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ORIGINAL ARTICLE

‘On a knife’s edge’: medical, police, and legal responses to self-harming protesters

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Abstract

Traditional liberal democratic theories of protest can readily account for protest violence against others or their property, and are quick to denounce and criminalize such actions. However, protests that involve self-harm are harder to frame; they neither engage the harm principle, nor threaten a sovereign state of ostensible peace. Under liberal legalism, capacitous and consenting protesters should not have their rights of expression interfered with in such cases. However, in England and Wales, legal responses to self-harming violence nevertheless emerge, not necessarily within a public order framework, but through a risk-averse, medicalized lens. Co-authored by a legal academic and a practising psychiatrist, this article argues that mental health practitioners, the police, and the courts engage in a ‘paternalistic pivot’ in self-harming protest cases, which undermines human rights protections that are ordinarily afforded to protesters who are not causing a threat to others or their property.

1 | INTRODUCTION

It is largely uncontroversial, under liberal democratic theories of protest, that violence towards third parties or their property may justifiably be prevented or prosecuted by the state. Under a classical liberal model, violence towards others contravenes the harm principle; the state is

justified in intervening to prevent harm to others.[1] The state can also intervene to maintain public order and to suppress any threats to a state of ostensible peace.[2] Accordingly, whereas peaceful protest may be accommodated within a liberal democratic state – and indeed, under the European Convention on Human Rights (ECHR), there is a positive obligation on the part of public authorities, including the police, to do so – violent protest (understood as protest that uses or threatens unlawful force against third parties or their property) receives no such legal protection.[3]

Very little has been written on the rarer, yet equally important matter of violence inflicted on *oneself* in acts of protest. Perhaps in part this is because it only infrequently occurs, and seldom comes before the courts.[4] Yet self-inflicted protest violence does happen, and it can be used to dramatic symbolic effect. The hunger strikes of political prisoners during the Troubles became an important symbol of resistance to British oppression.[5] In 1993, the self-immolation of Graham Bamford outside Parliament presented a powerful message against the atrocities in Bosnia and Herzegovina.[6] Cases in 2004 of asylum seekers in Glasgow stitching their lips together, protesting against being 'silenced' by immigration authorities, caught the attention of the international media.[7] More recently, immigration detention centres in the UK have seen widespread forms of self-harm, as detainees protest against ill-treatment and prolonged uncertainty as to their futures.[8] These examples, from across the UK, demonstrate the potential for self-harm to contribute to 'democratic dialogue', communicating moral and political claims made by protesters.[9] There is, however, a lack of critical legal literature on the nature of self-inflicted protest violence, and on the principled and theoretical underpinnings that could justify interference with these protesters' physical and moral autonomy by the state.

Specifically, we should question whether the state can (and should) interfere with self-harming protest for the purposes of maintaining public order, or whether it can (and should) only do so to protect that individual if their mental capacity is deemed to have been in some way negated. In this article, we argue that under current law, and current medical and police practice, there is a disjunct in how we frame self-harming protest. The article takes a transdisciplinary approach in analysing relevant public order and medical law, evaluating law and theory within

[1] J. S. Mill, *On Liberty* (1859); cf. J. Greenwood-Reeves, *Justifying Violent Protest: Law and Morality in Democratic States* (2022).

[2] For a critical perspective on the state's preservation of sovereign order, see I. rua Wall, *Law and Disorder: Sovereignty, Protest, Atmosphere* (2020).

[3] *Plattform 'Ärzte für das Leben'* v. *Austria*, Merits, App. No. 10126/82, A/139 [1991] 13 EHRR 204; *Kudrevičius* v. *Lithuania* [2016] 62 EHRR 34, at [92].

[4] The few reported prosecuted cases include *An NHS Trust* v. *A* [2013] EWHC 2442 (COP) and *R* v. *Collins ex parte Brady* [2000] *Lloyd's Rep Med* 355, discussed further below.

[5] *McFeeley* v. *United Kingdom* [1981] 3 EHRR 161; C. Yuill, 'The Body as Weapon: Bobby Sands and the Republican Hunger Strikes' (2007) 12 *Sociological Research Online* 1.

[6] J. Steel, 'Ultimate Sacrifice' *Guardian*, 20 January 1999, at <https://www.theguardian.com/theguardian/1999/jan/20/features11.g22>.

[7] BBC News, 'Asylum Seekers Stitch Up Mouths' *BBC News*, 22 February 2004, at <http://news.bbc.co.uk/1/hi/scotland/3511633.stm>; L. Brownlie, 'Abdul Rahman Safi Sews Mouth Shut as Part of Protest against Home Office' *Glasgow Times*, 21 September 2020, at <https://www.glasgowtimes.co.uk/news/18737132.abdul-rahman-safi-sews-mouth-shut-part-protest-home-office/>.

[8] L. Holland, 'Migrants Packed into Controversial Processing Centre "Threatening Self-Harm and Hunger Strike"' *Sky News*, 2 November 2022, at <https://news.sky.com/story/migrants-packed-into-controversial-processing-centre-threatening-self-harm-and-hunger-strike-12735932>.

[9] Greenwood-Reeves, op. cit., n. 1, pp. 76–80.

medical and police practice.[10] We argue that there is a 'pivot' in protest governance when protest violence is directed inwardly rather than outwardly. With this pivot comes a shift from a purportedly liberal public order mode to a paternalistic mode. We argue that there are two significant risks to this. First, it undermines the protections usually afforded to protest under the liberal mode. Second, it undermines the protester and their arguments, by framing the protester as lacking the capacity to make their claims as genuine political arguments worthy of fair consideration.

First, we explain the key differences between liberal and paternalistic modes of regulation. We then lay out the basic public order legal framework regulating protest violence in England and Wales – one that largely conforms to the liberal mode of protest governance.[11] We explain the reasons why self-inflicted harm is difficult to reconcile with the liberal conceptions of public order and harm that are implicit in this public order framework. We suggest that it is justifiable, in law and principle, *not* to use public order law to regulate behaviour that only threatens to harm the individual.

Second, however, we critique how mental health legislation usurps the role of public order legislation in such cases. Rather than regulating self-inflicted protest violence through public order mechanisms, as would be done if the harm was directed at third parties, the state intervenes (to the extent that it can claim that it is necessary to do so) in the interests of the individual. The pivot is facilitated by the presumption that self-harm *must* be symptomatic of a mental health condition, rather than the deliberate choice of a rational actor. Furthermore, mental health practitioners' precautionary approach in practice is liable to shift the rationale of such decisions further away from prioritizing the protester's free expressions and autonomy, to instead prioritizing their health. This is exacerbated by the 'theory–practice gap' between practitioners' legal training and its application in high-pressure scenarios.[12]

Third, we problematize this pivot as creating an oversight in the regulatory framework for public order and protest. Medical practitioners, the police, and the courts all shift their focus from the liberal mode to a more paternalistic mode. This pivot deprioritizes balancing political considerations inherent to the nature of protest, including the protester's rights of freedom of expression, in favour of preventing harms that the protester is wilfully causing to themselves. While the mental health regime is suitable as a safety net for the purposes of protecting those genuinely suffering from mental health conditions, the cautiousness of practitioners, the police, and the courts, and the shift from 'public order policing' to 'health care policing', create difficulties for ensuring the transparency and reliability of actions taken to detain those who may not be suffering from such conditions. The paternalistic pivot in practice risks failing to give sufficient weight to the rights of autonomy, expression, and assembly of self-harming protesters.

[10] The authors are a legal academic and a practising psychiatrist. On transdisciplinarity, see P. L. Rosenfield, 'The Potential of Transdisciplinary Research for Sustaining and Extending Linkages between the Health and Social Sciences' (1991) 35 *Social Science & Medicine* 1343; S. Burris et al., 'A Transdisciplinary Approach to Public Health Law: The Emerging Practice of Legal Epidemiology' (2016) 37 *Annual Rev. of Public Health* 135.

[11] The law at least *claims* to operate under a liberal mode. As will be discussed, recent restrictions on the right to protest demonstrate perhaps a more illiberal turn. However, these new laws are certainly not paternalistic, in that no claim is made by these laws or their proponents that they are designed with the interests of the protesters themselves in mind.

[12] J. Hopton, 'Reconceptualizing the Theory–Practice Gap in Mental Health Nursing' (1996) 16 *Nurse Education Today* 227; D. Warrender, 'Mental Health Nursing and the Theory–Practice Gap: Civil War and Intellectual Self-Injury' (2022) 29 *J. of Psychiatric and Mental Health Nursing* 171.

2 | ENGLISH AND WELSH LAW ON PROTEST AND VIOLENCE: THE LIBERAL MODE

A liberal mode of protest governance aims to prioritize the individual's autonomy, and chiefly regulates their behaviour only to the extent that it is necessary to do so to protect the interests of others – of either other citizens or the state itself.[13] Conversely, a paternalistic mode allows for the regulation of behaviour where it is deemed to be in the best interests of that individual (here, the protester) to do so.[14] Legal paternalism depends on the proposition that the state is best placed to make certain decisions about and for its citizens, in their best interests. As such, legal paternalism contradicts liberal democratic theory in two key respects. First, it allows the state to make decisions about what constitutes 'the good', instead of the individual. Second, it undermines the individual's autonomy to pursue their own conceptions of the good.[15] Legal liberalism therefore can only accommodate what Joel Feinberg (perhaps the most prominent critic of legal paternalism) called 'soft paternalism', where the individual is deemed not to have the legal capacity to consent or make their own volitional decisions – for example, where they are too young, or have a mental disorder, such as to render decision making difficult or impossible.[16]

It is possible for people with mental and legal capacity to choose to self-harm. Writing in the 1980s, Feinberg suggested that self-harm is usually attributable to either 'fraudulent' self-harm claims for attention or insurance payouts, 'madmen', or 'religious fanatics seeking purification or atonement'.[17] However, as the examples mentioned in our introduction demonstrate, capacitous and voluntary self-harm is possible. What is lacking is a robust analysis of how these political theories of liberalism and paternalism relate to the phenomenon of voluntary and political self-harm, through our existing law and practice.

To understand this relationship, we must examine the law itself within its purportedly liberal democratic context. Outside of cases where self-harming methods are used, the law's response to protest (violent or otherwise) broadly reflects a liberal mode of governance. In England and Wales, the individual's right to engage in non-violent protest is enshrined through the Human Rights Act 1998 (HRA), requiring public authorities to act in accordance with Articles 10 and 11 of the ECHR (the rights of freedom of expression and freedom of assembly, respectively).[18] There is a positive duty under domestic law to facilitate non-violent protest.[19] As such, peaceful protests are purportedly governed in a way that recognizes the importance of free speech, the value of protest within democracy, and the need for a balance of interests between protesters and the general public.

[13] J. Raz, *The Morality of Freedom* (1986) 38–69; J.-J. Rousseau, 'The Social Contract' in *The Social Contract and Other Later Political Writings*, ed. and trans. V. Gourevitch (1997) 156; A. J. Simmons, *Moral Principles and Political Obligations* (1979) 3; cf. B. A. Ackerman, *Social Justice in the Liberal State* (1980) 10–12, 43–45, 327–348. On equal concern and respect, see R. Dworkin, 'What Liberalism Isn't' *New York Rev. of Books*, 20 January 1983, at <https://www.nybooks.com/articles/1983/01/20/what-liberalism-isnt/>.

[14] J. Feinberg, *The Moral Limits of the Criminal Law, Volume 3: Harm to Self* (1989); J. Feinberg, 'Legal Paternalism' (1971) 1 *Cdn J. of Philosophy* 105. See also J. Kleinig, *Paternalism* (1993); J. Kleinig, 'Paternalism and Human Dignity' (2017) 11 *Criminal Law and Philosophy* 19.

[15] Feinberg, id. (1971).

[16] Feinberg, op. cit. (1989), n. 14, pp. 11–12.

[17] Id., p. 145.

[18] While Article 9 on the rights of freedom of thought, conscience, and religion also factors in many protest cases (see for example *Attorney General's Reference No. 1 of 2022* [2022] EWCA Crim 1259), most domestic and European Court of Human Rights (ECtHR) case law centres on Articles 10 and 11, which will therefore remain the focus for the present discussion.

[19] *Plattform 'Ärzte für das Leben'*, op. cit., n. 3.

This is not to say that *all* acts of peaceful protest are lawful in England and Wales, nor that the state does not impose restrictions on the right to protest in ways that might be called illiberal. First, offences such as obstruction of the highway and failing to comply with an officer's orders to disperse entail criminal sanctions for what would otherwise be peaceful protests. As Carolijn Terwindt argues, we must be cautious of the state's ability to delegitimize forms of protest through criminalization.[20] Nevertheless, it is broadly understood that certain limitations on peaceful assembly may not necessarily be incompatible with liberal governance, particularly where those limitations are prescribed by law and necessary in a democratic society to protect certain legitimate interests of other people.[21]

Second, however, such intrusions can seem to extend beyond what is necessary, and may in fact appear to reflect a more repressive approach that is difficult to reconcile with standard conceptions of liberalism. In particular, controversial recent legislation seems to depart from the underlying justificatory rationale of liberal public order governance. For example, Part 3 of the Police, Crime, Sentencing and Courts Act 2022 (PCSCA) includes provisions that tighten the regulation of assemblies that cause noise, and the Public Order Act 2023 introduces offences of 'locking on' and introduces stop-and-search powers and civil orders to prevent certain persons from attending protests. Such provisions have all been criticized for their illiberal approach and their potential chilling effects on peaceful protest.[22] However, they are criticized *as such* – for departing from our received understandings of what liberal governance of protest entails. The underlying justificatory rationale remains one of *purportedly* liberal democratic governance. Criticism is levelled at the government precisely for the failure in these instances to provide protection to the rights of peaceful protest that would otherwise be expected in liberal democratic states.[23]

Violent protest does not receive the same protection in liberal democratic theory, nor in English and Welsh law. It is deemed antithetical, and potentially harmful, to the liberty of citizens in such societies, due to its capacity to limit or destroy their freedoms and democratic participation.[24] It also contravenes the harm principle, an implicit presumption in liberal democratic theory. Legally, violent protest, in the sense of protest action that causes or threatens harm to others or their property, falls outside of the scope of both Article 10 and Article 11, and therefore beyond the protections under those Articles altogether.[25] There is no duty under either the ECHR or domestic law to accommodate such protests. Instead, under domestic law (as will be discussed presently), violent protest is criminalized – chiefly through statute, with further powers of arrest given under the common law doctrine of breach of the peace (BoP). This is compatible with the ECHR's

[20] C. Terwindt, *When Protest Becomes Crime: Politics and Law in Liberal Democracies* (2020).

[21] ECHR, Art. 10(2).

[22] Joint Committee on Human Rights, *Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order) Second Report of Session 2021–22* HC 2021–22 331; HL 2021–22 23, 40–42; Joint Committee on Human Rights, *Legislative Scrutiny: Public Order Bill, First Report of Session 2022–23* HC 2022–23 351; HL 2022–23 16, 24.

[23] There remain important criticisms of the purportedly liberal mode of protest governance, including that it grants too much power to the state to limit peaceful protest under the argument that it is necessary to do so to protect certain legitimate interests. It also allows organs of the state to exercise 'disciplinary' power over protesters, which effects a 'normalization' of their behaviour, limiting potential political challenges: see G. Hayes et al., 'Disciplinary Power and Impression Management in the Trials of the Stansted 15' (2021) 55 *Sociology* 561. Here, we focus on the equally important, though differently governed, regulation of self-harming protests, which we argue can fall outside the limited interest-balancing protections afforded by the liberal approach altogether.

[24] J. Schwarzmantel, *Democracy and Political Violence* (2001); H. Arendt, *On Violence* (1970); P. Singer, *Democracy and Disobedience* (1977) 82.

[25] *Kudrevičius*, op. cit., n. 3.

underlying rationale and reflects liberal democratic theory's prioritization of peaceful protest to the exclusion of violent protest.

It therefore follows that the law focuses on violence committed against third parties, not the self. The statutory framework of the Public Order Act 1986 criminalizes protest violence through Sections 1–3 – the offences of riot, violent disorder, and affray, respectively. Though each offence differs – chiefly regarding how many persons are involved – they have important commonalities. Each offence occurs where the defendant uses or threatens to use unlawful violence, and where a person of 'reasonable firmness present at the scene' would fear for their personal safety. This covers most forms of violent protest arising in a liberal democracy, such as clashes with the police or counter-protesters, and violent public disorder.

Violence to the self, however, falls outside the scope of these statutory offences. First, violence against the self is not unlawful – a requirement under Subsection (1) of each of Sections 1–3, above. Second, violence to the self need not cause others to fear violence against themselves – another requirement under these sections. Even if one were to construe 'violence' widely, so as to include harm exclusively to the self – a possible but tenuous reading under the vague definition of 'violence' under Section 8 of the Act – without this capacity to cause fear of violence in bystanders, any self-inflicted harm would lie outside the legislative scope anyway. As such, self-harming violent protest would not fall under these main statutory provisions.

Other provisions under the Act are unlikely to bite, even where they do not require violence against others – and where they do bite, they provide potential defences to protect the protester's Article 10 and 11 rights in doing so. Section 4, on causing fear or provocation of violence, only provides an offence where a person uses threatening, abusive, or insulting words or behaviour, or distributes or displays to another person any visible representation that is threatening, abusive, or insulting. This actus reus component itself is unlikely to extend to self-harming in public. While, for example, a visible, visceral cutting might be a 'visual display' of sorts, this alone is unlikely to constitute behaviour that threatens, abuses, or insults others.[26] The provision also requires an intention 'to cause [another] to believe that immediate unlawful violence will be used against him or another … or to provoke the immediate use of unlawful violence'. In the sorts of self-harm cases that we have previously outlined, none of this is applicable.

Conversely, Section 4A of the Act might come closer to criminalizing self-harming behaviour in public, though only in certain, more extreme cases. Section 4A provides that a person is guilty of an offence if, with intent to cause a person harassment, alarm, or distress, they use threatening, abusive, or insulting words or behaviour, or *disorderly behaviour*, thereby causing that or another person harassment, alarm, or distress. The terms of this provision are notoriously broad, and have been the subject of academic criticism for their infringement of free speech that is intentionally alarming or insulting.[27] It is feasible to conceive of a public, visceral form of self-harm meeting these criteria. Given a dramatic form of self-harm undertaken precisely to cause alarm, drawing attention to the protester and their cause, their behaviour might be called 'disorderly' given its ordinary English meaning (though see below), and it may cause alarm or distress to other persons. Likewise, Section 5 of the Act criminalizes disorderly behaviour if it is 'within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby'. No person actually need be

[26] *Brutus* v. *Cozens* [1973] AC 854, 862: 'threatening, abusive or insulting behaviour' must be given the ordinary meaning of those adjectives.

[27] A. Geddis, 'Free Speech Martyrs or Unreasonable Threats to Social Peace? "Insulting" Expression and Section 5 of the Public Order Act 1986' (2004) *Public Law* 853.

caused distress. In terms of mens rea, unlike under Section 4A, here intention is not necessary; per Section 6(4), all that is necessary is for the defendant to be 'aware that it may be disorderly'.

Much therefore turns, for both Sections 4A and 5, on what constitutes 'disorderly' behaviour. This includes behaviour that is less than abusive or insulting, but seems to fall short of what is 'orderly' behaviour. David Mead suggests that this should be given its 'ordinary meaning', and that violence to others is not necessary for the purposes of this offence.[28] Recent case law indicates that there does still need to be some real risk of public disorder due to defendants' actions.[29] Self-harm in public may be considered as posing such a risk only to the extent that it provokes strong reactions in other people, particularly where it is likely to provoke them to cause disorder.[30] However, as there are no reported cases of public self-harming behaviour being categorized as such, it cannot be said for certain what type of public self-harm could meet that level of 'disorderly' conduct, absent perhaps self-immolation. It is not clear whether acts of lip stitching or cutting, for example, are likely to cause 'disorder' in others, as it is understood in the case law.

Furthermore, even in cases where disorderly behaviour *could* be proved, both Sections 4A and 5 allow for possible defences where the behaviour is 'reasonable'. Under *DPP* v. *Ziegler*, this would still count as a statutory reasonableness defence, which provides a defence where the purpose of the behaviour was to engage in protest activity.[31] A balancing of Articles 10 and 11 would need to be undertaken before a prosecution could be successful in such cases.[32] In the recent case of *R (DPP)* v. *Manchester City Magistrates' Court*, the High Court found that the *Ziegler* defence was applicable in a Section 4A case where the defendant called a Conservative politician 'Tory scum' with intention to cause alarm or distress.[33] As such, though these provisions might indeed allow for the prosecution of particularly distressing and disorderly public acts of self-harming protest, they nevertheless may preserve the protections afforded through a proportionality balancing exercise by the courts.

Similarly, the offence of public nuisance under Section 78 of the PCSCA might produce an offence that applies here, where a person performs an act that 'creates a risk of, or causes, serious harm to the public or a section of the public', where serious harm includes 'serious distress, serious annoyance, serious inconvenience or serious loss of amenity'. Again, however, it is far from evident whether such provisions would bite here. Just as it is arguable whether certain acts of self-harm would necessarily be considered alarming or distressing for the purposes of the Section 4A offence, it is unclear whether they would further reach the level of 'seriousness' required of this provision. Even under these provisions, which are at the very edge of what might be called liberal protest governance, it remains uncertain whether self-harming protests therefore would be subject to this sort of criminal sanction.

[28] D. Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (2010) 223 fn. 280.

[29] *Campaign Against Antisemitism* v. *DPP* [2019] EWHC 9 (Admin).

[30] Mead, op. cit., n. 28, p. 219.

[31] *DPP* v. *Ziegler* [2021] UKSC 23. However, note that there appears to have been a retreat from the wider *Ziegler* proportionality defence, as a factual, case-by-case analysis of proportionality, in the later cases of *Attorney General's Reference No. 1 of 2022* [2022] EWCA Crim 1259 and *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32. It is unclear where this leaves *Ziegler* for the purposes of statutory offences with 'reasonable excuse' defences other than under the Highways Act. The potential effects of these decisions have been discussed elsewhere: S. Martin, 'Proportionality and Protest-Related Offences' (2023) 82 *Cambridge Law J*. 204; A. Deb, '*The Safe Access Zones Bill Reference* [2022] UKSC 32: Clearing the Fog of Proportionality?' (2023) 74 *Northern Ireland Legal Q*. 619.

[32] *Dehal* v. *CPS* [2005] EWHC 2154 (Admin).

[33] *R (DPP)* v. *Manchester City Magistrates' Court* [2023] EWHC 2938 (Admin).

Separately to these statutory provisions, the common law on BoP allows the police to issue instructions breaking up assemblies, and to arrest and detain persons who are causing BoP, but it is unclear whether this could extend to self-harming protest. The rule in the landmark case of *R* v. *Howell*, given by Watkins LJ, is that the police can only use these powers where, as a result of violence, the officer believes that any of the following will result: a person will be injured, a person will fear being injured, or a person's property will be damaged in their presence.[34] The cases of *Percy* v. *DPP* and *Steel* v. *UK* confirm this position in the common law and its compatibility with the ECHR, respectively.[35] These cases all presume that harm to a third party must be anticipated. It is clear in *Howell* that Watkins LJ was speaking of violence to third parties; the same is clear in the judgments of *Percy* and *Steel*. None of these cases discusses the possibility of using these powers to prevent an individual from harming themselves.

Were the police to interpret the rule in *Howell* to include self-harm regardless, and use their common law powers to detain self-harming members of the public, they might make some tentative arguments to support such arrests. First, the powers under BoP do not require a particular crime to be committed.[36] As such, while self-harm is not a crime in England and Wales, this alone does not prevent officers from invoking their powers where the *Howell* criteria are otherwise in play. Second, it is lawful for an officer to detain a person under BoP even if they do not anticipate that the person will be brought before a magistrate or other judicial body. The Supreme Court in *R (Hicks)* v. *Commissioner of Police for the Metropolis* confirmed that officers do not breach their duty under Article 5 of the ECHR to only arrest persons pending their appearance before a competent legal authority, where they act proportionately and fairly.[37] As such, provided 'violence' could be construed widely to include self-inflicted harm, it would be possible to argue in favour of the police using these powers to detain a self-harming protester.

However, such an interpretation would be inconsistent with the overall thrust and purpose of *Hicks*. Toulson LJ, who delivered the court's unanimous judgment, emphasized that this rationale was justified on the premise that Article 5 'must not be interpreted in such a way as would make it impracticable for the police to perform their duty to maintain public order and protect the lives and property of *others*'.[38] The judgment continuously refers to public safety and the risk of violence 'to others' within its reasoning; it is the prospect of a crime being committed, and violence being inflicted on other persons, that justifies arrest. Where the sole foreseeable harm is directed towards the detainee in question, and no crime is likely to be committed, this justificatory rationale would have no purchase. As such, it would not be lawful for an officer to arrest and detain a person who is harming only themselves under BoP.

The police also appear to adopt this interpretation of *Hicks*. The College of Policing refers explicitly to *Hicks* in its professional guidance on detaining persons who may be suffering from a mental disorder. Using BoP powers where an officer is not detaining an individual to place them 'before a competent legal authority' (such as a magistrate) would be a breach of ECHR rights.[39] The same rationale would no doubt apply for an arrest under BoP for a self-harming individual who did not have a mental disorder.

[34] *R* v. *Howell* [1982] QB 416; [1981] 3 All ER 383.

[35] *Percy* v. *DPP* [2001] EWHC Admin 1125; *Steel* v. *UK* [1999] 28 EHRR 603.

[36] *Howell*, op. cit., n. 34.

[37] *R (on the Application of Hicks and Others)* v. *Commissioner of Police for the Metropolis* [2017] UKSC 9.

[38] Id., [29], emphasis added.

[39] College of Policing, 'Authorised Professional Practice: Mental Health – Detention' *College of Policing*, 3 November 2020, at <https://www.college.police.uk/app/mental-health/mental-health-detention>.

Finally, it should be noted that under Section 24 of the Police and Criminal Evidence Act 1984 (PACE) an officer may only arrest a person to prevent 'causing physical injury to himself or any other person' *if* that person is guilty of an offence or if the officer has reasonable grounds to believe that they are guilty, or will be guilty, of such an offence. This being so, again, an officer cannot arrest and detain a protester under this power purely for harming themselves – no such offence exists in English and Welsh law – absent them committing some other relevant crime.

It is perhaps unsurprising – given that the chief rationale for these methods of regulation is founded on the harm principle and the exclusion of violence *to the freedoms of others* from public life – that these mechanisms do not apply to self-inflicted harms. Again, self-harm itself is not a criminal offence in England and Wales. Since the decriminalization of suicide under Section 1 of the Suicide Act 1961, there has been no specific criminal offence against harming oneself, fatally or otherwise. This decriminalization reflected growing popular attitudes, vocalized most prominently at the time in the *Wolfenden Report*, that acts that do not harm third parties are not the proper subject of criminal law.[40] This liberal position on the physical and moral autonomy of individuals to decide whether to harm themselves remains dominant in most Western states – notwithstanding underlying conservative attitudes as to the innate moral wrongfulness of suicide.[41]

Given that the underlying rationale of the powers to interfere with acts of protest is chiefly to protect the interests of others, acts of protest that do not cause harm to others or public disorder do not need to be subsumed within this framework. The harm principle does not bite. Even if the act of protest is distressing to other members of the public, or requires the use of state resources for monitoring or even resuscitating self-harming protesters, this is no different to the effects that entirely peaceful protest might have. Protest where no violence is committed, against oneself or others, is capable of causing these secondary effects; yet this alone does not justify criminal regulation and state interference.[42] Indeed, given that there is a duty to facilitate non-violent protest under the ECHR, and that self-harming protest does not fall under the legal definitions of violence, the state may indeed have a *positive* obligation to facilitate protesters who are engaged in self-inflicted protest violence. This leads us to an important conclusion: that under a liberal democratic mode, capacitous and wilful self-harming protest should not only not be criminalized, but also be protected as part of our wider democratic dialogue.

However, the state may have obligations of interference beyond this liberal framework. Especially in prisons and immigration detention centres, the state has positive legal obligations to preserve the health of detainees.[43] This in turn may produce an obligation either to deter and prevent these forms of protest, or to engage in emergency action if the protest harm reaches a stage where the protester's life is at stake. Furthermore, the risk that detainees may engage in these actions imposes an additional burden on the state: to make detention conditions such that such acts of protest and self-harm are unlikely to arise in the first place.[44] High rates of self-harm and suicidality in custody can be demonstrative of the state failing its international obligations to

[40] J. Wolfenden, *The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution* (1957). See also N. Osborough, 'Suicide Act 1961 (United Kingdom)' (1964) 15 *Northern Ireland Legal Q*. 311; L. Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016).

[41] G. J. Fairbairn, *Contemplating Suicide: The Language and Ethics of Self-Harm* (1995) 152–159.

[42] G. Sharp, *The Politics of Nonviolent Action*, *vol. 2* (1973) 69–71; J. Raz, *The Authority of Law: Essays on Law and Morality* (1979) 267.

[43] *Keenan* v. *UK*, App. No. 27229/95 (ECHR, 3 April 2001).

[44] Id.

detainees, either with regard to the preservation of life or to the treatment of detainees and the maintenance of their living standards more generally.

We should be cautious, however, before pivoting to this more protective framework. Lucy Fiske explains how detainees in immigration centres who engage in self-harming protest tactics often have their actions undermined by state narratives of the barbarity of the acts, and the desperation and irrationality that they interpret in these forms of violence.[45] Such attempts to present the narrative in this way wilfully misconstrue the protesters' ultimate aim: to reclaim their own agency and humanity in the face of oppression, drawing attention to the injustices that they face. Returning to the example of hunger strikes during the Troubles, Chris Yuill argues that part of the effect of these protests was the considered, rational re-authorship that autonomous prisoners exercised over their own bodies.[46] State narratives against the rationality of such protests serve a dual purpose: first, symbolically, to undermine their potency and legitimacy; and second, legally, to negate the capacity of the protester. What happens at this stage is a shift to a paternalistic justification for state interference, and a departure from the liberal mode, *against* the interests of the protester in question.

The legal framework as it stands, then, creates a tension between the state's positive obligation to preserve the life of detainees – particularly where there is reason to believe that the individual in question may lack capacity – and its positive obligation to facilitate protests that are not harmful to others. It is understandable, given that the justificatory rationale of the criminalization of violent protest is the protection of the rights and freedoms of others, that these criminal laws should *not* apply to acts of protest where the sole recipient of harm is oneself. The general rationale of public order law in regulating rights of protest is to protect the welfare or interests of *others* within the community, rather than necessarily the welfare or interests of the *individual*.[47] At the very least, there is a considered balancing of Article 10 and 11 rights against those wider public interests and aims. However, where the public order system of protest regulation fails, it is possible that instead the state and its agents may rely on a very different system of regulation – namely, mental health regulation. Here, the state pivots towards a more paternalistic regulatory framework, prioritizing the welfare of the individual, thereby shifting focus away from the Article 10 and 11 considerations altogether.

3 | MEDICAL LAW AND SELF-INFLICTED VIOLENCE: USURPING THE LIBERAL MODE

This section begins with an overview of the relevant mental health legislation, and how it appears at first glance *not* to justify interference with self-harming protesters absent a relevant mental disorder. This legislative framework may seem prima facie to fit within the liberal mode, because it prioritizes the autonomy of a capacitous individual. It limits state interference with self-harming protesters, consistent with the acceptable limitations of soft paternalism: first, the protester's actions must be in some way explicable through a recognized mental disorder; second, guidance for practitioners advises against unnecessary infringements of patient autonomy. However, it will be shown that professional practice encourages a cautious approach that favours

[45] L. Fiske, 'Human Rights and Refugee Protest against Immigration Detention: Refugees' Struggles for Recognition as Human' (2016) 32 *Refuge* 18.

[46] Yuill, op. cit., n. 5.

[47] Mead, op. cit., n. 28, pp. 18–20.

protective detention, even where the presence of a mental disorder is unclear, demonstrating a pivot towards the paternalistic mode of regulating self-harming protest.

In practice, the state often takes a medicalized view of self-harm and suicidality. Most notably, this operates through the Mental Health Act 1983 (MHA), as revised in 2007.[48] The MHA empowers specified persons to detain those suffering from a mental disorder and deemed to be a risk to themselves or others. Several sections of the MHA may be relevant in a situation of political self-harm. In a public space, the police may use powers under Section 136:

> If a person appears to a constable to be suffering from mental disorder and to be in immediate need of care or control, the constable may, if he thinks it necessary to do so in the interests of that person or for the protection of other persons, … remove the person to a place of safety.

Such a 'place of safety' is usually a hospital, but can be more broadly construed on occasion, and may be a police station.[49] Section 136 enables officers to remove a person from a public space for up to 24 hours for further assessment of their mental health.

Alternatively, or subsequently, a person may be assessed by a registered medical practitioner for consideration of admission to hospital under Section 2 of the MHA (subject to review by an independent, approved registered medical practitioner, and an approved mental health professional):

> An application for admission for assessment may be made in respect of a patient on the grounds that –
>
> - he is suffering from mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; and
> - he ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons.

Though the specific wording is different, in both cases we have a two-stage test. The second stage would seem simple in cases of political self-harm. Under Section 136, 'in immediate need of care or control' could likely be justified if a person is seriously harming themselves. Similarly, Section 2(b) would be fulfilled on the grounds of their own health or safety. Therefore, the crucial question becomes whether the person is suffering from a mental disorder under Section 2(a), which is much less clear-cut. In making this assessment, the *Mental Health Act 1983: Code of Practice* is worth considering at some length:

> Difference should not be confused with disorder. No one may be considered to be mentally disordered solely because of their political, religious or cultural beliefs, values or opinions, unless there are proper clinical grounds to believe that they are the symptoms or manifestations of a disability or disorder of the mind. The same is true

[48] Separately to this, the Mental Capacity Act 2005 makes provision for the definition and assessment of mental capacity, but does not itself contain the provisions for detention that are the principal focus here, and so is not discussed at length.

[49] PACE Code C (2019) 3.16 and Annex E, 6, at <http://www.gov.uk/government/publications/pace-code-c-2019/pace-code-c-2019-accessible>.

> of a person's involvement, or likely involvement, in illegal, anti-social or 'immoral' behaviour. Beliefs, behaviours or actions which do not result from a disorder or disability of the mind are not a basis for compulsory measures under the Act, even if they appear unusual or cause other people alarm, distress or danger.[50]

Clearly, therefore, self-harm as a *solely* political act should never be grounds for using powers set out in the MHA. As such, the question depends on whether such actions are explicable in full or in part by the presence of a mental disorder, and how such a determination is practically made. The MHA itself does not require diagnosis of a specific mental disorder, only evidence of one. Indeed, the purpose of admission under Section 2 is to enable further assessment and diagnosis. However, self-harm is often a feature of affective, psychotic, or personality disorders.[51] It is likely that a mental health professional would consider serious acts of self-harm as sufficiently indicative of an underlying mental health disorder to warrant a period of assessment.[52]

As such, detention only seems justified given circumstances that broadly fit within Feinberg's conception of soft paternalism – that is, that decisions can be made on behalf of the liberal subject where they are unable to make them themselves due to mental illness.[53] A relevant mental disorder must be present, or likely to be present. Where this has the effect of diminishing the ability of the individual to make rational choices, it cannot be considered truly to be an unjustifiable interference with the freedom of the individual for the state to act to protect them, at least under a liberal mode of governance.

However, while the above discussion describes how the law could be applied in theory, seeming to err in favour of the autonomy of protesters, in practice this is a very different matter. Mental health practitioners and academics have observed a theory–practice gap, prevalent throughout both the training and medical practice of psychiatrists and mental health nurses.[54] This gap represents the disjunct between what is taught to trainee psychiatrists, mental health nurses, and other specialists – including medical law and practice as it is taught academically and vocationally – and what rationalizations and decisions are made in practice. Given a situation where the police have used Section 136 powers to detain a protester who has been self-harming (even if not to a serious degree of harm) and may well be presenting as distressed and emotionally dysregulated, for example, it is easy to imagine mental health practitioners making recommendations for sectioning, erring on the side of detention.

The theory–practice gap is exacerbated when practitioners must act quickly or without the relevant information necessary to make fully informed decisions. Mandy Dixon and Femi Oyebode argue that in making assessments under the MHA, practitioners must factor in several 'uncertainties' in determining levels of risk.[55] This difficulty increases where there is a lack of reliable evidence of previous medical history, or where the reported circumstances of the individual's behaviour are unclear; both are likely in the case of a public act of self-harming

[50] Department of Health, *Mental Health Act 1983: Code of Practice* (2015) para. 2.8.

[51] M. Zetterqvist, 'The DSM-5 Diagnosis of Nonsuicidal Self-Injury Disorder: A Review of the Empirical Literature' (2015) 9 *Child and Adolescent Psychiatry and Mental Health* 31.

[52] K. Hawton et al., 'Psychiatric Disorders in Patients Presenting to Hospital Following Self-Harm: A Systematic Review' (2013) 151 *J. of Affective Disorders* 821.

[53] Feinberg, op. cit. (1989), n. 14, pp. 11–12.

[54] Hopton, op. cit., n. 12; Warrender, op. cit., n. 12, pp. 171–173.

[55] M. Dixon and F. Oyebode, 'Uncertainty and Risk Assessment' (2007) 13 *Advances in Psychiatric Treatment* 70.

protest. Further, mental health practice leans towards a precautionary approach, being a working environment that Frank Holloway describes as dominated by a 'risk agenda'.[56] For example, mental health practitioners often prioritize risk management over recovery-oriented care in cases where self-harm is a concern.[57] In making a prudential assessment, mental health practitioners are more likely to focus on the protection of a self-harming protester's health and welfare than their rights of freedom of expression, even in cases of relatively superficial forms of self-harm.

There are other prudential reasons why practitioners would take this precautionary approach, relating more to the interests of the medical professional than the protester. Should the protester continue to self-harm or even end their own life, whether deliberately or accidentally, the practitioners (and the NHS trust in question) may find themselves under investigation by the coroner, with potential allegations of professional negligence. There is furthermore an institutional pressure to mitigate the risk of legal challenges in negligence or under the HRA. The ECtHR has emphasized the state's duty under Article 2 of the ECHR to preserve life, once it is aware of the potential risk posed by a person known to be suffering from a mental disorder who is threatening or may threaten to harm themselves.[58] The practitioner is likely therefore to be conscious of the demands of their trust in mitigating against such risks.

Underlying all of these problems is the fact that practitioners are trained to identify self-harm as a symptom.[59] This makes them more likely to interpret such behaviour as symptomatic of mental illness than as a form of political expression. This problem is exacerbated when psychiatrists bring mistaken beliefs about self-harm into their decision-making process. Research by Debra Jeffery and Anna Warm into medical practitioner attitudes to self-harming patients found that, compared to community and social care workers, psychiatrists in particular are more prone to hold and apply mistaken views about self-harm – including that it 'is a sign of madness', that the 'best way to deal with people who self-harm is to make them stop', and that 'people who self-harm should be kept in psychiatric hospitals'.[60] Given the crucial importance of identifying a mental disorder under Section 2(a), as previously discussed, this risks undermining the main safeguard in the MHA that aligns it with soft paternalism. In doing so, the practitioner engages in the paternalistic pivot; by treating self-harm as a synecdoche for mental illness, and presuming therefore that the protester's rationality is in some way diminished, the practitioner thereby usurps their status as an autonomous subject. Instead, they become the focus of paternalistic state intervention through medicalization.

The focus thereby shifts to the risks posed to the individual in question, whose apparent disorder differentiates them from the standard 'liberal legal subject'.[61] As such, they are excluded from the liberal mode of regulation, which focuses on the freedoms of the individual as a

[56] F. Holloway, 'Reading about: Risk Assessment' (1998) 173 *Brit. J. of Psychiatry* 540.

[57] M. Haddad and N. Young, 'Self-Harm and Suicide: Occurrence, Risk Assessment and Management for General Nurses' (2022) 37 *Nursing Standard* 71.

[58] *Mammadov* v. *Azerbaijan* [2014] 58 EHRR 18.

[59] K. E. A. Saunders et al., 'Attitudes and Knowledge of Clinical Staff Regarding People Who Self-Harm: A Systematic Review' (2012) 139 *J. of Affective Disorders* 205.

[60] D. Jeffery and A. Warm, 'A Study of Service Providers' Understanding of Self-Harm' (2002) 11 *J. of Mental Health* 295, at 299–300.

[61] B. Clough, 'Disability and Vulnerability: Challenging the Capacity/Incapacity Binary' (2017) 16 *Social Policy and Society* 469.

rational, autonomous individual, and which regulates their exercise of those freedoms chiefly with reference to the freedoms of others. Here, provisions under the MHA reflect a more paternalistic mode of addressing self-harming protesters.[62] The justificatory rationale for interference changes – that the individual must be protected from themselves; so too does the mechanism for determining the scope and extent of that interference – namely, the level of risk ascertained by the practitioner. This is so even if the practitioner's cautiousness is motivated, consciously or otherwise, by their own interests rather than the patient's.

This paternalistic pivot leaves unspoken another shift in focus – namely, regarding the relevant ECHR rights to which the protester would otherwise appeal. Whereas under the liberal mode, rights of expression and assembly are the chief focus of analysis, in cases of self-harm, the rights to life and to the prevention of inhumane treatment come to the fore. However, as we will see in the next section, as a result the Article 10 and 11 protections risk being overlooked.

4 | THE RESPONSE OF THE POLICE AND THE COURTS TO SELF-HARM: REINFORCING THE PATERNALISTIC MODE

The paternalistic pivot can be seen not only among medical professionals, as detailed above, but also police officers and the courts themselves. This ultimately risks, in practice, a failure to provide suitable protections to the rights of expression and assembly of self-harming protesters.

4.1 | The police

The police's role in assisting mental health practitioners is important, given that they are often the first responders to incidents of purported violence.[63] Health care professionals often rely on officers to bring in individuals under Section 136 and to gather information for subsequent mental health assessments for the detainee.[64] This puts a heavy burden of responsibility on individual officers, whose choices at the point of interaction may lead to the individual following a very different regulatory pathway, either criminal or medical. Once this initial choice has been made, there is a large degree of path dependency; should Section 136 be employed, it is unlikely that there will be a subsequent switch to prosecuting for public order offences, and vice versa.

Police cautiousness is likely to cause disproportionate and undue interference with a protester's rights in two key respects. First, pragmatically, officers err on the side of caution when presented with a self-harming individual. In part, this is exacerbated by the fact that there is a lack of accountability for police decisions to detain under Section 136 of the MHA. Second, more broadly, in making such decisions there is a blurring of the police's public order and health care roles. This does not allow for the usual considerations of the individual's autonomy or rights of freedom of expression applicable in cases of non-self-harming protests.

[62] H. Bladon, 'Avoiding Paternalism' (2019) 40 *Issues in Mental Health Nursing* 579.

[63] Sainsbury Centre for Mental Health, *Briefing Paper 36: The Police and Mental Health* (2008), at <https://www.centreformentalhealth.org.uk/wp-content/uploads/2018/09/SainsburyCentre_briefing36_police_final_small.pdf>.

[64] K. Wright et al., 'Managing Mental Health Situations' (2008) 131 *Police Professional* 18; K. Wright and I. McGlen, 'Mental Health Emergencies: Using a Structured Assessment Framework' (2012) 27 *Nursing Standard* 48.

There is a wealth of professional literature and guidance on how officers should discharge their duties to prevent and mitigate self-harm for those in their custody. This ranges from the 2009 *Bradley Report* on the treatment of those with mental health disorders in the criminal justice system, to the McPin Foundation's 2016 report on the Crisis Care Concordat on responses to mental health crises, through to the 2018 report on police responses to vulnerable people and those experiencing mental health difficulties published by Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS).[65] However, none of this literature addresses the problem as it relates to acts of protest, and nowhere is the significance of a detainee's rights of freedom of expression given consideration. As such, police guidance on self-harming behaviours currently focuses solely on self-harm as it relates to mental illness and medical emergencies. The assumption appears always to be that the behaviour is a pathological and problematic one, not an autonomous expression made by the protester precisely to shock and draw attention.

In the absence of suitable guidance on this difficult area, several factors may lead officers to err on the side of caution and detain a self-harming protester. First, the powers under Section 136 are by their very nature paternalistic in purpose and scope. The phrasing of Section 136 envisions a paternalistic mindset on behalf of the police: 'if [the constable] thinks it necessary to do so *in the interests of that person*' (emphasis added). This indicates a substitution of the officer's judgement of the individual's best interests for their own. This is necessarily paternalistic in determining both that individual's concept of the good and how it is to be best achieved.[66] Similarly, this is seen in the assessment '[i]f a person appears to a constable to be suffering from mental disorder and to be in immediate *need of care or control*' (emphasis added).

One might argue that this also falls under soft paternalism, which is compatible with liberal democratic theory. The presumption here is that the individual in question *lacks* the mental capacity, and therefore legal capacity, to make rational decisions for themselves. Where there is a risk of them causing harm to themselves as a result, it is not (per Feinberg) an unjustifiable infringement of their freedoms for the police to act so as to prevent harm.[67]

However, officers are not trained to identify mental disorders, nor a lack of mental capacity.[68] The mere act of self-harm may be indicative of such, to an officer. The College of Policing's Authorised Professional Practice guidance mentions self-harm only with reference to its guidance on mental vulnerability and illness.[69] In doing so, it presents self-harm as an indication of 'acute behavioural disturbance' sufficient to justify removal and detention under Section 136.[70] As with medical practitioners, self-harm is treated as a synecdoche for mental

[65] K. Bradley, *The Bradley Report: Lord Bradley's Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (2009), at <https://basw.co.uk/sites/default/files/resources/basw_120004-10_0.pdf>; McPin Foundation, *Evaluation of the Crisis Care Concordat Implementation: Final Report* (2016), at <https://s16652.pcdn.co/wp-content/uploads/sites/24/2016/03/CCC-Evaluation_Report.pdf>; HMICFRS, *Policing and Mental Health: Picking Up the Pieces* (2018), at <https://hmicfrs.justiceinspectorates.gov.uk/publications/policing-and-mental-health-picking-up-the-pieces/>.

[66] Feinberg, op. cit. (1971), n. 14.

[67] Feinberg, op. cit. (1989), n. 14, pp. 11–12.

[68] R. Lane, '"I'm a Police Officer Not a Social Worker or Mental Health Nurse": Online Discourses of Exclusion and Resistance Regarding Mental Health-Related Police Work' (2019) 29 *J. of Community and Applied Social Psychology* 429.

[69] College of Policing, 'Authorised Professional Practice: Mental Vulnerability and Illness' *College of Policing*, 24 February 2022, at <https://www.college.police.uk/app/mental-health/mental-vulnerability-and-illness>.

[70] College of Policing, 'Authorised Professional Practice: Detention and Custody Risk Assessment' *College of Policing*, 28 February 2024, at <https://www.college.police.uk/app/detention-and-custody/detention-and-custody-risk-assessment#acute-behavioural-disturbance>.

disorder. Worse still, however, for the police, no actual identification of a mental disorder is involved at all.

Indeed, officers may not consider the assessment of mental illness to be their responsibility, let alone a priority. Rhiannon Lane found that officers are likely to conceive of and treat those apparently suffering from mental illness as 'deviant'.[71] She also found that officers often treat such people as being a potentially violent risk to officers themselves, justifying the use of force to detain them, while also aiming to 'deflect responsibility' onto mental health practitioners.[72] As such, the minimal protection afforded through some determination of a mental disorder is undermined, by both a lack of any training in making such a determination and an attitude commonly held by officers that it is not particularly their responsibility to do so.

There are several important differences between detention under Section 136 and an ordinary arrest, which then affect the procedural protections afforded to detainees. First, there is a statutory exclusion of liability for (what would otherwise be) unlawful detentions, provided under Section 139 of the MHA, so that officers and police services do not face criminal or civil liability 'unless the act was done in bad faith or without reasonable care'. This is a stronger threshold than unlawful arrests under, for example, Section 24 of the PACE, where the bar for liability for unlawful arrest is generally lower.[73] Officers are thereby given freer rein to err on the side of detention. Furthermore, detention under Section 136 does not require a caution, as it is not an arrest pursuant to potential criminal charge.[74] Officers may also use reasonable force for restraint; Schedule 2 of the PACE retains this. Given the contrasting risk of legal action when failing to protect an individual who is truly suffering from a mental disorder, it is unsurprising that officers would choose to exercise Section 136 detention on a precautionary basis. This is particularly so given that, as Robert Heaton observes, risk aversion is a growing aspect of police management and culture.[75] Officers are inclined to follow the path of least legal resistance, and to detain a self-harming protester so that they can be handed over to medical practitioners for assessment.

A further complication arises in that the College of Policing even blurs the lines when it comes to the very role of the police in such circumstances, between a public order role that operates under the liberal mode, and a health care role that operates paternalistically. Part of this blurring results from the protean nature of policing itself, and the indeterminate roles and purposes of the police in England and Wales.[76] Such roles include crime prevention and detection, public order management, and surveillance, but also community support and other miscellaneous roles, including what the College of Policing refers to as officers' 'health care capacity'. This police role is generally under-examined by academics and seems to have an ill-defined scope, but covers a wide range of activities that officers may undertake in the course of their duties.

[71] Lane, op. cit., n. 68, p. 438.

[72] Id.

[73] For example, arrests under Section 24 require genuine belief on the part of the officer in an objectively reasonable ground for suspicion, and that the arrest is necessary: *Hayes* v. *Chief Constable of Merseyside Police* [2011] 2 Cr App R 30.

[74] College of Policing, op. cit., n. 39; PACE Code G (2012) 1A.

[75] R. Heaton, 'We Could Be Criticized! Policing and Risk Aversion' (2011) 5 *Policing: A J. of Policy and Practice* 75.

[76] S. Charman, *From Crime Fighting to Public Protection: The Shaping of Police Officers' Sense of Role* (2018); R. Reiner, *The Politics of the Police* (2010, 4th edn); Independent Committee of Inquiry into the Role and Responsibilities of the Police, *The Role and Responsibilities of the Police* (1996), at <https://www.police-foundation.org.uk/wp-content/uploads/2017/06/roles_and_resp.pdf>.

The College of Policing guidance highlights this with a distinction that it claims to make as to 'whether the police are acting in a criminal justice or health care capacity or in both of these roles'.[77] In particular:

> When acting in a healthcare capacity, the police may be:
>
> - acting in support of healthcare agencies that are dealing with someone who is experiencing mental ill health – for example, the police may be exercising specific police powers
> - assisting a person who is experiencing mental ill health until healthcare professionals become involved[78]

Both are relevant in cases of self-harming protest. It appears that in both cases the legal mechanisms through which officers may act are those previously described, the most notable being Section 136 of the MHA.

The gear change from public order policing to health care policing in this context echoes the paternalistic pivot. Public order policing focuses on mitigating against public disorder and the potential harm to persons and property that it entails, as well as general disruption to the community. Illan rua Wall summarizes the role and purpose well: 'Public order techniques are employed to preclude unrest, or when disorder breaks out the apparatus seeks its minimisation, suppression, or exhaustion.'[79] Even a very repressive policing regime still ultimately engages in public order policing to maintain the status quo – that is, to protect the interests of *third parties*, rather than the protester themselves. In this role, the legal framework in which officers in England and Wales operate is as described in the first section: chiefly, the Public Order Act 1986, and the common law rules on BoP, and so forth, subject to a balancing of interests under the ECHR. Here, however, when using their powers under Section 136 of the MHA, the same logic regarding even a notional balancing of political interests is lost. No mention of the rights of expression or assembly are considered in this guidance. This can be contrasted with the College of Policing's *National Protest Operational Advice*, where relevant ECHR provisions (including Articles 10 and 11, explicitly) are placed front and centre.[80]

While there have recently been calls to limit police responses to mental health-related incidents,[81] it is unclear how this will itself provide greater protections to the rights of self-harming individuals. In July 2023, the College of Policing and National Police Chiefs' Council began the rollout of a new 'Right Care Right Person' toolkit, to be implemented by police services across England and Wales.[82] Its purpose is to allow police chiefs to adapt their services to

[77] College of Policing, 'Mental Health' *College of Policing*, 3 August 2016, at <https://www.college.police.uk/app/mental-health>.

[78] Id.

[79] Rua Wall, op. cit., n. 2, p. 92.

[80] College of Policing and National Police Chiefs' Council, *National Protest Operational Advice* (2023), at <https://assets.college.police.uk/s3fs-public/2023-06/National-protest-operational-advice.pdf>.

[81] M. Iftikhar, 'We Should Push for Non-Police Alternatives to Mental Health Crisis Response' (2023) 382 *Brit. Medical J.* 1935.

[82] College of Policing, 'Right Care Right Person Toolkit' *College of Policing*, 26 July 2023, at <https://www.college.police.uk/guidance/right-care-right-person-toolkit>.

meet a new partnership agreement, whereby officers only respond to mental health-related incidents

> to investigate a crime that has occurred or is occurring; or to protect people, when there is a real and immediate risk to the life of a person, or of a person being subject to or at risk of serious harm.[83]

While this seems to rule out police responses to much of the self-harming protest envisioned in this article, such as lip stitching, there are nevertheless reasons to be cautious. First, it remains to be seen how individual police services will implement this toolkit, and on whom the onus of making these decisions will fall. The reliance on a multi-agency response by 'health, social care and other relevant partners' begs the question whether local services are sufficiently resourced to manage this burden, when the police are not.[84] Second, it appears that there continues to be no mention of protest, or the ECHR, even in this new guidance. It is unclear whether the policy will therefore resolve the core problems of the paternalistic pivot, or whether it will simply replicate the problems of the theory–practice gap for mental health practitioners.

In summary, while public order policing and health care policing are not incompatible, their focus and priorities are different. Importantly, while public order policing looks towards balancing the rights of the individual with those of the community, in line with the ECHR, health care policing narrows its focus to identifying and protecting the best interests of the individual. For self-harming protesters, this places them at risk, once again, of the paternalistic pivot.

4.2 | The courts

Given their judicial role, and the relative lack of immediacy expected from their deliberations, one might assume that the courts are more likely than the police to consider the ECHR protections afforded to self-harming protesters, and to engage deliberatively in a rights-balancing exercise. However, this does not prevent the paternalistic pivot from taking effect there, too. Chiefly, this can be seen through the courts' willingness to attribute self-harm to a mental disorder, which can outweigh – or obviate – any attempt to balance rights of free speech and assembly.

There has yet to be a reported case of a self-harming protester coming to the courts *without* discussion as to their mental capacity. On the rare occasions that self-harming protesters do come before the courts, it is principally on the basis that they have lost capacity, and the issue arising is one of whether forcible treatment is a breach of their ECHR rights. A good example of this is *An NHS Trust v A*. An Iranian doctor went on hunger strike to seek leave to remain in the UK. The court decided that he lacked capacity due to a delusional disorder, though, as Baker J explained, there was one medical opinion to the contrary: 'From the outset the preponderance of opinion has been that he lacks capacity, although on 23rd July one consultant psychiatrist observed: "I think he has capacity and is making a political point." Most professionals, however, reached a

[83] Department of Health & Social Care, 'National Partnership Agreement: Right Care, Right Person (RCRP)' *Gov.uk*, 17 April 2024, at <https://www.gov.uk/government/publications/national-partnership-agreement-right-care-right-person/national-partnership-agreement-right-care-right-person-rcrp>.

[84] E. Mahase, 'Government Must Get a "Firmer Grip" on Mental Health Crisis, Says Watchdog' (2023) 380 *Brit. Medical J.* 324.

different conclusion.'[85] Baker J did concede, however, that forms of self-harming protest need not arise from a mental disorder such as to deprive the individual of capacity:

> It is not uncommon for people to go on hunger strike in the hope that the Government will be forced to change its policy. Hunger strikes are a legitimate form of political protest. Not all hunger strikers are suffering from a mental disorder. In this case, however, I am satisfied that Dr A is suffering from a delusional disorder and that this impairs the functioning of his brain by affecting his ability to use or weigh up information relevant to his decision whether or not to accept nourishment.[86]

This part of the ruling clearly demonstrates what Beverley Clough elsewhere refers to as the 'binary' position on capacity in English and Welsh medical law.[87] In short, the law treats mental capacity as an on/off switch. Where a patient is engaging in protest and is deemed not to be suffering from any mental disorder, they are deemed to have legal capacity. The courts will then uphold the virtues of political speech, and will factor in Article 10 and 11 rights in making a decision to deprive them of liberty. Where a disorder is found, however, the protest action is considered irrational and is not framed at all within this political language.

Again, one could argue that, at least in liberal democratic theory, there is nothing inconsistent with this binary approach. Where the patient is deemed to have capacity, the position is clear that treatment may be refused (even unreasonably) by them, and cannot be forced on them.[88] The underlying rationale for this is respect for the patient's autonomy. Conversely, where there is a mental disorder that causes a lack of capacity, then it is not inconsistent with liberal democratic theory, per Feinberg's conception of soft paternalism, to respect the autonomy of that individual by trying to act in their best interests, given that they seemingly cannot do so themselves.

The difficulty, however, is that medical professionals (and, consequently, the courts) are frequently eager to treat self-harm as the product of, and evidence for, an underlying mental disorder. As such, despite the courts alluding to the fact that self-harm *need not* be a symptom, they nevertheless default to treating self-harm as proof of mental illness. By way of example, in *R* v. *Collins ex parte Brady*, the prisoner undertook a hunger strike, and argued that his refusal of food was unrelated to his medical disorder and was a rational decision based on his sincere convictions.[89] Regardless of the applicant's intentions, Kay J found that

> [t]he hunger strike is a manifestation or symptom of the personality disorder. The fact (if such it be) that a person without mental disorder could reach the same decision on a rational basis in similar circumstances does not avail the Applicant because he reached and persists in his decision because of his personality disorder.[90]

While it is important to note that *Brady* was decided before the HRA came into force, this only affects the means of rights review undertaken by the courts in determining the level of

[85] *A*, op. cit., n. 4, [6].

[86] Id., [47]. Similarly, see *Brady*, op. cit., n. 4.

[87] Clough, op. cit., n. 61.

[88] *Secretary of State for the Home Department* v. *Robb* [1995] Fam. 127; *Airedale NHS Trust* v. *Bland* [1993] AC 789 [864]. For the position before the HRA, see J. Munby, 'Rhetoric and Reality: The Limitations of Patient Self-Determination in Contemporary English Law' (1998) 14 *J. of Contemporary Health Law & Policy* 315.

[89] *Brady*, op. cit., n. 4.

[90] Id., [44].

interference with rights of a patient who has lost capacity. The courts have since moved away from the old 'super-*Wednesbury*' approach to *Daly* proportionality review.[91] However, this does not affect the issue relevant to us here – namely, the courts' willingness to find that the protester has lost capacity, by reference to the fact of self-harm itself. We saw this in the post-HRA case of *A* discussed previously.[92] Even after the HRA and *Daly*, it is clear that the courts place considerable weight on the preservation of life in such cases, and seem willing to impute self-harm to an existing mental disorder; the individual's autonomy seldom plays a decisive role in this balancing exercise.[93]

Even where the protester is found to have a mental disorder, it is necessary to show that their decision to self-harm *results from* a disorder that causes in the patient an inability to (among other things) weigh and use information. Nevertheless, even on this point the courts tend to err on the side of caution and find such a causal relationship. The case of *Avon and Wiltshire Mental Health Partnership* v. *WA* is a good example of this.[94] The patient suffered from post-traumatic stress disorder and depression because of (inter alia) being told that his date of birth had been officially altered, without his consent, which in turn triggered traumatic memories of helplessness from his childhood in Palestine. The patient refused food and treatment, partly out of protest and partly out of a sincere desire to end his own life. On multiple occasions, expert testimony as to whether WA had capacity to refuse food and treatment was 'extremely difficult' or 'on a knife's edge'.[95] Nevertheless, the court assessed this delicate balance and found that WA lacked capacity, sufficiently to tip the balance of probabilities test required under the MCA, with the court further finding that his decisions to refuse treatment were themselves symptomatic of his mental disorders.[96] This is illustrative of the courts' disinclination to allow self-harming patients to risk causing themselves any further harm.

However, there are two chains of false syllogism at play in all of these cases: first, that self-harm *must* be a symptom, and a symptom *must* be evidence of a disorder; second, that the self-harming protest *must* be caused by the mental disorder. Further, given (as discussed above) that psychiatrists are trained to identify self-harm as a symptom of mental illness, there is a very real risk that practitioners will infer a lack of capacity, or the existence of a relevant disorder, from such acts alone. As judges rely heavily on mental health practitioners as expert witnesses in these cases, this gives the courts all that they need to find in favour of detention, and forcible treatment, even in cases that are 'on a knife's edge'.

5 | CONCLUSION

Self-harming protest remains relatively rare, and consequently seldom comes before the courts. Nevertheless, it has been possible to examine what legal rules may apply to such protests, and to problematize these responses. Whereas protest violence directed at others is easily explained and

[91] *Wilkinson, R (on the Application of)* v. *Broadmoor Hospital, Responsible Medical Officer & Ors* [2001] EWCA Civ 1545. See *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* [1948] 1 KB 223; *R (Daly)* v. *Home Secretary* [2001] UKHL 26.

[92] *A*, op. cit., n. 4.

[93] Id., [53].

[94] *Avon and Wiltshire Mental Health Partnership* v. *WA* [2020] EWCOP 37.

[95] Id., [63], [84], [85].

[96] Id., [84].

governed through the liberal democratic mode, with the harm principle and the preservation of public order as its main justificatory rationales for state interference, the same is not so for self-harming protests. These protests are not, and should not be, regulated under the Public Order Act 1986, the rules on BoP, and so forth. However, instead, they get subsumed within a paternalistic mode of governance. Police officers engage in a health care policing, shifting focus away from a balancing of rights towards a protective, risk-averse form of policing. While those seriously harming themselves as a result of genuine mental illness would benefit from this protective regime, the police are ill-equipped to make such determinations. There is a lack of professional guidance on how officers are to balance Article 10 and 11 rights in such circumstances; existing College of Policing training equates self-harm with mental disorder, without any consideration of potential political motivations or considerations of freedom of speech. Medical practitioners are similarly prone to this pivot, given their professional training, their motivations, the theory–practice gap in their professional culture, and their aversion to risk. The courts in turn are liable to follow the approach of practitioners, and are unlikely to find capacity in such circumstances, even where such a decision would be highly debatable.

Legal liberalism still allows for some soft-paternalistic state responses, but this is only justifiable where the individual does not have capacity to make their own choice.[97] Looking at the potential risks caused by self-harm, inferring a mental disorder and a lack of capacity from these risks, and then removing that capacity in order to prevent those risks unjustifiably undermines individual autonomy. The upshot of this, moreover, is that self-harming protesters may not have their Article 10 or 11 rights considered thoroughly in how their protests are policed and regulated. This poses a difficulty for the protester and their rights of political participation.

In particular, it is possible to identify the main area where the pivot takes effect, which can be the focus of future work to clarify and rationalize law and policy in this area – namely, the framing of self-harm as a symptom of, or synecdoche for, mental illness. Officers are advised to adopt this framing in their College of Policing guidance, medical practitioners fall into it within the theory–practice gap, and the courts follow after them. Proper instruction on the nature and history of voluntary political self-harm is necessary for these actors to make appropriate decisions in the fulfilment of their roles. There should be clarification in police guidance on self-harm, expanding the contexts of self-harm beyond vulnerable persons to include instances where it is willingly chosen by a capacitous individual. In these ways, those actors who make decisions whether to pivot from liberal to paternalistic modes of governance can avoid – or at least be more aware of – the pivot.

As such, as well as highlighting the illiberal turn in recent legislation against peaceful protest more broadly, we must be wary of the different, but equally illiberal, ways in which self-harming protest is governed – through medicalization, and under a paternalistic mode – and, worse still, how this may fall entirely off the radar in our discussions. Self-harming protest actions may be uncommon, but they can be dramatic and persuasive, and in some cases they can have enormous social and political impact. We should not sleepwalk into a paternalistic approach to state interference and regulation of these protests without a proper discussion about the rights of the individuals in question. Framing their actions as necessarily symptomatic of mental illness not only deprives them of proper human rights protections, it also paints them as Feinberg's 'madmen' and 'religious fanatics', whose politics and messages can be discarded as meaningless ravings.[98] Those who are willing – or perhaps driven by outrageous injustices – to demonstrate their convictions in this way should not be so readily silenced.

[97] Kleinig, op. cit. (1993), n. 14; Feinberg, op. cit. (1989), n. 14, pp. 11–12.

[98] Feinberg, id., p. 145.

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