aftermath of the HL’s judgment in Austin, Fenwick criticised the “immensely broad and bewilderingly imprecise powers” available under the breach of the peace doctrine, arguing that the judgment opened the door to “policies of suppression and intervention” which could amount to “political censorship”.124 Yet she endorses kettling as a “last resort” technique used in “extreme protest situations”.125 In order to limit the use of the tactic, Fenwick suggests that the technique be put on a statutory footing. She advocates an expansion of the statutory regime to grant the police powers to “enforce” conditions on marches and assemblies rather than only a power of arrest in relation to non-compliance.126 Alternatives, she suggests, could be the greater use of ‘snatch squads’ in order to remove “troublemakers” from the crowd and allow “peaceful” protesters to disperse.127

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124 Fenwick, H. (2009), supra, n.8, p.763.
125 Ibid., p.762.
126 Ibid., p.761.
127 Ibid., p.762.
A similar approach can be found in the work of Glover. Writing in the *Criminal Law Review*, Glover accepts uncritically official claims that kettling arose following a realisation that existing tactics “were ineffective against a hostile crowd bent on trouble”. Glover argues that examples of where the police “over-react” in their use of kettling arise from the imprecise nature of the legal basis for the powers. Existing legal restrictions on the exercise of the breach of the peace power are, according to Glover, “unduly restrictive” and there is a significant degree of uncertainty among police officers surrounding their legitimate use. In order to resolve these problems, he suggests the law on police cordons should be codified “in order to create certainty and clear legal authority” for their use.

It is submitted that these arguments do not challenge the arbitrary nature of kettling but rather legitimise its use. As noted in Chapter Two, empirical research into police work has highlighted the limits of legal constraints on the exercise of police discretion. According to McConville *et al.*, arguments that police behaviour can be appropriately constrained by objective legal rules embody the “false promises” of liberal legalism. Indeed, as discussed in Chapter Five, the statutory public order regime is drafted in such a way that maximises police discretion whilst limiting the opportunity for legal challenge. Expanding the statutory framework would not direct the exercise of police discretion but rather legitimise existing practices. In failing to look beyond the official police narrative and recognise the limits of legal protection, the judicial and academic responses do not challenge the use of kettling but rather sanction its use.

Chapter Three presented an alternative account of the kettling from the point of view of protesters. Kettling in this context was not perceived as a proportionate response to violent protest, but as a violent and provocative public order tactic. In failing to challenge the official police narrative, the possibility that kettling might represent something other than a proportionate policing response is entirely absent from the

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129 Ibid., p.249.
130 Ibid., p.257.
131 Ibid., p. 247.
judicial and academic responses presented in this chapter. A genuine critique of kettling thus requires moving beyond the dominant discourse and examining kettling from the standpoint of the policed.

7.4 Conclusions

This chapter has attempted to argue that rather than restraining the arbitrary exercise of state power, human rights law has provided a powerful tool to legitimate an expansion of coercive public order policing powers. Protesters’ experiences of kettling is excluded from an official discourse which presents kettling as a necessary crowd control tactic developed in response to an increased willingness on the part of protesters to resort to violence. Just as the construction of striking miners as a pervasive ‘enemy within’ legitimised road blocks and other forms of state repression during the coal dispute, the ‘new age of protest’ discourse which presents protest in the modern age as less amenable to traditional forms of control has been invoked to justify kettling. In accepting this discourse uncritically and excluding from their analyses the reality of kettling from the point of view of those subject to it, much recent academic work has failed to challenge in any real way the repressive nature of the discretionary power. Rather, the response to arbitrary policing has been to sanction arbitrary policing.

The purpose of this chapter has been to demonstrate how, in omitting to look beyond the official protest policing discourse presented in Chapter Four, even the most extreme measures can be legitimised as human rights-compliant strategy. The following chapter will develop this argument, demonstrating how the state’s construction of protesters as a violent ‘enemy within’ has been used to marginalise protesters’ human rights and justify more intrusive methods, including covert surveillance and infiltration of lawful political organisations.
8. Policing ‘extremism’: Intelligence, security and the denial of human rights

You were stopped, you had your photograph taken, they said they wanted your name, address and date of birth. You were photographed and you had to say to a camera what your details were. And then you got marched away by the same two policemen and then got patted down and had your bags looked through.¹

In January 2011 the trials of six environmentalist activists charged with conspiracy to commit aggravated trespass collapsed following allegations that the Crown Prosecution Service had deliberately tried to suppress evidence that might have exonerated them.² Allegations that the group had planned to occupy the Ratcliffe-on-Soar power station were withdrawn after the defence discovered that one of the one hundred and fourteen activists that had been arrested in a pre-emptive raid was PC Mark Kennedy - an undercover police officer who had infiltrated the group and secretly recorded activists’ conversations. As the network of police spies planted inside protest groups began to unravel, allegations that police officers operated as agent provocateurs³, attempted to “fit up” activists in criminal proceedings⁴, sexually abused women in order to boost their credibility with activists⁵ and used the identities of dead children as aliases⁶, caused a serious crisis of legitimacy for undercover police work in the UK.

Through an analysis of media reports, official policy documentation and Hansard, this chapter will consider the processes by which lawful political groups and activists have been subjected to intrusive methods of intelligence gathering, including covert

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¹ Dossier of complaints submitted by STWC to the Commissioner of Police for the Metropolis, dated 9 February 2009.
surveillance and infiltration. The chapter will be split into two parts. The first part of the chapter will consider the development of the state’s intelligence gathering apparatus and its use to monitor political movements. This will include an analysis of the centralisation and significant expansion of the state’s intelligence structures in the decades following the 1984-5 miners’ strike including the development of the Animal Rights National Index (ARNI) and the National Public Order Intelligence Unit (NPOIU). Moreover, the development of the concept of ‘domestic extremism’ and the extent to which it has led to a blurring of the boundaries between public order and counter terrorism policing will be considered. The second part of the chapter will consider how these developments have been reflected in law. This will include an examination of the expansion of the definition of ‘terrorism’ under the TA 2000 to include a broad spectrum of political activity and the use of counter terrorism policing powers against political groups and activists.

8.1 ‘Anarchists’, ‘subversives’, ‘communists’ and ‘terrorists’: The development of security and intelligence practices in the UK

The recent revelations that undercover police officers have been used to monitor lawful political organisations have triggered widespread public condemnation. Writing in the Guardian newspaper in February 2013, former Director of Public Prosecutions Ken Macdonald claimed that undercover police work has gone “badly wrong”. However, Porter’s analysis of the history of the Special Branch suggests that such practices have always been a feature of the modern British state’s response to popular campaigns for social and political reform. Prior to the formation of the Special Branch in 1883, the state’s intelligence-gathering apparatus was largely limited to informal practices of surveillance and interception, often carried out at the

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The formation of a dedicated policing unit with the explicit responsibility to monitor political groups and activists removed covert surveillance from parliamentary control. The formalisation of covert surveillance practices followed growing militancy within the Irish nationalist movement and the surveillance of Irish political activists through the use of spies, informants and other intelligence gathering techniques became the central task of the small number of Irish-born men who made up the Branch’s personnel. By the early part of the twentieth century, the focus of Special Branch attention was expanded from Irish nationalism to a range of other ‘militant’ groups including foreign anarchists, pacifists, trade unionists and the suffragette movement. Following the Russian Revolution of 1917, the focus of Special Branch officers was the activities of ‘Communists’ – a category that Bunyan suggests in practice was deemed to include just about “everyone who was ideologically to the left of the Tory Party”.

The Special Branch’s counter revolutionary function continued throughout the inter-war years, when its network of spies and informants infiltrated a range of extra parliamentary groups including the National Unemployed Workers’ Movement (NUWM) who had begun to organise hunger marches and petitions in response to soaring levels of unemployment. Growing opposition to nuclear deterrence in the 1950s put the Campaign for Nuclear Disarmament (CND) members and supporters under official suspicion. By 1962 the Branch, which had previously been limited to London, was extended to cover the whole of the UK and the number of personnel serving as Special Branch officers increased dramatically. By the late 1960s, the focus of Branch activity had shifted from communism to the broader categories of ‘subversives’ and ‘terrorists’ - terms which were not officially defined but which included within their remit politically moderate groups and individuals including

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11 Special Branch was originally named the ‘Political Branch’ of Scotland Yard’s Criminal Investigation Department (CID). It was re-named the ‘Special Irish Branch’ before becoming ‘Special Branch’ in 1888. See Bunyan, T. (1977) supra, n.9, pp.104-5.
several Liberal and Labour politicians. Concerns that the police did not have an adequate grasp of the growing movement against the Vietnam War prompted the formation in 1968 of the ultra-secretive ‘Special Demonstration Squad’ – a specialist sub-unit within Special Branch consisting of a small group of officers who worked undercover to infiltrate left-wing groups and report back to MI5. As Bunyan notes, what linked the various categories of ‘subversives’, ‘militants’, ‘communists’ and ‘terrorists’ which have become the focus of Special Branch since its inception was a perception that such groups and individuals constituted a threat to the security of the state and its personnel: “An historical study of the Branch (and the other agencies) shows only one consistent criterion – for ‘subversive’ read ‘all those actively opposed to the prevailing order’”.  

8.1.1 The Animal Rights National Index

During the second half of the twentieth century, the intelligence and security apparatus of the state to monitor and suppress lawful political activity was significantly expanded. The two decades following the 1960s witnessed a growth in extra-parliamentary activity inspired by the international revolutionary movements of 1968. This period also witnessed a reassertion of militant industrial action including a wave of workplace occupations and unofficial walkouts. In 1972 striking miners delivered a decisive blow to the Conservative government when an outnumbered police force failed to prevent pickets from shutting down a coking depot at the Saltley Gate plant in Birmingham. The miners’ victory triggered a significant expansion of the state’s intelligence capacity. This included the formation of Special Patrol Groups in all urban centres and the creation of the National Reporting Centre which was to play a decisive role in the defeat of the miners’ strike the following decade.

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This period also witnessed the emergence of new socialist and revolutionary organisations and the formation of single-issue campaign groups. Of particular concern for the security services was the growth of animal liberation groups in the UK, which by the 1980s had developed “into a large-scale, well-publicised and theoretically informed social movement”. Much of the movement’s campaigning during this period was moderate and non-violent. However, the latter part of the twentieth century witnessed a growth in more militant forms of direct action among the animal activist community. This included an intensification of the animal rescue raids and “economic sabotage” techniques of the Animal Liberation Front (ALF) and the emergence of new pro-violence groups such as the Animal Rights Militia and the Hunt Retribution Squad who openly declared a willingness to harm “animal abusers”. These developments led to the formation in 1985 of the Animal Rights National Index (ARNI) - a special policing unit at Scotland Yard tasked with monitoring the activities of animal rights activists and gathering intelligence on potential targets.

Although violence against the person committed by animal rights activists was extremely rare, the campaigns did cause significant economic damage to their protest targets. In 1991 SmithKline Beecham’s stock market value dropped by £67 million after it was required to recall all bottles of Lucozade from shops across the UK that the police, acting on faulty intelligence, feared had been contaminated by the ALF. The police responded by launching the “biggest-ever crackdown” on militant animal rights groups. Their activities were re-branded as ‘terrorism’ and

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27 A notable exception was the activities of the somewhat marginal groups such as the Animal Rights Malitia who, in 1990, were alleged to have planted explosives under a car belonging to a veterinarian in Porton Down, Wiltshire which injured a child: see Quirke, T. (1992) ‘They shoot scientists, don’t they?’ *The Times*, 7 November; Parry, G. (1990) ‘Baby hurt by Bristol car bomb’, *The Guardian*, 11 June.
the Anti-Terrorist Squad and a specialist Royal Ulster Constabulary anti-terrorist surveillance unit were drafted in to investigate their activities. The homes of ALF members and sympathisers were bugged by police, activists from across the country were subject to twenty-four hour surveillance and dozens were taken in for questioning. The group was infiltrated by undercover police officers and private companies targeted by protest campaigns were supplied with information about activists from ARNI officers.

These developments led to the Independent Broadcasting Authority in 1989 extending the Government-imposed ban on direct television interviews with members of the IRA to the ALF. Parallels between the tactics and organisational structure of the ALF and IRA were repeatedly highlighted in the media, and information emanating from senior police sources suggested an overlap of membership and control between the two groups. Following the 1994 IRA ceasefire, senior Special Branch officers claimed that the ALF had “replaced the IRA as the biggest terrorist threat on mainland Britain … emerging as the most dangerous subversive organisation in the country”. Anti-terrorist manpower previously directed towards Irish republicanism would now focus on this new emerging threat, which, according to the Sunday Times, had caused “more damage to property on mainland Britain than the IRA’s terror campaign”.

### 8.1.2 The National Coordinator for Counter Terrorism

By the mid-1990s the extensive systems of surveillance developed in the context of Northern Irish political violence were normalised and applied to a new group of

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30 Quirke, T. (1992) ‘They shoot scientists, don’t they?’ The Times, 7 November.
31 Ibid. Although Scotland Yard have denied that Special Branch regularly supplied information about activists contained on the Index to private companies. During the 1996 libel trials of the ‘McLibel Two’, Helen Steel and Dave Morris, McDonald's former Head of Security confirmed that ARNI officers provided information to the Company on activists handing out leaflets outside their store, who then went on to be issued with libel writs by the fast-food chain. See Penman, D. McDonald’s ‘used police sources’ in libel case, The Independent, 12 June, p.4; McDonald’s Corp and another v Steel and another [1995] 3 All ER 615.
35 Ibid.
dangerous ‘extremists’. This period saw the actions of even mainstream animal activists and other direct action protest groups labelled as ‘terrorist’ amid claims from police that peaceful protests were being “infiltrated” by “violent militants” who were “operating off the back of a peaceful demonstration”.\textsuperscript{36} Senior police officers claimed that there was a direct link between animal rights activism and the growing militant social movements of the left; according to Mick Brewer, acting Deputy Chief Constable of Warwickshire Police, the ALF was “closely linked” with other contemporary protest groups who had been involved in confrontation with police: “We see them at hunts, at poll-tax riots, at Criminal Justice Bill demonstrations. They are setting out to have a go at the Establishment.”\textsuperscript{37}

The growth in militancy among a very small number of animal rights campaigners during the latter part of the twentieth century set the scene for a significant expansion of the state’s apparatus to monitor and suppress political dissent. It was not long before the intelligence structures were extended to encompass other protest movements. A particular focus of concern for senior police officers was the emergence of a growing environmentalist movement, which intensified following the ‘Battle of Newbury’ between January and April 1996. In one of the largest anti-road protests in European history, some 7,000 people took part in demonstrations against the building of the Newbury bypass in Berkshire, adopting a strategy of non-violent direct action which included setting up protest camps and occupying land designated for clearance. During a massive policing and security operation costing in excess of £28 million\textsuperscript{38}, over eight hundred people were arrested, mostly for minor offences, and the building of the bypass was delayed leading to spiralling costs for the developers.\textsuperscript{39} In January 1996, following the conclusion of a pilot study on “environmental extremism”, the ACPO Committee on Terrorism and Allied Matters (TAM) recommended the development of a coordinated response against animal

\textsuperscript{37} Quoted in \textit{ibid}.
rights and environmental activism. The Committee recommended that the role of National Coordinator for Counter Terrorism be extended to include the investigation “of all aspects of terrorism and co-ordination of environmental inquiries”.\footnote{Elliott, C. and Campbell, D. (1996) ‘Police chiefs want anti-terror squad to spy on green activists’, \textit{The Guardian}, 27 March, p.1.} Responding to criticism that the proposed move represented a threat to civil liberties\footnote{See e.g. Wadham, J. (1996) ‘Letter: Call for terror squad to screen greens over-steps a thin blue line’, \textit{The Guardian}, 30 March, p.26.}, the ACPO claimed that the co-ordinating function would be limited to violent groups and “top of the scale” activists, rather than ordinary protesters\footnote{Elliott, C. and Campbell, D. (1996) \textit{supra}, n.40.}:

> We are not going to target people who climb trees or lie down in front of bulldozers to try to stop a road. We are talking about those who might be ready to plant a bomb under the site foreman’s car.\footnote{Quoted in Rose, D. (1996) ‘Terrorist squad targets greens’, \textit{The Guardian}, 14 April, p.3.}

Admitting that no such attacks had ever been carried out by environmental campaigners, a senior officer quoted in the \textit{Guardian} newspaper maintained, “I would rather be aware of what’s happening before an offence is committed … Some will say we are going too far. I would rather we kept our ear to the ground.”\footnote{Ibid.} The move, which was not debated by Parliament or any of the police authorities, was approved by a private meeting of the ACPO Chief Constable’s Council in April 1996.\footnote{Ibid.}

### 8.1.3 The National Public Order Intelligence Unit

The move to coordinate and centralise the surveillance of protest movements led to the establishment in 1998 of the National Public Order Intelligence Unit (NPOIU).\footnote{See <http://www.acpo.police.uk/NationalPolicing/NCDENationalCoordinatorDomesticExtremism/TheNationalPublicOrderIntelligenceUnitNPOIU.aspx>, accessed 18 December 2012. See also Bennetto, J. (1998) Police unit to target green protesters, \textit{The Independent}, 7 November, p.4.} Based at Scotland Yard and led by the head of Special Branch, the unit encompassed the ARNI as well as two further regional intelligence units set-up to monitor New Age travellers and hunt saboteurs.\footnote{The NPOU is funded directly by the Home Office “to reduce criminality and disorder from domestic extremism” and to “support forces managing strategic public order issues”: HMIC (2012), \textit{supra}, n.2, p.5.} The decision followed protests at the G8 summit in Birmingham earlier that year by the growing anti-capitalist movement ‘Reclaim
The Streets’, whose tactics of non-violent direct action based on the environmentalist campaigns of the early 1990s were causing disruption in cities across the country.\footnote{48} Relying on information from Special Branch officers, MI5 and other sources, the NPOIU was tasked with compiling profiles of protesters and organisations and drawing up “action plans” for chief constables to prevent potential public disorder.\footnote{49} The Unit extended the ambit of the former units to include the surveillance of protesters at industrial disputes and “extreme left wing” organisations. Quoted in the \textit{Independent} newspaper, Assistant Commissioner Anthony Speed, Chair of the ACPO Public Order sub-committee, justified the coordinated response by claiming that it was a common group of “troublesome” individuals who were involved in all of the protest movements:

Experience shows that the same people are involved in demonstrations - whether it’s disruption of building works and motorways, runways, live animals for export, or people ‘reclaiming’ the streets … It tends to be the same people who support them and travel around the country. It’s about keeping a database on them - identifying the main individuals.\footnote{50}

Strong support for centrally collated intelligence came in a thematic inspection report published by HMIC in March 1999.\footnote{51} The Inspectorate claimed that environmentalist campaigners were operating in a way that “goes far beyond the bounds of reasonable protest”, constructing “defensive” structures at protest sites including “elaborate bunkers, trenches and tunnels, often containing highly dangerous booby traps posing considerable danger to those involved”. Calling for greater legal powers to target environmental protesters, the report claimed that it was only a matter of time before such actions resulted in serious injury:

These groups have adopted a strategic, long-term approach to their protests employing new and innovative tactics to frustrate authorities and achieve their objective. There is evidence that some elements operate in cell like structures in a quasi-terrorist mode to keep secret their movements and intentions. The police response has to be equally focused and determined with energy directed to intelligence gathering and dissemination at a local and national level.\footnote{52}


\footnotetext{50}{Quoted in \textit{Ibid}.}

\footnotetext{51}{HMIC (1999) \textit{Keeping the peace: Policing disorder} (London: HMIC).}

Following the publication of the HMIC report, the NPOIU’s remit was expanded to “include all forms of domestic extremism, criminality and public disorder associated with cause-led groups”.\(^{53}\) This ambiguous formulation brought a remarkably broad spectrum of protest activity within the focus of the NPOIU.

### 8.2 ‘Rights proofing’ security and intelligence in the UK

At the time the HRA 1998 came into force in October 2000, an expansive intelligence and security apparatus existed in the UK to monitor a wide range of political activists. Under Article 8 of the ECHR, citizens have a right to respect for private and family life, home and correspondence, subject to restrictions that are “in accordance with the law” and “necessary in a democratic society”, including those made in the interests of national security, public safety or the prevention of disorder or crime. Case-law under Article 8 has established that although a state may carry out covert investigations on an individual, such measures must be regulated by law and contain effective safeguards.\(^{54}\) In the absence of a statutory framework governing the use of covert surveillance, the Government introduced the Regulation of Investigatory Powers Act 2000 (RIPA 2000), which sought to “rights-proof” security and intelligence practices in the UK.\(^{55}\) The RIPA 2000 created statutory guidelines governing the use of informers\(^{56}\) and established a tribunal to investigate alleged abuses within the covert policing system.\(^{58}\) According to Home Secretary Jack Straw, the RIPA 2000 was “a significant step forward for the protection of human rights in this country”.\(^{59}\)

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\(^{54}\) See e.g. Leander v Sweden (App. no. 9248/81) [1987] ECHR 9248/81; Klass and others v Germany (App. no. 5029/71) [1978] ECHR 5029/71.


\(^{57}\) RIPA 2000, Part II.

\(^{58}\) RIPA 2000, Part IV.

\(^{59}\) HC Hansard 6 March 2000 c767.
However, in the decade following the introduction of the HRA 2000 and the RIPA 2000 the informal and extra-parliamentary security apparatus of the state continued to expand. In 2004, the National Extremism Tactical Co-ordination Unit (NETCU) was established to provide “tactical advice and guidance” to businesses and other organisations that are the potential target of protest campaigns. The move reflected growing unease at the level of activity among protest groups and a recognition that both the ARNI and the NPOIU had failed to stop the growth of the animal rights and environmentalist movements; in September 2004, two major pharmaceutical companies threatened to withdraw new research investment from the UK unless action was taken to prevent the organisations being targeted by protest campaigns.60

The new Unit was placed under the command of a ‘National Coordinator for Domestic Extremism’ (NCDE), staffed by over one hundred serving police staff with an annual budget of around £9 million.61 Although “domestic extremism” has no legal definition, it has been defined by the ACPO as consisting of:

activity, individuals or campaign groups that carry out criminal acts of direct action in furtherance of what is typically a single issue campaign. They usually seek to prevent something from happening or to change legislation or domestic policy, but attempt to do so outside of the normal democratic process.62

Such activities include acts of “crime and public disorder” committed by groups and individuals whose purpose falls within one of the broad categories of “animal rights”, “extreme right wing”, “extreme left wing”, “environmental” or “emerging trends”.63 Unlike the list of proscribed organisations published by the Home Office under the TA 2000, the identity of the groups and individuals listed as an ‘operational priority’ for the NCDE are not published. As a private limited company,

61 HMIC (2012), supra, n.2.
the ACPO (and thus the NCDE) is exempt from FOI 2000 requests. With the creation of the NCDE, ‘domestic extremism’, a term that has never been debated openly in Parliament, was officially incorporated into the covert security apparatus of the state.

By far the largest section of the domestic extremism framework is the NPOIU, which was brought under the command of the NCDE in 2004. Based in a secret location in London, the NPOIU’s official remit is “to gather, assess, analyse and disseminate intelligence and information relating to criminal activities in the United Kingdom where there is a threat of crime or to public order which arises from domestic extremism or protest activity”. Within five years of the NPOIU being brought under the NCDE, the Unit’s annual budget more than doubled, rising from £2.6 million in 2005/06 to some £5.7 million in 2009/10. By the end of 2009 the NPOIU was employing up to sixty police officers and staff. In 2005, the NCDE was expanded further when a new ‘National Domestic Extremism Team’ (NDET) was brought within its command, tasked with the responsibility of investigating criminal offences committed by political activists. The NCDE is headed by an ACPO-rank police officer, who, until 2011 was responsible only to the ACPO Commissioner for TAM. For “security reasons”, the ACPO do not release the names of those working for NCDE, or the location of the subsidiary units. Like the ACPO, the NCDE operated from its outset as a secretive and unaccountable policing body with considerable powers to monitor and suppress political activity.

In 2008 the state’s ‘domestic extremism’ apparatus was expanded yet again with the creation of the ‘Confidential Intelligence Unit’ (CIU) - a subsidiary unit within the NPOIU tasked with overseeing the NCDE’s “covert operational response”. The Unit’s existence was only made public after the Mail on Sunday newspaper published details of an internal job advertisement circulated by the ACPO and the

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64 Section 7 and Schedule 1 of the FOIA 2000 limits the application of the Act to “public authorities”.
67 HC Hansard 10 November 2009 c340W.
68 Ibid. c339W.
NCDE for a ‘Head of Confidential Intelligence Unit’ who would be responsible for managing “the covert intelligence function for domestic extremism”. The job description stated that the post-holder, who must be of at least the rank of Detective Chief Inspector, would work closely with regional counter terrorism units, government departments, communities and the commercial and academic sectors “in reducing or removing the threat, criminality and public disorder that arises from domestic extremism.”

The precise budget and remit of the Unit is unclear and its function has never been debated openly in Parliament; in May 2009, Home Secretary Jacqui Smith denied its existence. Although little public information on the operation of the secretive unit exists, the CIU appears to operate a similar function as its predecessor the SDS which operated under the now disbanded Special Branch.

8.2.2 The enemy in our midst: PC Mark Kennedy and the HMIC review

In January 2011 the operation of these secretive units were thrown into the public spotlight when the covert activities of PC Mark Kennedy were made public following the collapse of the trials of the Ratcliffe-on-Soar power station protesters. The Kennedy revelations prompted twelve separate official inquiries into the actions of undercover police officers and the operation of the public order intelligence units. Perhaps the most significant was the thematic review of public order intelligence units by HMIC, which considered the appropriateness and existing “operational oversight and governance arrangements” of the units as well as the extent to which their intelligence activities are proportionate and authorised in accordance with the law. The subsequent report, published in February 2012, recommended that the ACPO and the Home Office agree a “tighter definition” of domestic extremism which is limited to “threats of harm from serious crime and

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71 “There is no organisation called the Confidential Intelligence Unit, nor are there any plans to set one up.” HC Hansard 7 May 2009 c371W.
74 HMIC (2012), supra, n.2, Annex A.
75 Ibid.
serious disruption to the life of the community arising from criminal activity”.

The report recommended that the positioning of both public order intelligence and domestic extremism intelligence within the NDEU “be reconsidered” and that there should be a “thorough review” of all undercover operations by authorising officers.

According to HMIC, the Kennedy’s actions might have been prevented by “[a] more systemic implementation of controls” and improved “management of risk”.

The report recommended enhanced training and accreditation procedures for those officers responsible for authorising undercover operations and the development of a new framework for reviewing the value of proposed operations and their continuation.

Subject to these additional “safeguards”, domestic extremism should continue to be managed within the existing Counter Terrorism Unit structure.

Following the Kennedy revelations, Policing Minster Nick Herbert announced plans to transfer the NPOIU, the NECTU and the NDET from the ACPO to the control of the MPS in order to ensure greater “accountability” and “transparency”.

The units were to be subsumed in the MPS’ Counter Terrorism Command – a unit which “aims to protect London and the UK from the threat of terrorism”.

As a result, the state’s security and intelligence apparatus, which intensified dramatically following

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76 Ibid., p.15.
77 Ibid., p.12.
78 Ibid., pp.9-10.
79 Ibid., pp.9-14.
80 Ibid., p.41. The crisis of legitimacy in undercover policing prompted by the Kennedy affair also forced a re-consideration of the operation of the ACPO. Although based at Scotland Yard, funded publicly (through by a Home Office grant and funding from the 44 police authorities), and playing a crucial role in drafting and implementing policy, the ACPO is a private limited company exempt from the obligations bestow on public bodies including those under the FOIA 2000, the DPA 1998 and the HRA 1998. In Adapting to Protest, HMIC recommended that status of the ACPO “should be clearly defined with transparent governance and accountability structures, especially in relation to its quasi-operational role of the commissioning of intelligence and the collation and retention of data”: HMIC (2009b) Adapting to Protest – Nurturing the British Model of Policing (London: HMIC), p.166. In March 2010 the Ministry of Justice announced that the FOIA would be extended to include the ACPO from October 2011, although the organisation remains a private limited company rather than a democratically accountable statutory body: Ministry of Justice (2010) Greater transparency in Freedom of information, Press Release, 30 March, available at:

81 HC Hansard, Session 2010-11, Police Reform and Social, Responsibility Bill, c258.
the events of 11 September 2001\textsuperscript{83}, has been formally expanded to encompass lawful protest.

### 8.3 Public protest and counter terrorism

Although at an operational level protest policing was brought within the realm of counter terrorism policing during the latter part of the twentieth century, these developments were not immediately reflected in law. The application of the emergency powers conferred to the police under the temporary Prevention of Terrorism Acts (PTAs)\textsuperscript{84} was limited to political violence committed in the context of the Northern Irish ‘Troubles’. In 1983 Earl Jellicoe conducted a report into the operation of the legislation in the UK which recommended that the PTAs be extended to encompass ‘international’ political violence committed outside of the context of Northern Ireland\textsuperscript{85}. However, domestic terrorism should remain excluded from the Act, since:

> Nothing in the past history or likely future activity of terrorist groups indigenous to Great Britain persuades me that the use of these powers against them is necessary or would be of real value.\textsuperscript{86}

When the issue was raised again in the House of Lords over a decade later, a Home Office Minister stated that the ‘extremism’ associated with the animal rights movement should not be regarded as ‘terrorism’ for the purpose of the Act, since the actions carried out by the groups in question were already criminal offences.\textsuperscript{87}

\textsuperscript{83} Gill, P. and Phythian, M. (2012), \textit{supra}, n.7.


\textsuperscript{86} \textit{Ibid.}, para.77.

\textsuperscript{87} “I can assure my noble friend, however, that actions such as breaking in, burglary, theft, arson and criminal damage, which covers things such as sticking up locks with glue and writing slogans on walls, sending postal bombs and contaminating food, are already criminal offences. I believe that to equate that with terrorism would be to go a little too far. It is perfectly true that the use of parcel bombs and incendiaries may be akin to terrorism, but the Prevention of Terrorism Acts have never applied to domestic extremism whether from the animal rights movement, nationalists who resort to assault in North Wales, or violent campaigners for Scottish independence. I think that it would be better to leave the law as it is because most of the offences that these people commit are already covered by the criminal law” (HL Hansard 21 February 1994 c422, Earl Ferrers, Minister of State, Home Office).
8.3.1 The Lloyd Report and the Terrorism Act 2000

In January 1996 Lord Lloyd of Berwick, a former Law Lord, was asked by the then Conservative Government to chair an “Inquiry into Legislation Against Terrorism” to consider the need for permanent counter terrorism legislation following the IRA ceasefire and the likely decline in activity by armed groups. The subsequent two volume Report, published in October 1996, recommended that the emergency provisions contained within the PTA be replaced with permanent specialist counter-terrorism legislation. The report recommended that the legislation should include an expanded definition of terrorism which included Irish, international and “domestic” terrorism. According to Lord Lloyd:

There is, in truth, no difference in principle between domestic and international terrorism. From the point of view of the innocent victim killed in a terrorist outrage in the United Kingdom, it makes no difference whether the bomb was planted by an Arab fundamentalist from the Middle East drawing attention to his cause or a militant member of some animal rights organisation, anxious to impose his will by violence on the United Kingdom Parliament, or some half-crazed anarchist opposed to all forms of government; the terror inspired in the civilian population is the same in all three cases.

Whilst accepting that the level of domestic terrorism remained “mercifully low”, Lord Lloyd concluded that the risk that domestic groups might resort to more extreme tactics in the future justified the need for expanded powers:

Existing pressure groups might adopt more violent means. New, and more violent pressure groups might be formed. In the well-worn phrase, they might adopt the bomb in the preference to the ballot box.

After years of parliamentary opposition to the renewal of the Prevention of Terrorism Acts, Lord Lloyd’s recommendations were adopted by the Labour Government who took power the following year. In December 1998 the Government

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89 Lord Lloyd of Berwick (1996) Inquiry into Legislation Against Terrorism, Cm.3420.
90 Ibid., paras.5.18-5.21.
91 Ibid., para.5.12.
92 Ibid., para.5.21.
published a Consultation Paper in which it declared its intention to “maximise the appropriateness and effectiveness of the UK’s response to all forms of terrorism” including “new forms of terrorism which may develop in the future”. The Government proposed replacing the temporary PTAs with a permanent piece of framework legislation based on an expanded definition of terrorism which included within its remit “international”, “domestic” and “Irish” terrorism. The Government shared Lord Lloyd’s view that since the three forms of terrorism adopt the same techniques, it was “illogical” to distinguish between these types of activity and thereby limit the use of counter terrorism policing powers. The document highlighted the high level of economic damage caused by animal rights activists’ “persistent and destructive campaigns”, arguing that whilst the level of terrorist activity committed by such groups is low, there is nothing to suggest that the threat posed would deteriorate.

The majority of Lord Lloyd’s recommendations were incorporated into the Terrorism Act 2000 (TA 2000), which came into force on 19 February 2001. The Act set out a new and expanded definition of terrorism to incorporate acts carried out for religious and ideological motivations, as well as those with a political cause. The legislation was no longer limited to Northern Irish or international terrorism, but to “all forms of terrorism”, including “domestic terrorism”. The Act also extended the range of conduct capable of falling within the definition of terrorism from that which involves serious violence against the person to action which “endangers a person’s life”, involves “serious damage to property”, creates “a serious risk” to public health or safety or “is designed seriously to interfere with or seriously to disrupt an electronic system”.

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93 Ibid.
94 Ibid., para.3.6.
95 Ibid., para.3.6.
96 Ibid., paras.3.10-3.11.
97 TA 2000, s.1(1)(c). Under the Prevention of Terrorism (Temporary Provisions) Act 1989, “terrorism” was limited to “the use of violence for political ends, and includes any use of violence for the purposes or putting the public or any section of the public in fear” (s.20).
99 Terrorism Act 2000, ss.1(2)(a)-(e).
As the Terrorism Bill was passing through Parliament, a small number of MPs raised concerns that the very loose definition of terrorism contained within the Bill would lead to a real danger that the powers would be used to suppress political dissent. Alan Simpson MP described the Bill as “fundamentally flawed”, noting the vast range of political and campaigning groups whose actions might be said to fall within the expanded definition. John McDonnell MP pointed out that industrial action such as the 1984-5 miners’ strike was indeed an “ideological cause” which involved “serious violence against persons and property” and could thus fall within the expanded definition. In response, the Government gave repeated assurances that industrial action such as the miners’ strike and the activities of environmentalist groups such as Greenpeace would not be caught within the scope of the legislation. Home Secretary Jack Straw claimed that the Bill was not intended to threaten in any way the right to demonstrate peacefully and would not apply to the majority of “domestic activist groups”. The definition was limited solely to “domestic extremists”, although he admitted that there was a “fine dividing line” between the two types of groups. Alternative definitions proposed by human rights group Liberty were rejected at Committee and Third Reading stages. With the passing of the TA 2000, the covert and extra-parliamentary practices of the past were given official sanction.

8.4 The impact of counter terrorism powers on the right to protest

The hysteria surrounding a small number of militant animal rights activists triggered the expansion of the covert intelligence infrastructure and the official redefinition of a broad spectrum of protest activity as ‘terrorism’. In focusing on the ideological motivation behind group or individual action, the TA 2000 Act subjects political

100 HC Hansard 15 March 2000 cc391-3.
101 Ibid. c414.
102 Ibid. c414.
103 Ibid. c414.
104 HC Hansard 14 December 1999 c154.
105 Ibid. cc154-5.
activists to the ‘two-tier system’ of criminal justice which Hillyard\textsuperscript{106} lucidly demonstrated had developed in Northern Ireland. As John Wadham, Director of Liberty pointed out at the time, the extension of the ambit of counter terrorism legislation to include domestic terrorism would leave those suspected of committing offences with political motivations with fewer rights than ‘ordinary’ criminal suspects:

Of course there is diversity of views about the morality of damaging property to prevent a new road scheme or making threats of violence to try to halt experimentation on animals. But I cannot see the logic of a system that assumes that those suspects whose motivation is ideological or even religious should have fewer rights than those who commit crimes for revenge or greed.\textsuperscript{107}

Less than seven months after the provisions of the TA 2000 came into force in the UK, the dramatic events of September 11 2001 triggered a surge of legal activity in the field of counter-terrorism at the international, regional and national levels.\textsuperscript{108} On 13 November 2001, the UK Government declared a ‘state of emergency’ and derogated from the UK’s obligations under Article 5(1) of the ECHR\textsuperscript{109} in order to introduce the ‘indefinite detention’ provisions under Part 4 of the ATSCA 2001.\textsuperscript{110} Later, Prime Minister Tony Blair’s claim that “the rules of the game are changing”\textsuperscript{111} legitimised a remarkable expansion of counter terrorism policing powers and informal measures of social control. Between 2001 and 2013 five major new pieces of counter terrorism legislation were enacted in the UK\textsuperscript{112}, constituting what Pantazis and Pemberton have described as “a radical transformation of the relationship between the state and the individual”.\textsuperscript{113} Writing before the London bombings of 7 July 2005, Lustgarten noted that the UK had already developed “the most

\textsuperscript{109} Article 5(1) guarantees the right to liberty and security of person.
comprehensive, and in some respects most draconian, legislation directed against ‘terrorism’ anywhere in the world”.  

The cumulative result of these developments is that during the last decade, executive powers to restrict the activities of lawful political activists have been significantly expanded. As the definition of terrorism is central to the application of the broad powers of arrest, search and detention contained within the legislation, the TA 2000 was the platform for the major extension of counter terrorism powers and their use to restrict the activities of political activists. This section considers the impact of two of the most contentious counter terrorism controls on the right to protest: namely proscription and stop and search.

8.4.1 Expansion of powers of proscription: Section 3 Terrorism Act 2000

Most nations enact laws which empower the executive to ban non-state actors in armed conflict and criminalise their activities. Such measures serve an important role for the state in removing the source of legitimacy of political groups for their political claims and actions, by starving them of what Prime Minister Margaret Thatcher called the “air of publicity”.

Under Schedule 2 of the PTA 1989, only organisations connected with the affairs in Northern Ireland were proscribed under the Act. In 1998, the Government published a Consultation Paper in which it proposed extending the ambit of proscription to make it possible for groups not connected with Irish terrorism to be outlawed. The Government claimed that such powers would provide a mechanism to “signal clearly condemnation” of terrorist groups, although it recognised that the practical difficulties involved in monitoring an up to date list of international and domestic groups would be “formidable”.

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117 Ibid., para.4.18.
Section 3 of the TA 2000 thus granted the Home Secretary\textsuperscript{118} the power to proscribe any organisation which he believed to be “concerned in terrorism”.\textsuperscript{119} An organisation is “concerned in terrorism”, according to the Act, if it “commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise concerned in terrorism”.\textsuperscript{120} Once an organisation is deemed to fall within the expanded definition of terrorism under Section 1 of the TA 2000, the Home Secretary has an almost unfettered authority to proscribe it.\textsuperscript{121} Under Section 11, it is an offence punishable by a maximum of ten years imprisonment to be a member (or profess to be a member) of a proscribed organisation. Section 12(2) makes it an offence to arrange a meeting where a member of a proscribed organisation speaks or which is intended to support or further the activities of a proscribed group. Wearing uniforms or an item of clothing which indicates support for a proscribed organisation is outlawed under Section 13. The Act therefore goes further than simply banning organisations: “It specifies that anyone and everything connected to those organisations is now outlawed.”\textsuperscript{122}

The Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001 came into force on 29 March 2001, listing twenty-one organisations that were proscribed by the Home Secretary.\textsuperscript{123} As the Bill was debated in Parliament the Government indicated that they did not intend to proscribe any of the “domestic extremist” groups

\begin{footnotesize}
\begin{enumerate}
\item In the case of organisations connected with the affairs of Northern Ireland, this power is granted to the Secretary of State for Northern Ireland.
\item TA 2000, s.3(4). Section 121 of the Act defines an “organisation” as including, “any association or combination of persons”.
\item Terrorism Act 2000, ss3(5)(a)-(d).
\item The Home Office have stated that the Secretary of State will take into account other factors when deciding whether or not to exercise their discretion. These include the nature and scale of an organisation’s activities; the specific threat that it poses to the UK and British nationals overseas; the extent of the organisation’s presence in the UK; and the need to support other members of the international community in the global fight against terrorism: see: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118186/terror-groups-proscribed.pdf>, accessed 18 June 2013.
\item The twenty-one proscribed organisations were: Al-Qa’ida, the Egyptian Islamic Jihad, Al-Gama’a al-Islamiya, the Armed Islamic Group (GIA), the Salafist Group for Call and Combat (GSPC), Babbar Khalsa, the International Sikh Youth Federation, Harakat Mujahideen, Jaish e Mohammed, Lashkar e Tayyaba, Liberation Tigers of Tamil Eelam (LTTE), the Hitzballah External Security Organisation, Hamas-Izz al-Din al-Qassem Brigades, the Palestinian Islamic Jihad -Shaqaqi, the Abu Nidal Organisation, the Islamic Army of Aden, Mujaheddin e Khaq, the Kurdistan Workers’ Party (PKK), the Revolutionary Peoples’ Liberation Party (DHKC-P), Basque Homeland and Liberty (Euskadi ta Askatasuna – ETA) and the November 17 Revolutionary Organisation (N17).
\end{enumerate}
\end{footnotesize}
known to them at that time.\footnote{124}{The Home Secretary chose not to include in the list of proscribed organisations groups such as the ALF and Hunt Retribution Squad, although he maintained that such groups may be added in the future.\footnote{125}{The Act did however criminalise thousands of people from the UK’s refugee communities who were involved in liberation movements and resistance against tyrannical regimes in their home countries, including Kurds, Tamils, Sikhs, Kashmiris and Palestinians.\footnote{126}{The Terrorism Act 2006 (TA 2006) extended the range of circumstances in which the Home Secretary may proscribe an organisation to include those where it is believed that an organisation is involved in “promoting” or “encouraging” terrorism.\footnote{127}{This includes organisations that “indirectly” encourage terrorism through “glorification”. Glorification is unlawful if the persons:

who may become aware of it could reasonably be expected to infer that what is being glorified, is being glorified as conduct that should be emulated in existing circumstances or is illustrative of a type of conduct that should be so emulated.\footnote{128}{The Home Secretary’s proscription powers were also extended to include organisations whose activities “are carried out in a manner that ensures that the organisation is associated with statements of unlawful glorification”.\footnote{129}{As Cram\footnote{130}{has noted, this remarkably broad provision means that the mere presence at a public meeting of members of a lawful organisation alongside a group deemed to be involved in glorifying terrorism could render the organisation liable for proscription. As of November 2012, forty-nine international terrorist organisations are proscribed under the TA 2000\footnote{131}{, including two organisations proscribed as “glorifying terrorism”.\footnote{132}{

\footnotesize
\begin{itemize}
\item[124] HL Hansard 27 March 2001 c145.
\item[125] HC Hansard 13 March 2001 c968; HL Hansard 27 March 2001 c198.
\item[127] TA 2006, s.1.
\item[128] TA 2000, s.3(5B).
\item[129] TA 2006, s.1.
\item[131] Al Ghurabaa and the Saved Sect or Saviour Sect (ibid).
\item[132] Home Office (2012) ‘Proscribed terror groups or organisations’, available at:
\end{itemize}
With the expanded definition of terrorism and the loosing of the triggers for prohibition, proscription offences severely undermine freedoms of expression and assembly. The designation of an organisation as outlawed both denies individuals the opportunity to participate in the political organisations of their choice and also curtails the formation of alternative political projects. Sentas has further argued that the criminalisation of political groups through proscription serves a powerful role for the state in depoliticizing social movements and masking the social and political motivations behind their formation. The human rights concerns raised by the expanded definition of terrorism were barely contemplated when it was first expanded to encompass international political violence committed outside of the context of Northern Ireland under the PTA 1984. Today, over a decade after the introduction of the HRA 1998, this omission is less comprehensible.

8.4.2 Expansion of police powers to stop and search: Section 44 Terrorism Act 2000

A further important mechanism available to the police to restrict protest under the expanded definition of terrorism was Section 44 of the TA 2000. Under Section 44, a police officer could stop and search an individual within an “authorised area” in order to search for “articles of a kind which could be used in connection with terrorism”. Unlike the provisions under Section 1 of PACE, searches under Section 44 could be carried out without the need to establish reasonable grounds for suspicion that the individual searched had committed, or was about to commit, a

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133 Cram, I. (2009), supra, n.130; Sentas, V. (2012), supra, n.126.
134 Sentas, V. (2012), supra, n.126.
135 Cram, I. (2009), supra, n.130.
136 An authorisation must be made by a police officer with the rank of assistant constable or equivalent (s.44(4)) and must specify the area and duration of the authorisation (s.46).
137 Terrorism Act 2000, s.45(1).
138 Most police searches in England and Wales are carried out under Section 1 of the Police and Criminal Evidence Act 1984, which allows police officers to stop and search a person in a public place where they have reasonable grounds for suspecting that they would find stolen goods or prohibited articles.
criminal offence. The authorisation to search could be made where a senior officer merely considered it “expedient for the purposes of the prevention of terrorism”.139

The power to stop and search an individual without reasonable grounds for suspicion was not new - a similar power existed under Sections 13A and 13B of the Terrorism (Temporary Provisions) Act 1989.140 The Lloyd Report suggested that counter terrorism search powers should be retained in permanent counter terrorism legislation. Lord Lloyd found that the power had been used with “great discretion” under the 1989 Act and that the requirement of authorisation had proven to be “an important control mechanism” on the police.141 Although admitting that no terrorists had been caught by police following a counter terrorism search, Lord Lloyd concluded that the power remained a significant deterrent for would-be terrorists.142

With the expanded definition of terrorism under the TA 2000, Section 44 gave the police an almost unfettered discretion to stop and search in relation to terrorist activities.143 As documented on Table 8.1, the number of stops and searches under Section 44 increased dramatically following the events of 11 September 2001, rising from 10,200 searches in 2001/02 to 210,000 in 2008/09. The powers did not lead to a single conviction for terrorism offences during this period.

**Table 8.1: Searches of pedestrians, vehicles and occupants under Section 44 Terrorism Act 2000**

<table>
<thead>
<tr>
<th>Year</th>
<th>S44 stops and searches</th>
<th>Arrests for terrorism offences from s44</th>
<th>Convictions for terrorism offences from s44</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001/02</td>
<td>10,200</td>
<td>20</td>
<td>0</td>
</tr>
<tr>
<td>2002/03</td>
<td>32,100</td>
<td>19</td>
<td>0</td>
</tr>
</tbody>
</table>

139 Terrorism Act 2000, s.43(3).
140 The powers were incorporated into the 1989 Act by Section 81 of the CJPOA 1994, which also created a similar power under Section 60 to authorise 'suspicionless' searches for offensive weapons or dangerous instruments. The Section 60 power is more limited than the corresponding power under Section 44 Terrorism Act 2000 in that the authorisation is limited to 24 hours and may only be given where the senior officer “reasonably believes” that serious violence may take place (s.60(1)(a)).
142 Ibid., p.58.
Walker\textsuperscript{144} suggests that the purpose of counter terrorism search powers is not only to secure convictions, but to gather intelligence and disrupt terrorist activity. This is corroborated by ACPO’s evidence to the HAC in 2005, which stated that

\begin{quote}
The use of Section 44 stop and search to disrupt and deter this activity (terrorist reconnaissance) is of critical importance and should not be underestimated.\textsuperscript{145}
\end{quote}

Despite assurances from the Home Secretary that the powers under the legislation were being used “solely for the prevention and investigation of acts of terrorism”\textsuperscript{146}, Section 44 powers were used extensively to disrupt the activities of protest groups and gain intelligence on activists. The first use of the Section 44 power against political protesters to receive public attention was in March 2003, when 995 searches under Section 44 of the TA 2000 and Section 60 of the CJPOA 1994 were carried out against anti-war protestors outside the Fairford Air Base in Gloucestershire.\textsuperscript{147} In stark contrast to the restraint described by Lord Lloyd in the operation of the powers under the 1989 Act, Section 44 operated as a blanket search power against the anti-war protesters - once the area around the base was authorised for searches,\textsuperscript{147}

146 HC Hansard 21 Mar 2003 c975W.
147 The US military were using the base to launch its bombing raid on Iraq: HC Hansard 28 April 2003 c219W. The total estimated cost of policing the Fairford protests was £6.9 million: HC Hansard 6 October 2003 c1234W.
a protester could expect to be stopped and searched about half a dozen times by different groups of police officers … It was very obvious that only individuals whom the police assumed to be anti-war protesters were stopped and searched.148

Protesters’ personal documents including driving licenses, credit cards and personal diaries were inspected by officers and personal details were recorded.149 None of the searches led to a single arrest under counter terrorism legislation, although sixty eight were arrested on suspicion of aggravated trespass and other public order offences.150 Following the Fairford protests, the powers were used to search protesters outside a bomb depot at Welford in Berkshire, at the Atomic Weapons Establishment at Aldermaston, Menwith Hill and at the annual arms fair in London’s Docklands.151

A significant challenge to the use of counter terrorism powers against political protesters came in September 2003, when anti-war protesters who were gathered outside of an arms fair in London’s Docklands were indiscriminately stopped and searched under Section 44. A small number of protesters were also arrested under Section 41 of the TA 2000, which allows a police officer to arrest a person without warrant whom he or she “reasonably suspects to be a terrorist”.152 Supported by human rights group Liberty153, two of those subject to the power, freelance journalist, Pennie Quinton and student Kevin Gillan, challenged the legality of the police action in a test case brought under their names. In the course of the legal proceedings154, the MPS revealed that successive Section 44 authorisations covering the whole of the Metropolitan Police district had been made and confirmed since the

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149 Ibid.
150 HC Hansard 28 April 2003 c219W.
151 Monibot, G. (2005) ‘Protest is criminalised and the huffers and puffers say nothing: The police abuse terror and harassment laws to penalise dissent while we insist civil liberties are our gift to the world’, The Guardian, 4 October, p.27.
152 Terrorism Act 2000, s.41(1). Although the MPS initially insisted that searches were carried out under Section 1 of PACE rather than counter terrorism legislation, they eventually conceded that officers did resort to the use of counter terrorism powers to search and arrest protesters: Allison, R. (2003) ‘London weapons fair: Liberty plans court action after protesters held under terror act’, The Guardian, 10 September, p.4.
154 R (on the application of Gillan and another) v Metropolitan Police Commissioner and another [2003] All ER 526 at 24.
2000 Act came into force on 19 February 2001. The Claimants challenged both the rolling authorisation and the arbitrary exercise of the power against peaceful protesters, arguing that they constituted an unlawful interference with their rights under the ECHR. The High Court dismissed both elements of the application, finding that Parliament had “clearly envisaged” that an authorisation might cover the whole of a police area rather than a specific locality where there was a substantial threat of terrorism. According to Brooke LJ who gave the leading judgment:

The right to demonstrate peacefully against an arms fair is just as important as the right to walk or cycle about the streets of London without being stopped by the police unless they have reasonable cause. If the police wish to use this extraordinary power to stop and search without cause they must exercise it in a way that does not give rise to legitimate complaints of arbitrary abuse of power.

However, the court concluded that the country was “concerned with a threat greater than any [it] has ever faced except in times of war”, and the application of the power as a method of preventing and detecting terrorism was proportionate. The Court found “just enough evidence” to suggest that the arms fair was an occasion that the police were justified in resorting to the Section 44 powers, although admitted that the use of counter terrorism powers in these circumstances was “a fairly close call”. The Court of Appeal upheld the High Court’s ruling and the case eventually reached the House of Lords, who handed down their judgment on 8 March 2006. The House of Lords dismissed the Claimants’ appeal, ruling that neither the authorisation nor the searches constituted an unlawful interference under the ECHR. The Law Lords found that although powers were “clearly open to abuse”, a stop and search under Section 44 did not amount to a deprivation of liberty contrary to Article 5(1) of the ECHR, as the “relatively brief” procedure was
more akin to being “kept from proceeding or kept waiting”, rather being confined or held in custody.\footnote{164}{R (on the application of Gillan and another) v CPM [2006] UKHL 12 at 25. See Moeckli, D. (2007) ‘Stop and search under the Terrorism Act 2000: A comment on R (Gillan) v Commissioner of Police for the Metropolis’, Modern Law Review 70(4): 654-679. In light of growing opposition to the use of the Section 44 powers against political protesters, the National Police Improvement Agency (NPIA) issued guidance on behalf of ACPO in 2008 which stated that powers under the TA 2000 “must be used with great care” and “must never be used as a public order tactic”. Nonetheless, the guidance made clear that “Section 44 authorisations may be appropriate to protect large public events – including protests – that may be at risk from terrorism.”: NPIA (2008) Practice advice on stop and search in relation to terrorism, available at: <www.npia.police.uk/en/docs/Stop_and_Search_in_Relation_to_Terrorism_-_2008.pdf>, accessed 3 October 2011.}

By the time the Gillan case reached the House of Lords, public opposition to Section 44 had grown considerably. In September 2005 veteran Labour Party activist Walter Wolfgang was forcibly evicted from the Labour Party conference after he heckled foreign secretary Jack Straw during a speech on the Iraq War. The eighty-two year old was refused re-entry by police officers who cited powers under Section 44 of the Terrorism Act 2000 (TA 2000).\footnote{165}{HL Hansard 20 December 2005 c1633.} In an embarrassing episode for the government, a further six hundred protesters assembling outside the conference were reportedly stopped and searched under the Act.\footnote{166}{Figures cited in Jones, S. (2005) ‘Heckler, 82, wins apology from Labour’, The Guardian, 29 September, p.1.} Public concerns about the abuse of Section 44 powers to target protesters, journalists\footnote{167}{Brown, J. (2009) ‘Photographers criminalised as police ‘abuse’ anti-terror laws’, The Independent, 6 January, p.18.} photographers\footnote{168}{\textit{Ibid}. See also <http://photographernotaterrorist.org>, accessed 3 October 2011.} and even trainspotters\footnote{169}{In early 2005 a group of trainspotters was detained and searched under Section 44 at Basingstoke train station, after the Home Office designated it a possible target for a terrorist attack: Johnson, P. (2005) ‘The police must end their abuse of anti-terror legislation’, Daily Telegraph, 3 October, p.22.} was reinforced by growing evidence that the power had not been effective in combating terrorism. A Human Rights Watch Report published in July 2010 showed that none of the nearly 450,000 people subjected to Section 44 stop and searches in the two years following April 2007 had been successfully prosecuted for a terrorism offence.\footnote{170}{Human Rights Watch (2011) Without Suspicion: Stop and Search under the Terrorism Act 2000, 4 July 2010, 1-56432-654-3, available at: <http://www.unhcr.org/refworld/docid/4c317b502.html>, accessed 3 October 2011.} In written evidence to the Home Affairs Committee in 2004, the MPA stated:

Section 44 powers do not appear to have proved an effective weapon against terrorism and may be used for other purposes … It has increased the level of distrust of our police. It has created deeper racial and ethnic tensions against
the police. It has trampled on the basic human rights of too many Londoners. It has cut off valuable sources of community information and intelligence. It has exacerbated community divisions and weakened social cohesion.\(^{171}\)

By 2006, Lord Carlile, the Government’s independent reviewer of counter-terrorism legislation, who had previously supported Section 44 as necessary to protect the public interest, institutions, and in the cause of public safety and the security of the state\(^ {172}\), was far less enthusiastic about the power. In his Annual Report he found “little or no evidence” that Section 44 was any more successful at preventing acts of terrorism than the other statutory powers of stop and search.\(^ {173}\) Despite these concerns, however, the reviewer concluded that the powers were necessary and proportional to the risk of terrorism and should remain in force.\(^ {174}\)

In January 2010 the Gillan case eventually reached the ECtHR, which ruled that the Section 44 provisions were too wide and did not provide adequate safeguards against abuse.\(^ {175}\) In a unanimous judgment, the Strasbourg Court found that requiring the authorisation to be considered “expedient” rather than “necessary” did not provide adequate protection against arbitrary interference, and the temporal and geographic restrictions provided under the legislation failed to act as a real check on the issuing of Section 44 authorisations.\(^ {176}\) The Court disagreed with the House of Lords’ finding that the transitory nature of the search distinguished it from a deprivation of liberty, finding instead that the public nature of the search may “compound the seriousness of the interference because of an element of humiliation and embarrassment”.\(^ {177}\) The use of the power therefore amounted to an unlawful interference with the Claimants’ privacy contrary to Article 8(1) ECHR. Although the Court did not reach a conclusion as to whether Section 44 violated the rights to free expression and peaceful assembly under Articles 10 and 11, it noted: “there is a

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\(^{171}\) Written evidence from the MPA to the HAC, 8 July 2004, cited in Liberty (2008) Liberty’s response to guidance on the use of stop and search carried out under Section 44 of the Terrorism Act 2000 (London: Liberty).


\(^{174}\) Ibid.

\(^{175}\) Gillan and Quinton v United Kingdom [2010] ECHR 4158/05.

\(^{176}\) Ibid., at 80-81.

\(^{177}\) Ibid., at 63.
risk that such a widely framed power could be misused against demonstrators and protestors.”

Although the Government vowed to appeal the ruling\(^\text{179}\), in reality the use of Section 44 was already declining significantly following revised guidance from the Home Office on the authorisation and search procedure; in the year ending December 2010, a total of 23,882 Section 44 stops and searches were carried out in Great Britain, an eighty-four per cent drop on the previous twelve months. By the third quarter of 2010/11 only 30 stops and searches were recorded, compared with 22,092 during the same quarter the previous year.\(^\text{180}\) In January 2011 the Government finally announced that the Section 44 powers were to be replaced as part of a broader review of security and counter terrorism and replaced with a “tightly defined” power of “much more limited scope and duration … to prevent a terrorist attack where there is a specific threat”.\(^\text{181}\) The powers were suspended in the interim by issuing a Remedial Order under Section 10 of the Human Rights Act 1998.\(^\text{182}\) Part 4 of the Protection of Freedoms Act 2012 repealed Section 44 TA 2000 and replaced it with a new Section 47A, which limits authorisations for stop and search to situations where a senior officer “reasonably suspects that an act of terrorism will take place” and that authorisation “is necessary to prevent such an act”.\(^\text{183}\)

8.5 Conclusions

At a time when, according to the official discourse, the police are moving towards a more human-rights compliant strategy of protest policing, the security and intelligence-gathering apparatus of the state has intensified its efforts to monitor and

\(^{178}\) *Ibid.*, at 85.


\(^{182}\) Terrorism Act 2000 (Remedial Order) 2011.

suppress political movements on an unprecedented scale. Just as the rhetoric of ‘subversives’, ‘militants’ and ‘communists’ has historically justified the criminalisation of groups targeted by the state’s covert security apparatus, the concept of ‘domestic extremism’ is a new political strategy which adopts the discourse surrounding the ‘War on Terror’ to justify a rapid expansion of the state’s security apparatus to a level far greater than that which existed during the worst years of the Northern Ireland conflict. The expansion of intrusive methods of covert surveillance is legitimised by a legal regime which defines a broad spectrum of oppositional activity as ‘terrorism’.

The HRA 1998 has not restrained this authoritarian development. Instead, the spaces of exception entrenched by the Act have legitimised a remarkable expansion of the security apparatus of the state to delegitimize, criminalise and pacify dissent. The ambiguous concept of ‘domestic extremism’ places protesters who act within the law, outside of the protections of the ECHR. According to HMIC, whilst the right to peaceful protest is acknowledged in law this is not unconditional: “it does not provide a defence for protesters who commit serious crime or disorder in pursuit of their objectives”.\(^{184}\) Reinforcing the ‘new age of protest’ discourse presented in Chapter Four, the report claims that:

> Over the last decade, some members of society have chosen to pursue a belief or cause through serious criminality or by serious disruption of the community arising from criminal activities, rather than through the democratic process. The police are tasked by society to protect the public by preventing these crimes and, if they do happen, by bringing the perpetrators to justice.\(^{185}\)

According to HMIC, covert intelligence does not undermine human rights, but is instead an essential mechanism to distinguish between those protesters whose rights should be protected and those who fall outside of the protections of the ECHR:

> The difficulty for the police is identifying those individuals who are intent on serious criminal activity, while protecting the rights of those who wish to protest peacefully. Key to differentiating between the two is reliable intelligence.\(^{186}\)

\(^{184}\) HMIC (2012), \textit{supra}, n.2.
\(^{185}\) \textit{Ibid.}, p.15.
\(^{186}\) \textit{Ibid.}
Under a negotiated management model, such developments are necessary and proportionate in order to allow the police to distinguish between ‘peaceful’ and ‘violent’ protesters, and thus ‘facilitate’ the rights of those groups whose activities fall within the protections of the Convention. This official justification for the expansion of covert surveillance is reflected in the work of several academic writers in the area. Stott, for example, argues that human rights compliant policing requires that the police limit the use of more intrusive tactics such as kettling to those adopting “aggressive and violent attitudes”\(^\text{187}\):

> It is recommended that the subsequent police strategy is not oriented exclusively toward the control of the crowd through the use or obvious threat of force but also the effective *facilitation* of the legitimate intentions underpinning crowd action … if and when the police are required to use force [they should] *differentiate* between groups and individuals within the crowd and above all avoid the indiscriminate use of force. [Emphasis in original].\(^\text{188}\)

Stott suggests that the key to distinguishing between peaceful and violent protesters is through the development of reliable intelligence. From this perspective, the use of covert intelligence gathering does not represent a threat to human rights, but rather allows the police to respond in a manner that avoids “the indiscriminate use of force”.\(^\text{189}\) As McCulloch\(^\text{190}\) notes, police attempts to justify violent policing tactics by reference to violent protesters demonstrates the way intelligence is used to legitimise excessive force, rather than minimise it as Stott suggests:

> Given that effective protests and campaigns almost always include people who have been to other protests, who are members of non-party political organisations, or activists who believe that it is not only their right but their duty as citizens to protest, there will be few protest actions the police will view as legitimate.\(^\text{191}\)


Conclusion

In light of the foregoing, it is about time human rights lawyers – the supercilious, the self-important and the gullible – were heard to explain what is going on, and why they deceived so many into thinking that the HRA would make a difference to human rights practice (as opposed to human rights law practice, with which some human rights lawyers appear arrogantly to conflate human rights practice). At a time when human rights appear to have gone AWOL, perhaps they will explain also why the British courts do so little to prevent the use of the torturer’s scalpel.¹

This provocative statement from Keith Ewing encapsulates his disdain at the failure of the HRA 1998, in the hands of the domestic courts, to strengthen protections for individuals against torture. Writing over twelve years after the HRA 1998 came into force, Ewing offers a critique of a form of a human rights idealism which sees the courts do little more than “pay lip service” to the importance of human rights principles.² Given the failure of human rights law to deal with something as fundamental as torture, Ewing asks, “what is the point of the HRA?”³

Ewing’s question could equally be posed in relation to the present analysis. The introduction of the HRA 1998 was celebrated as marking a “new era”,⁴ including the state’s approach to public protest. For the first time in domestic law, rights of free speech and peaceful assembly were given positive recognition, and placed the courts and public authorities under a positive duty to ‘facilitate’ protesters’ rights. As noted in Chapter Two, the HRA 1998 was welcomed with euphoric optimism by many of its supporters. It was predicted that the Act would represent a “turning point” whereby domestic law would be “redrawn in categories which reflect fundamental social values.”⁵ It was further prophesied that the Act would enhance the awareness of human rights principles throughout the whole of society, proving a guiding light that would constrain all public authorities. Neyroud and Beckley foresaw a new era of “ethical policing” that would be centred on a commitment to securing and reconciling human rights.⁶

² Ibid., p.58
³ Ibid.
⁴ Venables and another v News Group Newspapers Ltd and others [2001] 1 All ER 908 at 100.
In Chapter Two it was argued that the impact of the HRA 1998 should be measured against the material circumstances faced by people. To this end Chapter Three presented a case study of the Gaza protests from the standpoint of the policed, a narrative of a hard-to-reach group that has rarely been presented. The experiences of the people analysed in the chapter show little sign of progressive developments in public order policing. Indeed, the policing of the demonstrations was widely perceived by those affected to have involved serious violations of human rights. It is posited that the experiences of the Gaza protesters reflect the processes of criminalisation and marginalisation that characterise the regulation of political dissent in the current era. Despite the existence of “a fully-fledged right to protest” in domestic law, the scope of law to regulate protest is more extensive than ever before. Chapter Five charted the expansion of a pre-emptive legal regime that confers extensive powers on the police to ban and impose conditions on public assembly. The proliferation of criminal offences and the drift to summary justice and arbitrary decision-making, described in Chapter Six, have further undermined progressive aspirations associated with the HRA 1998. Despite the “constitutional shift” that was predicted on introduction of the Act, as noted in Chapter Seven, the judiciary have not departed from their traditional approach of extreme deference to police decision-making in public order situations.

The period in which human rights were “brought home” was also one that witnessed a considerable expansion of the security and intelligence gathering apparatus of the state to monitor and suppress political dissent. In Chapter Eight it was noted how the development of the concept of ‘domestic extremism’ blurred the boundaries between counter terrorism and public order policing. Moreover, the expansion of the statutory definition of ‘terrorism’ just a short while after the HRA 1998, under the Terrorism Act 2000, subjected protesters to the shadow system of criminal justice developed in the context of the Northern Ireland conflict. Despite the claim that the HRA 1998


\[^8\text{Redmond-Bate v Director of Public Prosecutions [1999] 163 J.P. 789 at 795.}\]

was to “herald a new dawn for civil liberties”\textsuperscript{10}, the cumulative effect of these developments has been a dramatic increase in police discretion at the expense of civil liberties.

The analysis presented in this thesis highlights the significance of Ewing’s distinction between “human rights practice” and “human rights law practice”\textsuperscript{11}. If the HRA 1998 has not led to a progressive transformation in the public experience of the exercise of state power, then it has not achieved the purported intention of Parliament. However, Ewing’s characterisation of the HRA 1998 as a “futile” instrument\textsuperscript{12} suggests it has not played a role in preventing these regressive developments. Indeed, much of the criticism directed towards the HRA 1998 presented in Chapter Two suggest that the Act has been notable by its absence. From this perspective, the introduction of the HRA 1998 has had little or no impact on the condition of civil liberties in the UK.

In contrast it is argued that the HRA 1998 has been central to the law and policy developments presented in this thesis. As discussed in Chapter Four, the discourse of human rights has been firmly entrenched within the official discourse of the state. The duty to ‘facilitate’ peaceful protest is said to be the predominant consideration in all public order operations and there is a strong rhetorical recognition of the right to protest in political, judicial and official policy discourses. Human rights principles have become a yardstick against which the legitimacy of public order policing policies and practices have come to be measured. However, I argue that rather than representing a progressive development, the HRA 1998 has provided a “template of justification” with which the police have attempted to legitimise existing practices.\textsuperscript{13}

The human rights principle of proportionality, for example, has enabled rights of protesters to be weighed against an apparently indefinite list of competing interests. In presenting the police as neutral arbitrators in this process, the official discourse obscures the fundamental power imbalance between the police and protest groups:

\textsuperscript{11} Ewing, K. (2012), \textit{supra} n.1, p.60.
they do not stand before the law as equals. Whilst those who engage in protest activity are subject to increasing criminalisation, the police in public order situations act with relative legal impunity. As noted in Chapter Five, moves to make public order policing more “human rights compliant”\(^{14}\), by integrating negotiated management practices into operational policing, are not a progressive development and have served to legitimise the bureaucratic regulation of protest.

Furthermore, the arbitrary distinction between ‘peaceful’ and ‘violent’ protest inherent in ECHR case law has enabled the police to acknowledge human rights and, at the same time, deny their application. The concept of domestic extremism places those protesters designated by the police as ‘violent’ or ‘extreme’ in a space of exception outside of the protections of the HRA 1998. The association of protest with violence, criminality and terrorism has legitimised the use of extreme public order policing measures, including covert surveillance, the imposition of restrictive conditions and militarised ‘containment’ strategies.

The process of criminalisation serves an important function for the state in neutralising social movements. The criminalisation of protest both legitimises its control within the criminal justice process and discredits the protesters’ cause in the eyes of the public. These developments have significantly increased the powers of the state to set the parameters of legitimate dissent. It is submitted that in the context of public protest, human rights have not gone “AWOL”, as Ewing suggests\(^{15}\) and the HRA 1998 has provided a framework by which the police have legitimised the expansion and normalisation of repressive state practices and the suppression of political dissent.

The crisis of legitimacy triggered by the G20 protests created an important opportunity for a comprehensive public debate about the legitimacy of existing methods of the policing of protest. However, in allowing the police to dominate the agenda, the parameters of the debate have been fatally narrowed. Despite clear evidence of increasingly authoritarian policing tactics, much recent academic work


\(^{15}\) Ewing, K. (2012), *supra* n.1, p.60.
appears to accept uncritically the idea that the police are moving towards a more consensual and human rights compliant style of protest policing. This thesis has attempted to move beyond the official discourse and consider the impact of the HRA 1998 from the standpoint of the policed. In doing so, I have departed from what Kennedy has characterised as human rights “idolatry”, namely prioritisation of legalism at the expense of the social and political transformation required for genuine human emancipation.16

The findings presented in this thesis highlight the dangers in relying on human rights law as a panacea for progressive reforms in public order policing. In itself, human rights law is insufficient to stop the processes of criminalisation and marginalisation that are central to the operation of state power and the regulation of dissent. Resisting these processes requires a more fundamental challenge to the system of law through which they are administered. Reliance solely on legal rights to protect public protest is an example of the “legal fetishism” described by Hillyard and others which ignore the reality of law as “an integral part of the repression and organisation of state violence”.17

However, whilst rights discourses are capable of serving a repressive function, this does not mean that they cannot play a part in emancipatory projects. As noted in Chapter Two, the fact that human rights have been appropriated by the state for repressive purposes does not make them inherently repressive. The present analysis suggests that human rights can be useful on an instrumental basis. The right to protest was a central mobilising discourse utilised by the defence campaign following the Gaza protests and was successful in shifting the focus from the alleged violence of protesters towards the tactics of the police. The repeal of the SOCPA 2005 prohibition on unauthorised protest in Parliament Square followed a sustained campaign to assert the right to free assembly in the Square and forced the issue into the political sphere - despite an absence of Parliamentary opposition to the provisions at their introduction. Moreover, although commonly credited to the

ECtHR’s judgment in *Gillan*\(^\text{18}\), the Government’s decision to repeal Section 44 of the TA 2000 followed years of resistance to the use of counter terrorism powers to undermine the right to protest. These examples highlight the political utility of human rights and the importance of viewing human rights dialectically.

At a time when human rights are part of political, judicial and policing-policy language, notwithstanding the rather minimalist interpretation of the meaning of human rights, the promotion of the concept of human rights and radical rearticulation of their content is possible in the current political climate. Since the right to protest is inherently a collective rather than individual right, such a project would need to transcend the liberal deployment of human rights. In Harvey’s words, it is necessary to “democratize” human rights through the construction of social movements which insist on the right to protest and the right to popular control over public space.\(^\text{19}\)

On a final note, many of the coercive measures analysed in this thesis have been justified as preventing violence and extremism. Yet, as discussed in Chapter Three, operation of these measures has often resulted in violence. These experiences have had widespread consequences on people’s lives, including physical harm and emotional turmoil. In many cases there has been no form of redress whatsoever. Hillyard has described this process as the “terror of prevention”\(^\text{20}\) – a form of terror that is experienced by those directly affected by repressive state practices which extend into the suspect community in its entirety. In reality, these practices contribute to the ‘threat of extremism’ which the state claims they serve to prevent. Speaking during the criminal trials that followed the Gaza protests, an Imam from a mosque which three of the imprisoned protesters attended described the frustration of young men and women in his community following the arrests:

> We noticed how angry they were, they don’t trust the police, they feel that police are not fair with them, not cooperating with them, they feel the media is not giving the right picture about them, and what is happening with the massacres in Gaza. So that makes them boil from inside, and the reaction of the people who are boiling from inside, without giving them the right and facilitating their right to demonstrate, can be very dangerous.\(^\text{21}\)

\(^{18}\) *Gillan and Quinton v United Kingdom* [2010] ECHR 4158/05.


\(^{21}\) Interview, 21 July 2009.
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Appendix One
Appendix Two