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The law of crowds

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From the Arab Spring and Occupy to the London riots and student tuition fee protests, the disordered crowd has re-emerged as a focal point of anxiety for law makers. The paper examines two recent cases where the UK courts have thought about crowds. In Austin*, the House of Lords connected the crowd to an idea of human nature. This essentialist rendering placed the crowd within an old analytical register where it is understood to release a primordial violence. In* Bauer*, the Administrative Court utilised a very different sense of the 'crowdness' of the crowd to uphold the conviction of UK Uncut activists for aggravated trespass. In their novelty and difference, these two mutually exclusive senses of the crowd open an essential question of the relation between law and society. This paper introduces the 'Law of Crowds' as a distinctive way to understand the questions of protest, revolt and democracy.*

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INTRODUCTION

One of the tasks of the critical legal project is to make evident the disciplinary structures of legal analysis, revealing the presuppositions and blind spots that constitute our everyday understanding. A more difficult critical task, however, is to think across these disciplinary barriers, describing the law anew and thereby producing new ways of seeing old problems.[1] This paper proposes just such a move. It suggests that we can productively reframe a number of major debates at the juncture of law and politics by focusing on what I call the 'Law of Crowds'. As a new field, the 'Law of Crowds' has the potential to reach into a number of different areas (human rights, constitutional, criminal, labour, tort, contract or emergency law), but this paper will focus on one particular point – the crowd in protest. It will take aim at the hegemonic position of criminal and human rights law to understand this dissenting subject. The paper narrows its focus for two reasons. First, it does so to vindicate the case for a new field of legal study: a paper must convince its readers that it can add something distinctive. In this

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1. This task has been performed with infinitely greater nuance and deftness by many Crits in many different legal fields. See eg P Williams *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1992); C Douzinas *The End of Human Rights* (Oxford: Hart Publishing, 1999); M Koskenniemi *From Apology to Utopia* (Cambridge: Cambridge University Press, 1989); and D Kennedy *A Critique of Adjudication* (Cambridge, MA: Harvard University Press, 1997).

sense, a survey of all of the different ways in which law talks about crowds is far less interesting, I suggest, than a more developed approach to old questions of disordered speech and association. Secondly, it will focus on the crowd in protest because this has been a major site of development. Since the economic crisis of 2008, the London student protests of 2010 and the riots of the following summer, the disordered crowd is back as a focal point of political anxiety.[2] In the immediate wake of the 2008 financial crash, there were some murmurings about coming disorder, and the necessity for law to be awake to the dangers of populism and crowds. Following the student protests and the riots, these murmurings became more insistent calls to retool UK law for coming social unrest. What is more, this anxiety is not simply confined to the UK: to understand its global reach, one only need think about the events of the 'Arab Spring', Occupy New York or Hong Kong, the World Cup protests in Brazil, Gezi Park in Turkey, *Puerto del Sol* or Syntagma Square, and the list could go on. This paper is therefore a response to the moves in law to combat this form of political activity.

The difficult question that emerges at the outset is how to define crowds. The most generic definition would be that a crowd is any large group of people. The English term 'crowd' would seem to support such a broad construction. It comes, via the old English *crudan*, from the Middle High German term *kroten*, 'to press, oppress'. However, already in this we can see a more specific sense of the crowd. It is associated with 'oppression'. In Latin, the different aspects of the crowd were rendered through three terms: *turba*, *multitudo* and *vulgus.* As Sofroniew says, '*turba* referred to civil disorder and the confusion that resulted from uncertainties in government and rule'. On the other hand, *multitudo* 'had a numeric connotation' and *vulgus* 'has a definition based on class'.[3] When we get to the heyday of the crowd (understood as a key social agent) in the nineteenth and early twentieth centuries, we see these three elements very clearly at play. The crowd is a large gathering of people; it is enormous, where such enormity signifies both size and the horror of the bystander. Number signifies power and force, and is connected with the crowd's class status. The crowd was one of the few powers truly open to the workers in the nineteenth century, alongside the withdrawal of their labour. As such, it was the object of great fear for the upper echelons of society. In other words, 'the crowd' is not simply a gathering of people. It carries centuries of denigration.[4] That said, in recent years crowds have been subject to a major resignification. No longer are they rendered as 'savage packs' bent on 'mindless violence'; they have become productive and even reasonable social agents. We now have the wisdom of crowds,[5] crowdfunding, crowdsourcing of ideas, crowd testing of software and crowd-based outsourcing. This resignification has generated a sense of the crowd as the key economically productive element of a new flatter, more efficient and thoroughly

2. DC Johnston 'Inequality may spark unrest, Davos elites worry' Opinion, *Al Jazeera* 22 January 15; available at http://america.aljazeera.com/opinions/2014/1/davos-inequalityeconomicsinstability.html (accessed 4 February 2015).

3. AKT Sofroniew '"Turba": Latin' in JT Schnapp and M Tiews (eds) *Crowds* (Stanford, CA: Stanford University Press, 2006) p 30.

4. On the changing nature of this 'political disorder', see EP Thompson 'The moral economy of the English crowd in the eighteenth century' in *Customs in Common: Studies in Traditional Popular Culture* (New York: New Press, 1993), pp 185–258; and E Hobsbawm *Primitive Rebels* (Manchester: Manchester University Press, 1964). For an excellent recent reframing of this and many other ideas of crowds and power, in the US context, see J Frank *Constituent Moments* (Durham, NC: Duke University Press, 2010).

5. J Surowiecki *The Wisdon of Crowds* (London: Abacus, 2004).

neo-liberal economy. With this shift, the simple synonymic relation between the crowd and disorder has begun to be complicated.

Of course, the crowd also has a less political sense. There are crowds in theatres, churches, sports events or on the street, and it goes without saying that there are a multitude of laws that govern these crowds. How law reacts to, or designates, these crowds also has analytical value; for instance, the crowd of runners at the 2014 Sheffield half-marathon. Following the failure of the bottled water supply for the event, the organisers cancelled the half-marathon for fear of runners suffering dehydration. This decision was announced to the runners as they awaited the start of the race. The crowd heard the order to disperse but refused to comply with many setting off on the course despite the warnings of the organisers. The police then attempted to stop the runners, setting up a road block on the course, trying to encourage them back to the start of the event.[6] This is a disorderly crowd, but not a political one. And it can tell us much about law as a way of regulating and thereby creating forms of life – a biopolitics, in other words.[7] Material and metaphoric crowds operate throughout the legal field, from the image of a crowd of shareholders or the 'dangerous speech' of a false cry of fire in a crowded theatre to the regulation of flow on public pavements.[8] But this is certainly not to say that the 'Law of Crowds' is going to be equally useful in all of these legal fields. That said, it will be useful to explore the very different constructions of crowds from the calm crowd attending *La Traviata* in the Royal Opera House in Covent Garden, and the throng of shoppers on Oxford Street, to a local derby between Celtic and Rangers or the crowds at the latest anti-austerity march. The 'Law of Crowds' is a way into thinking about the production of social order and the moments at which it breaks down. In this sense, the 'Law of Crowds' is not a new legal field, but a submerged jurisprudence. Before social psychology or behavioural economics, judges and lawyers produced a series of complex and submerged analyses of crowds: from certain types of sedition and unlawful assembly to tortious and contractual wrongs of crowds around striking factories.

In order to demonstrate the type of generative power of this new framework, I will focus on just two important cases that frame crowds: *Austin*[9] and *Bauer*.[10] In the 'kettling' case of *Austin*, we find an old idea of the crowd as releasing a primordially violent human. This vision can be contrasted with the current ideas of social psychology's 'Elaborated Social Identity Model', which sees the crowd as a responsive

6. D Forrest 'In Sheffield we half-marathon runners turned a farce into a thing of beauty' *The Guardian*, Comment is Free 7 April 2014; available at http://www.theguardian.com/commentisfree/2014/apr/07/sheffield-half-marathon-runners-farce-water-shortage (accessed 22 June 2014).

7. This is not the place to delve into biopolitics, but for a good introduction see T Lemke *Biopolitics: An Advanced Introduction* (New York: New York University Press, 2011). For original work in the field, see: M Foucault *Society Must Be Defended* (London: Allen Lane, 2003); G Agamben *Homo Sacer* (Stanford, CA: Stanford University Press, 1998); M Hardt and A Negri *Empire* (Cambridge, MA: Harvard University Press, 2000); R Esposito *Bios: Biopolitics and Philosophy* (Minneapolis: University of Minnesota Press, 2008); N Rose 'The politics of life itself' (2006) 18(6) Theory, Culture, Soc'y 1; C Blencowe (ed) *Biopolitical Experience: Foucault, Power and Positive Critique* (London: Palgrave Macmillan, 2012); P Hanafin 'Law, biopolitics and reproductive citizenship' (2013) 4(1) Tecnoscienza 45; A Cerwonka and A Loutfi 'Biopolitics and the female reproductive body as the new subject of law' (2011) 1(1) Feminists@Law; A Swiffen *Law, Ethics and the Biopolitical* (Abingdon: Routledge, 2010).

8. N Blomley *Rights of Passage: Sidewalks and the Regulation of Public Flow* (Abingdon: Routledge, 2010).

9. *Austin & another v the Commissioner of Police of the Metropolis* [2009] UKHL 5.

10. *Edward Bauer & Ors v DPP* [2013] EWHC 634 (Admin).

and emergent identity. In *Bauer*, on the other hand, where a number of activists from the UK Uncut group appealed against their aggravated trespass conviction, we find a much more nuanced and dynamic idea of crowds, closer to current sociological and social psychology models. Moses LJ pinpoints the 'crowdness' of the crowd as the aggravation of the UK Uncut trespass in Fortnum & Mason. While both cases remain metaphysically, theoretically, practically and methodologically distinct, they do share a common concern with a 'disordered crowd' and in this sense they provide an important contrast. This focus on just two cases should not be read as the 'Law of Crowds' lacking breath. This paper could equally have rested upon historical cases such as the Peterloo massacre prosecution in *R v Hunt*,[11] or the mass picketing question in *Thomas v NUM (South Wales Area)*[12] to give just two examples from the innumerable cases on riot, protest and strike. While we can pick out many old cases, this paper seeks to address itself to our current conjuncture, where the law is retooled to deal with the perceived coming instability.

THE LAW OF THE KETTLE

Lord Hope of Craighead opens the decision of the House of Lords in *Austin & another v the Commissioner of Police of the Metropolis* with an imagination of urban spatial relations: London is a space in which 'thousands of demonstrations' occur annually. It teems with the dissenting life. This dissent usually operates in a congruous and harmonious way with the police, who facilitate the calm rights of a democracy. Lord Hope tells us that the reasoned many, however, are at the mercy of the unreasoned few. 'Human nature, being what it is', there are sometimes violent elements present and the police must restrain them. We should pause whenever we hear assertions of human nature; they signify our explicit entry into the realms of metaphysics. Despite the everyday context in which Lord Hope draws it out, the question that has been settled before the decision begins is of the bestial nature of mankind and the higher rule of reason, order and law. The threat of a full expression of this 'human nature' means that the police must sometimes 'take control of the event to ensure public safety and minimise the risk of damage to property'.[13] Suddenly, the bustling space of a city in which thousands of protests occur every year becomes something other than a vibrant democratic zone. London's urban order represents a space of threat. If these thousands of crowds were to be allowed to release the pent-up violence of this 'human nature', the gleaming metropolis would descend into the mire. This unrestrained and uncontrolled human nature is inimical to the life of the city. Here, control is the crucial term. In metaphysical terms, the release of bestial human nature is opposed to the human will. Law stands above both in an attempt to discipline the city of fear.

Austin concerned the kettling or 'containment' of a May-Day march by anti-globalisation and anti-capitalist activists in 2001. The police emphasised the unknown nature of the protests: the activists had refused to give details of their intentions and had encouraged secrecy from those attending. The police expected the march to arrive at Oxford Circus at 4 pm, but despite its unplanned and secret nature, they were surprised when it arrived two hours early. At this point, they decided to kettle or 'contain' the 3000 or so

11. (1820) 3 Barnewall and Alderson 566.
12. 1985 IRLR 136.
13. *Austin*, above n 9, para 1.

demonstrators who were within Oxford Circus, excluding the 'several thousands more gathered outside'.[14] The containment or kettle was effected by sealing the feeder streets with a cordon of police bodies, which they held from 2 pm to 9 pm. Although unremarked in the House of Lords facts, Mead comments that the 'conditions for those trapped quickly became unpleasant – and worsened during the afternoon and early evening'.[15] Lois Austin was held within the containment field for these seven hours, leading her to sue for false imprisonment and breach of her European Convention of Human Rights Art 5 rights. Her claim was rejected by all three domestic courts as well as the European Court of Human Rights' Grand Chamber. But our interest here is not in the relative merits of these decisions; it is in the manner in which the House of Lords writes about the crowd.

The police feared that there were violent and peaceful protestors mixed up within the kettle. Lord Hope agreed: 'While about 60% remained calm about 40% were actively hostile, pushing and throwing missiles. Those who were not pushing or throwing missiles were not dissociating themselves from the minority who were.'[16] Thus, the crowd is divided between the peaceful protestors who are key to a vibrant democracy and the violent ones who have released their bestial nature. But the failure of the peaceful democratic subjects to mark out the violent ones and assist the police in their arrest makes them increasingly less virtuous in the eyes of the law. They did not dissociate themselves. Lord Hope seems to hint that their failure to do so suggests something sinister about this apparently peaceful majority.[17] As Reicher et al quip, it looks like the 'bad leading the mad'.[18] Gone is the city of protest as a symbol of a vigorous and healthy democracy, and instead a particularly questionable crowd emerges, where the violent and the peaceful seem to make common cause. At the heart of this are two ideas: the connections between human nature and the crowd, and the manner in which the crowd infects otherwise peaceful people with the germ of disorder.

It appears that Lord Hope does not have a particular philosophical or theological notion of human nature in mind in *Austin*, beyond a sort of generic pessimism about people's motivations. There is little that connects the three other times he mentions 'human nature' in his Supreme Court decisions.[19] Obviously, the idea of an evil within humanity is as old as thinking about the human. In Judeo-Christian political theology and political theory, the nature of evil and its relation to the essence of the human is massively complex, and it is entirely beyond this essay to consider the genealogy of such metaphysical claims. Looking at the three other times that Lord Hope uses the phrase 'human nature, being what it is', we can see that it is generally a minor rhetorical flourish. However, unlike the other cases, in *Austin* it becomes key to understanding the way the decision is framed. This is the case because Lord Hope frames the crowd through this bestial sense of human nature. The crowd has always been associated with disorder and instability. In Latin, the term is *turba*, from the sanskrit *turami* ('to hasten') and ancient Greek *túrbe* ('disorder', 'confusion' and 'tumult').[20] Thus, linguistically in

14. Ibid, para 3.
15. D Mead 'Kettling comes to the boil before the Strasbourg court' (2012) 71(3) Camb L J 472.
16. *Austin*, above n 9, para 6.
17. Ibid, para 6.
18. S Reicher et al 'An Integrated approach to crowd psychology and public order policing,' (2004) 27(4) Policing: Int'l J Police Strategy & Mgmt 558 at 560.
19. *R v Forbes* [2001] UKHL 40 at para 15; *Benedetto v R; Labrador (William) v R* [2003] UKPC 27 at para 33; *Jones v Kaney*, [2011] UKSC 13 at para 166.
20. Sofroniew, above n 3, p 30.

English there is a relation between the crowd, 'turmoil', 'tumult' and 'turbulence'. As we noted earlier, Sofroniew connects it to civil disorder.[21] In this sense, by framing the crowd through a pessimistic view of human nature, Lord Hope makes a very old and familiar move. The crowd is figured as the danger of releasing human nature. Lord Hope's connection is unsurprising, as Clifford Stott makes clear. Reviewing the police's public order training in the wake of the 2009 G20 protest kettling, he notes that the strategies of the police are imbued with the ideas of the classic crowd theorists, ideas born in the late nineteenth century and disproven soon afterwards.[22] These theorists tended to emphasise a determinate human nature – for Sighele, it was a base criminality;[23] for Le Bon, it was the weakness of reason in the many. This base human nature was then released in the crowd, as the participants felt hidden and anonymous. Le Bon is perhaps the most interesting in that he begins to allow us to see the contours of a second question – the manner in which being part of a crowd infects the peaceful majority with the disorder of the few.

For Le Bon, the crowd presents irrationality;[24] it releases the violent passions that lie in every man's soul. Man is 'torn between the primal elements of sentiment and reason, the latter having emerged only recently in human evolution and seldom exercising real influence on human affairs'.[25] Le Bon imagined the crowd as a mechanism for releasing the 'savagery' within humanity. Crucially, this savagery returns individuals to a common collective unconscious. In other words, crowds draw men into a trance-like state; they become suggestible. In this state, affects such as anger, panic and envy are transmitted swiftly and without rational interruption. Contagion is the term used by Le Bon – panic or anger are contagious in these intense gatherings. What is more, the crowd 'is not prepared to admit anything can come between its desire and the realisation of its desire'.[26] As Stott explains, again in the context of the police review for Her Majesty's Inspectorate of Policing:

> Given that from this perspective crowds are understood as unpredictable, volatile and dangerous, it becomes almost self evident that they need to be controlled and that this control must be exerted primarily through the use of force. This theoretical position results in police tending to see the general heterogeneous composition of crowds in terms of a simple dichotomy: an irrational majority and a violent minority who can easily assert influence over the crowd.[27]

21. Ibid.
22. Her Majesty's Chief Inspectorate of Constabulary (HMIC) *Adapting to Protest – Nurturing the British Model of Policing* (London: Her Majesty's Inspectorate of Policing, 2009) p 85.
23. E Laclau *On Populist Reason* (London: Verso, 2005) p 38.
24. C Borch 'Body to body: on the political anatomy of crowds' (2009) 27(3) Sociol Theory 271.
25. R Nye *Origins of Crowd Psychology* (London: SAGE Publications, 1975) p 42.
26. 'A crowd is not merely impulsive and mobile [in its sentiments]. Like a savage, it is not prepared to admit anything can come between its desire and the realisation of its desire. It is the less capable of understanding such interventions, in consequence of the feeling of irresistible power given it by its numerical strength. The notion of impossibility disappears for the individual in a crowd. An individual knows well enough that alone he cannot set fire to a palace or loot a shop, and should he be tempted to do so, he will easily resist the temptation. Making part of a crowd, he is conscious of the power given to him by number, and it is sufficient to suggest to him the ideas of murder and pillage for him to yield immediately to temptation.' G Le Bon *The Crowd: A Study of the Popular Mind* (London: Fisher Unwin, 1903) pp 42–43.
27. HMIC, above n 22, p 85.

In this sense, we can understand Lord Hope's position a little more clearly. In *Austin*, he begins the first paragraph with precisely this dichotomy between the violent few and the peaceful but suggestible many, and as we progress through the decision we can see that the many become increasingly suspect. The idea that the crowd is an expression of human nature and that it infects people with the germ of disorder is not an isolated idea that Lord Hope just happens upon. This is precisely its rhetorical effect in the decision. It is an idea that many have been attracted to over and again. The problem is that these ideas are 'outdated and unsustainable scientifically'.[28] This classical view is 'dangerously wrong', misrepresenting 'the basic psychology of crowds' and impeding 'the development of strategies that may … improve the relations with the crowd'.[29]

Against the classical view, social psychologists have produced the Elaborated Social Identity Model (ESIM).[30] The key to this model is that individuals in crowds do not simply lose a sense of themselves (what is called the 'deindividuation' thesis) as Le Bon imagined. Instead, each person gains another (perhaps momentary) collective identity. As Cocking explains, the ESIM emerges from self-categorisation theory, which understands 'human behaviour in terms of self and group processes' of individual and collective identity formation: 'So, if a collective identity becomes salient (such as people together on a demonstration with a common cause), then … [the participants] begin to categorise with similar others … and consequently, a shared sense of identification develops.'[31] To illustrate, Vaughan Bell describes a scenario where you are on a crowded bus, travelling through a major city. There are others around you; teenagers listening to tinny music on their phones, hung-over students and an earnest old couple – in other words, a typically alienated individualistic city scene, where no one seems to have anything in common:

> You feel nothing in common with anyone on the bus and, to be honest, those teenagers are really pissing you off. Suddenly, two of the windows smash and you realise that a group of people are attacking the bus and trying to steal bags through the broken windows. Equally as quickly, you begin to feel like one of a group. A make-shift social identity is formed ('the passengers') and you all begin to work together to fend off the thieves and keep each other safe. You didn't lose your identity, you gained a new one in reaction to a threat.[32]

In the context of public disorder, the ESIM suggests that the conflict between the rioters and the police generates commonality on both sides. In other words, the crowd lacks any unity until it sees the police apparently attacking it. In this way, there is a sudden emergent sense of the crowd's common self and the antagonism with the police. The great benefit of the ESIM is that it understands that violent crowds do not simply emerge out of nowhere. The cause is the complex relations within the crowd and with the police ('intergroup relations rather than individual characteristics') and the historical situatedness of those involved on both sides.[33]

28. Ibid.
29. Reicher et al, above n 18.
30. M Hogg, D Terry and K White 'A tale of two theories: a critical comparison of identity theory with social identity theory' (1995) 58(4) Soc Psychol Q 255.
31. C Cocking 'Crowd flight in response to police dispersal techniques: a momentary lapse of reason?' (2013) 10 J Invest Psychol & Offender Profiling 219 at 222.
32. 'Riot psychology' 10 August 2011; available at http://mindhacks.com/2011/08/10/riot-psychology/ (accessed 15 December 2014).
33. J Drury, C Stott and T Farsides 'The role of police perceptions and practices in the development of "public disorder"' (2003) 33(7) J Appl Soc Psychol 1480.

Let us imagine two scenarios in order to compare the very different causality involved in *Austin* and that suggested by Stott and others as part of the ESIM. In the first scenario, as suggested by Lord Hope, we have an individual or group of individuals who woke up that morning having decided to fight with the police, loot or smash windows. They may have a political purpose or they may be ordinary criminals, but either way they arrive at the protest and make good their plan. The police then respond to this violence by containment, dispersal or arrest. In this scenario, the causation is linear. These people have made a plan or arrive generally disposed to violence and the police simply respond. The protestors *cause* the kettling by their violent presence. An extreme version of this is imagined by Lord Neuberger in his concurring judgment in *Austin*. He insists that if protestors turn up to a protest where there is a possibility of violence, then they might be considered to have given (imputed) consent to being confined:

> if imputed consent is an appropriate basis for justifying confinement for article 5 purposes [which he doubts], then it seems to me that the confinement in the present case could be justified on the basis that anyone on the streets, particularly on a demonstration with a well-known risk of serious violence, must be taken to be consenting to the possibility of being confined by the police, if it is a reasonable and proportionate way of preventing serious public disorder and violence.[34]

There are three moments in Lord Neuberger's scenario: before the protest (where *anyone on the streets* before a protest, particularly where there is a suspicion that disorder might occur, must foresee confinement); during the protest (where confinement becomes a reasonable and proportionate way of preventing disorder); and after the protest/confinement (where the confined cannot complain because of their imputed consent). It is important to keep this temporality apart to see Lord Neuberger's reasoning. It makes police confinement entirely the responsibility of the protestors, who are said – in law – to have agreed to be confined. By separating out the temporality, it becomes possible to see the effect of such a concept: to dissuade anyone from taking part in a protest where there is any possibility of violence. Lord Neuberger demands an anticipatory consciousness from protestors; they must take responsibility for all their fellow future-protestors.

We could, however, imagine a very different scenario in which an entirely peaceful and calm group of protestors gather to march for climate justice or some other such ideal. Perhaps it comes in the context of preceding violent clashes between the police and other groups of protestors, but for whatever reason the police are fired up for confrontation. Let us imagine the scenario in which a police officer pushes or trips a protestor as they go past – it need not be as malicious as PC Harwood, who struck the ill-fated Ian Tomlinson, for instance. It would not be unreasonable for his or her fellow protestors to remonstrate with the police, and certainly not unusual for the police to respond with increasingly fraught words and actions. In these scenarios, as tension mounts the chances of violence increase, and once violence begins it spreads quickly. In terms of a linear analysis of causality, we could say that the protestors caused the violence, because if they had not been there it would not have happened. Or we could identify later moments as the 'cause': the act of the police officer, the crowd's response to the trip. However, it seems to me that this scenario does not have a simple linear causality. It is better to think about a complex process by which voices, fists and batons

34. *Austin*, above n 9, para 61.

become raised until finally a baton or a fist crashes into a skull, and from then on it becomes a mêlée. These protestors and police did not come with violent intents. Rather, *violence spirals*. Events unfold in fits and starts; there are accelerations and sudden stops. There is a complex causality in which the attribution of blame is precisely the wrong question for a public law case. The point here is simply that the court's account of violent and peaceful protestors is simplistic. It completely elides the complexity of the events, drawing instead on common misconceptions of crowds. It singularly fails to see the complex manner in which the events unfold.

An understanding of the complex causation of moments of disorder needs to see the actions of the police and protestors existing in a material, social and cultural context. The crowd responds to police force on the basis of perceptions of legitimacy and victimisation, while the occupational culture of the police 'others' the protestors.[35] In this sense, certain signifiers have a multiplier effect. Masked black-clad protestors may signify the threat of the 'black bloc' for police, while the attempts by the police to arrest individuals may be perceived as unwarranted victimisation by many in the crowd, particularly when taken in the context of problems with stop-and-search powers and so on.[36] At the same time, the 'understandings and actions of one group (say, the perception of the police that the crowd as a whole is dangerous and hence the decision to employ riot shields) *form the material reality which the other group faces* and which frames their own understandings and actions – which then in turn form the context for the first group'.[37] The ESIM demands an asymmetric and contextual approach, and as such it is useful to understand the complex effect of kettling.[38] The problem for the police, and later for the court, is that the crowd is mixed.[39] The violent and the peaceful are indistinguishable. The kettle is thus a matter of purifying mixtures, an apparatus of differentiation. In this way the crowd can be refined, detaining the violent and releasing the non-violent. This can be particularly seen in *Castle & Ors v Commissioner of Police of the Metropolis*, which contains a long narration on the question of purifying the kettle so that the vulnerable and peaceful are released.[40] But it is not simply a matter of holding a number of people for some time in order to better process them. The kettle has an effect on those within the containment field. It frustrates them, and presents them with a wall of police bodies against which this frustration can be worked out. The kettle brings the crowd to boiling point. What is more, it does so within a contained, observed and controlled space. At this boiling point, certain elements are brought to violent action, expressing their 'nature'. The problem that the kettle addresses is that there is no way of identifying the violent within a crowd until it is too late – at which point, the crowd itself gets to determine the terrain on which it protests and disrupts. The kettle narrows the zone of policing so that the

35. See eg B Loftus *Police Culture in a Changing World* (Oxford: Oxford University Press, 2009); and PAJ Waddington 'Police (canteen) sub-culture: an appreciation' (1999) 39(2) Br J Crim 287.

36. L Weber and B Bowling (eds) *Stop and Search: Police Power in Global Context* (London: Routledge, 2012); LSE & The Guardian *Reading the Riots* (2011) p 19; available at http://eprints.lse.ac.uk/46297/1/Reading%20the%20riots(published).pdf (accessed 4 February 2015).

37. J Drury and S Reicher 'Collective action and psychological change: the emergence of new social identities' (2000) 39 British Journal of Social Psychology 579 at 582 (my emphasis).

38. For a full discussion of this, see Reicher et al, above n 18.

39. See *Austin*, above n 9, para 6 and *Castle & Ors v Commissioner of Police of the Metropolis* [2011] EWHC 2317, para 13.

40. *Castle*, ibid, particularly paras 21–26.

entire disciplinary apparatus can be focused on the crowd tumult. It also has the effect of concentrating the cameras on to the images of violence and destruction, which plays well on television and in the newspapers.

A reading of the kettle through the ESIM gives us a more nuanced and dynamic understanding of the crowd. The classic model employed quietly by Lord Hope in *Austin* is replaced by a shifting set of social identities. Causality is understood as complex, with multiplier effects, feedback loops and unpredictable spirals of events. The crowd is understood as varied and complex, made up of very different identities. These different identities and interests may continue in distinction to one another, or the crowd may cohere on the emergence of a new super-identity. That Stott was called in to consult on the reform of public order policing thus seems to represent law using outdated ideas and a sociological discourse entering the fray to reform the law. It looks like progress, the invisible hand of providence. However, the picture is more complex than that. If we shift our focus from this public law case to a recent criminal prosecution, we can begin to understand that law is not ignorant of crowd dynamics. The decision in *Edward Bauer & Ors v DPP* reveals a much more interesting, albeit deeply problematic set of reflections.

THE LAW OF ATMOSPHERE

Just after 4 pm on 26 March 2011, during a massive anti-austerity march organised by the UK Trades Union Conference (TUC), approximately 150 people entered the upmarket Fortnum & Mason grocery store in London. The group gathered under the title of UK Uncut, organised to underline the prevalence of tax avoidance by major UK corporations and multinational companies. UK Uncut had been organising theatrical and spectacular events in shops and businesses that had utilised 'tax-efficient' creative accounting. The group identified Fortnum & Mason as being part of a 'tax scam'. The members of UK Uncut began to protest within the store, with placards and banners, and shouted songs and slogans.[41] They distributed a number of humorous leaflets and spoke about tax justice, succeeding in closing the shop after half an hour. There was a massive police presence on the streets of London that day for the TUC demonstration. The group inside Fortnum & Mason were very quickly corralled within the store, remaining there for approximately two and a half hours, before being promised that they could leave without arrest. Upon their exit, however, they were detained, with 138 people charged with aggravated trespass.[42] In the end, all but 30 charges were dropped. Those that remained were successfully prosecuted in three trials at the Westminster Magistrates Court. In one of these cases, District Judge Snow 'agreed to state a case, annexing to that case a written judgment', giving rise to *Edward Bauer & Ors v DPP* in the Administrative Court.[43]

41. See http://www.youtube.com/watch?v=VgSp0mWd_Ic and http://www.youtube.com/watch?v=B7UETxLTgog (both accessed 5 February 2014).

42. S Malik 'Cuts protestors claim police tricked them into mass arrest' *The Guardian* 28 March 2011; available at http://www.theguardian.com/uk/2011/mar/28/cuts-protest-uk-uncut-fortnum (accessed 5 February 2014). For a contemporaneous discussion of the arrests under aggravated trespass, see D Mead 'Dropping the case against the Fortnum protesters is not as interesting as their charges of aggravated trespass. This is yet another threat to the freedom to protest' LSE Blogs, 25 July 2011; available at http://eprints.lse.ac.uk/37987/1/blogs_lse_ac_uk-Dropping_the_case_against_the_Fortnum_protesters_is_not_as_interesting_as_their_charges_of_aggravated.pdf (accessed 4 February 2015).

43. *Bauer*, above n 10, para 1.

The charge of aggravated trespass has been controversial since it was first enacted in 1994.[44] Introduced by s 68(1) of the Criminal Justice and Public Order Act 1994 (hereinafter CJPOA) to criminalise fox-hunting saboteurs, it was initially intended to cover only acts committed 'in the open air'. This was amended by s 59 of the Anti-social Behaviour Act 2003, and so the offence now consists of anyone who trespasses on land and disrupts, obstructs or does anything that is intended to have the effect of intimidating persons undertaking any lawful activity. It forms a powerful tool in the police's arsenal for disciplining political activity and protests. Lord Laws explained the test in *DPP v Barnard*:[45] The offence requires: '(i) trespass on land … (ii) the doing of some act – that must be some distinct and overt act beyond the trespass itself; and (iii) the intention by this second act to intimidate, obstruct or disrupt'.[46] The CPS develops this in their guidance: 'Trespassing on land does not, in itself, amount to the commission of the offence … The requirement appears to be for conduct over and above the act of trespassing.'[47] Ten members of UK Uncut appealed to the Administrative Court, in *R (The Queen) v Bauer.* Of this ten, there were six who undertook specific acts (listed below), and four who did nothing more than be present in the throng.[48] District Judge Snow had summarised:

> Beyond presence, there is no evidence of the behaviour of any of these Defendants inside the store except; Mr Coleman was seen to use a loudhailer in the Atrium. Mr Jones carried a furled up banner into the store. Mr Lichmann picked an umbrella up from the floor and opened it. He played with a beach ball. Mr Pope carried a placard into the store. Mr Ramsay used a loud hailer. Mr Storrar played the bagpipes.[49]

The question for the court at first instance was thus whether the six defendants who undertook these relatively innocuous activities (certainly not threatening force or violence) had done the requisite *additional* act on top of their trespass, and whether those four who had done no named additional act were also guilty of aggravated trespass.

At trial, the judge had suggested that the four 'more passive' trespassers might be found liable under accessory liability, with the six 'more active' committing the principal offence. This is an interesting logic. Someone may be held liable as an accessory if they aid, abet, counsel or procure the criminal act. So the accessory is potentially the cause of a criminal act, in the sense of a leader who instructs his followers. Or the accessory is a minion of the principal actors, aiding and abetting their transgression, providing succour and support. Unlike a traditional vertical organisation with its leaders and followers, UK Uncut is a fully horizontal group. There is no one at its head. There is no leader that gives it definition or structure; there is no one to command its activities and patrol its borders. Rather, each person decides to meet in a place announced over Twitter, with tweets not fulfilling the role of orders but suggestions, to which some respond and others do not. Fortnum & Mason was not the only place where UK Uncut gathered that day; rather, a network of sites was thronged. There was no overriding structure or organisation, except for the researchers who gathered and published the

44. A Murdie 'Trespassers will be prosecuted' (1995) 145 New L J 389.
45. *DPP Barnard*, quoted in *Bauer*, aboe n 10, para 12.
46. Ibid.
47. See http://www.cps.go.uk/legal/s_to_u/trespass_and_nuisance_on_land/ (accessed 1 February 2014). See also D Mead 'Will peaceful protestors be foxed by the diisional court decision in *Capon DPP*' (1998) Crim L Re 870.
48. *Bauer*, aboe n 10.
49. Ibid, para 9, quoting the District Court judgment (his emphasis).

(already public) information on certain corporations' tax avoidance measures. Thus, there could be no question of principal/accessory liability for the organisation of the events before the occupation; at question for District Judge Snow was *only* the events in Fortnum & Mason.

In the Administrative Court, Moses LJ wrote the opinion upholding the conviction of the Fortnum & Mason protestors. However, he refused to accept the relevance of the principal/accessory logic. He said: 'there is a contradiction between the facts as found and the conclusion that participants were guilty only as accessories'.[50] The principal/accessory logic simply did not fit the facts before the court, and so the question for the Administrative Court was whether all of the defendants, even the passive ones, had directly committed the offence. District Judge Snow was under the impression that mere presence could not be the additional conduct that aggravated the trespass. This makes sense: how can we separate out the act of trespass from the trespassing presence? However, Moses LJ insists that this view is mistaken. It all falls on the reading of *R v Coney*,[51] which he summarises:

> Those participating in a prize fight in the ring were guilty of unlawful assault. Spectators were tried at Berkshire County Quarter Sessions with common assault. The Chairman of Quarter Sessions directed the jury to convict the spectators of common assault on the basis that having stayed to watch the fight, they encouraged it by their presence. The decision of the majority of the Queen's Bench Division was that that direction was incorrect. Mere voluntary presence at a fight did not as a matter of law necessarily render those present guilty of assault. The court was not saying that the jury could not have convicted the spectators on the basis merely of their presence. The objection of the majority was that the case had been withdrawn from the consideration of the jury … *R v Coney*, therefore, is authority for the proposition that presence is not conclusive evidence of encouragement. It is not authority for the proposition that it cannot be sufficient evidence of encouragement.[52]

With this clarification, Moses LJ found it very easy to declare the irrelevance of the principal/accessory element, which required a discussion of whether the passive members of the group encouraged the offence by their presence. Instead, he insisted that the facts as stated by District Judge Snow suggested 'that the presence of each one of the demonstrators in force within Fortnum & Mason *was* [*itself*] the conduct element of the charge against them of aggravated trespass'.[53] The presence '*in force*' of the crowd is an intimidating aggravation of the trespass. This phrase 'presence in force' is a question of number. As El-Enany makes clear in her superb genealogy of the charge of violent disorder, large crowds were understood in criminal law as equating to violence or force, with the Lord Chancellor insisting that 'numbers constituted force, and force terror, and terror illegality'.[54] Being 'in force' still holds the sense of 'in great quantities, in hordes, in full strength'. So when Moses LJ explains that the 'presence of each … of the demonstrators in force' is the conduct element of the crime, he means that their presence in large number is the extra-element of the crime. In other words, irrespective

50. Ibid, para 36.
51. (1882) 8 QBD 534.
52. *Bauer*, above n 10, para 31.
53. Ibid, para 30 (my emphasis).
54. N El-Enany '"Innocence charged with guilt": the criminalisation of protest from Peterloo to Millbank' in F Pakes and D Pritchard (eds) *Riot: Unrest and Protest on the Global Stage* (London: Palgrave Macmillan, 2014), p 72 at p 75.

of any other acts, all of UK Uncut protestors who manifested themselves in Fortnum & Mason on that day were guilty of aggravated trespass. They trespassed when the licence to be there was revoked, and they aggravated that trespass by their presence *as a crowd in demonstration*.

What is the crowd's 'presence as part of a demonstration'[55] and how does that differ from the initial presence-as-trespass? There is none of Lord Hope's reliance on a metaphysics of violent subjects expressing a static atemporal human nature; instead, Moses LJ seems to understand that a crowd in a shop during the 'Black Friday' sales is very different from the UK Uncut protestors, who are in turn quite different from the TUC protestors who were walking outside the grocers that day. All crowds are not the same. In fact, the crowd now is not even the same as it was five minutes ago; it is a dynamic entity.[56] The crowd's composition, mood and activity change constantly. And because it is never simply a single unified entity to which we could ascribe essence or intention; we need to think differently. The Elaborated Social Identity Model, discussed earlier, would give an idea of the shifting identity of the crowd. However, the shortcomings of this model now manifest themselves. The key problem is that ESIM relies upon identity as a concept, which is misleading for understanding crowds. Identity is a representation, a naming of some thing or event. Identities are already existing social constructs,[57] and although appearing innocent, are entirely enmeshed in networks of power. Obviously, those outside the crowd will name it (for instance, when David Cameron called the London riots 'pure criminality'), but this is not the social identity that the ESIM imagines. Rather, for the ESIM, the social identities are those that emerge from the crowd as it coalesces to form the crowd identity. In this sense, the key theoretical problem is that there is rarely an iteration of this identity; there is rarely a moment when a crowd names itself. The process of applying a name to something like a crowd is difficult, and will never fully capture the event. Identity is a problematic mode of analysis because once discovered, it seems to insist that it is everything you need to know to understand the crowd itself.[58] The identity becomes the *significance* of the crowd – its existence in language. In this, the representation of the crowd is more important than the doing or happening of the crowd. Thus, the biggest problem with the ESIM is that the crowd lacks any moment when a common representation (identity) could be generated and, furthermore, any identity that could be gleaned can never encapsulate the complexity of the crowd or remain constant, as the crowd itself changes its modes and purposes. Rather than thinking about the problems of representing crowds, it is far better to remain a materialist and insist upon thinking about what crowds do, thinking about their being and becoming.

While we may doubt the *identity* element of the ESIM, the key recognition is that the crowd's being shifts constantly. It needs to be thought about as a process of becoming, rather than stable being that just needs to be accurately represented.[59] While Lord Hope's static human nature at play in the kettled crowd cannot account for this shifting crowd-becoming, Lord Justice Moses understands the crowd as a dynamic process. The

55. *Bauer*, above n 10, para 36.
56. Perhaps the best account of this is Elias Canetti's masterpiece *Crowds and Power* (New York: Viking Press, 1962).
57. For instance, gay, straight, lesbian, white, black, Asian, Indian, Irish and British are all socially constructed identities.
58. In a different context, this is Wendy Brown's critique in *States of Injury* (Princeton, NJ: Princeton University Press, 1995).
59. Canetti, above n 56, pp 16–17.

crowd aggravates its trespass because of its 'crowdness'. Not all groups of people who trespass will have aggravated that trespass, because they have not become a crowd. Equally, what is now an aggravating crowd may have been a non-aggravating crowd a few moments ago. Something changes; some additional element takes place – this is the 'crowdness' of the crowd. Now, of course, this neologism of 'crowdness' is not satisfactory. It doesn't really begin to describe this supplement. This extra element of crowds is something that crowd theorists have struggled with since the birth of social psychology. It is better, I suggest, to think in terms of the atmosphere generated by the crowd-in-demonstration. Imagine yourself as a shopper in Fortnum & Mason. As people start entering from the crowd and it becomes clear that they are unwelcome (their presence is not covered by the implied licence that allowed them access to the private space), you can see the emergence of a trespass. Then they stand there demonstrating, playing with beach balls, shouting, opening umbrellas, laughing, distributing leaflets explaining their action and talking with the staff and shoppers around you. Lord Justice Moses' idea is that the extra act that they do is to generate an atmosphere around their crowded demonstration. This atmosphere is an intensity of affect that gathers the crowd together, and identifies the shopper as someone distinct. Law has words for this intensity of affect – menace, for instance – but these are less useful.

Atmospheres tend to flummox our best philosophers.[60] They are so obvious in our lived experience: the electrifying gig, the tension-filled room, the winter's evening before a pub's fire, the intensity of the stadium during a local derby, or in this case the enormity of the throng. At their most intense, atmospheres are palpable. But once we insert them into our traditional epistemologies, they seem to evaporate. The neo-phenomenologist Gernot Böhme concurs:

> We are not sure whether we should attribute [atmospheres] to the objects or environments from which they proceed or to the subjects who experience them. We are … unsure where they are. They seem to fill the space with a certain tone of feeling like a haze.[61]

Atmospheres prove difficult to think about, certainly. However, in a wonderful article, Friedlind Riedel challenges the idea that they are ineffable and beyond rational explanation. She insists that this ineffability is premised upon classical Western metaphysics, which divides the mind's rational thought from the body's emotional response. Only within this frame do atmospheres become 'categorically resistant to intellectual apprehension'.[62] The result of this is that we seldom think about atmospheres, instead focusing on other experiences. As Philippopoulos-Mihalopoulos suggests, 'the concept of atmosphere [is] an attempt at understanding affective occurrences as collective, spatial and elemental'.[63] Affect is to be understood *as* collective and spatial, rather than

60. There are a number of notable exceptions to this. In the legal field, there are few more insightful than Andreas Philippopoulos-Mihalopoulos. See 'Atmospheres of law: senses, affects, lawscapes' (2012) 7 Emotion, Space & Soc'y 35; and *Spatial Justice: Body, Lawscape, Atmosphere* (Abingdon: Routledge, 2014). More generally, see G Böhme 'Atmosphere as the fundamental concept of a new aesthetics' (1993) 36 Thesis Eleven 113; P Sloterdijk *Spheres*, vol I: *Bubbles: Microspherology* (Los Angeles: Semiotext(e), 2011); and P Sloterdijk *Spheres*, vol II: *Globes: Macrospherology* (Los Angeles: Semiotext(e), 2014).

61. Böhme, above n 60, at 114.

62. F Riedel 'Music as atmosphere: lines of becoming in congregational worship' (2015) 6 Lebenswelt 86.

63. Philippopoulous-Mihalopoulos *Spatial Justice*, above n 60, p 109.

individual. Or again he sees 'atmosphere as a force of attraction. As such, it is embodied by each body yet exceeding the body because it cannot be isolated. An atmosphere spreads through and in-between a multiplicity of bodies like a sticky substance.'[64] Atmosphere emerges from bodies and yet exceeds them. So, for instance, stadia utilise an architecture of atmospheres. They are carefully designed to ensure that they generate the intense enmity at the specific moment of the sporting occasion. The atmosphere must be intensified when the spectators fill the terraces, but it must also be abated when the spectators are not in the bowl of the arena. The danger of violence before and afterwards is managed by division of opponent crowds, breaking up the atmosphere of enmity by enclosing crowds in narrow tunnels with shops, food stalls and other distractions. Within the arena, opposing crowds face each other, witnessing the fervour of the others and valorising their sentiment. Despite this intense effort at the production of atmosphere, it will often desert these carefully designed spaces. It can never be simply produced or orchestrated, because it is an excess of bodies. It is not predictable or manageable, but has an element of spontaneity.

In the context of *Bauer*, Moses LJ identifies this extra element: the atmosphere that the crowd-in-demonstration generates in Fortnum & Mason. With this, he has clearly understood what is at stake in such a protest, making the crowd intelligible to law in a way that the brute essentialism of *Austin* cannot recognise. This is not Mead's fear that aggravated trespass moves us closer to 'criminalising states of mind',[65] because atmosphere is not a state of mind. But in a way it is just as bad. *Bauer* lowers the test for aggravated trespass without any consideration of the significance of such a move. The District Court distinguished between presence as trespass and presence as encouragement. If this was the right test, Moses LJ suggests, the defendants should have been found not guilty. In a sense, then, the earlier (philosophically suspect) test should have made the offence more difficult to prove. The shift to the understanding of the fluidity of the crowd's presence lowers the threshold for the prosecution, meaning that the emphasis is placed upon the proof of trespass and the relational impact of the crowd's presence. In this, the police get to decide when 'crowdness' becomes agitating, aggravating the initial trespass. The question for the police and prosecution is whether the trespass has generated an atmosphere of fear and disruption. In a sense, then, we are talking about the criminalisation of atmosphere. However, atmosphere is an ephemeral experience, incapable of capture in subjective understanding or objective act. As the aggravating element of the crime, the atmosphere as the 'crowdness' of the crowd is impossible to place within the *actus reus* and *mens rea.* Atmosphere deconstructs the criminal law's reliance upon the enlightenment subject identified by Norrie and so many others.[66] But it does so in a way that makes it easier to prosecute, fulfilling the substance, if not the form, of Mead's fear.

The seriousness of this lower threshold can be understood when we think about the operation of aggravated trespass. Moses LJ insists that because this is a matter of trespass on private property, and because the legality of the provisions on aggravated trespass is not challenged, it is not necessary for the court to deal with whether this criminalisation of protest is proportionate. This sealing off of the possibility of any Art 10 or Art 11 arguments means that there can be no group protest in a private space that is not immediately subject to criminal prosecution as aggravated trespass. This is

64. Ibid, p 122.
65. Mead, above n 42.
66. A Norrie *Punishment, Responsibility and Justice* (Oxford: Oxford University Press, 2000).

particularly chilling given the creeping formal privatisation of functionally public spaces, such as town centres. If major sections of our urban spaces are private and any crowd protesting on private land is subject to s 68(1) CJPOA, the quiet delegitimisation of protest is evident.[67] The work of David Mead and Antonia Layard is exemplary on this point.[68] They have repeatedly drawn our attention to the growing closure of the spaces of any sort of public sphere.

THE LAW OF CROWDS

Bauer and *Austin* are very different judgments in very different contexts; *Austin* comes from public law, *Bauer* from criminal; the former takes place on the terrain of human rights while the latter eschews it; one seems indebted to moral philosophy while the other would seem to prefer social theory; one is legitimated by a moral valuing of bad protestors, whereas the other actually understands crowd dynamics and criminalises the 'crowdness' of the crowd. Of course, neither response to crowds is natural or obvious; they represent two different ways of writing (about) crowds. And this is precisely why I want to draw them together. I want to suggest that we think about these cases as standard-bearers for a distinct legal field: the 'Law of Crowds'. There are many other moments when law thinks about crowds, from the prosecutions for violent disorder and breach of the peace, to the dynamics of strike jurisprudence. However, because it straddles a multitude of legal subdisciplines (criminal, administrative, tort, contract, human rights, labour and emergency law, to name but a few), the 'Law of Crowds' remains a submerged field.

These questions of protest and revolt are usually understood through human rights, which provide a competing analysis of these two decisions to the one that I am putting forward. The human rights argument would run as follows: decontextualising the judgments from their legal subdisciplines of criminal and public law renders them unintelligible – if there is a common legal framework, it is human rights and not a submerged jurisprudence of the 'Law of Crowds'. There is certainly merit in this response, but it misses the point of this paper, which is to avoid the conventional analysis and see

67. See Liberty's 'Supplementary evidence to the Joint Committee on Human Rights: "policing and protest" – private property'; available at http://www.liberty-human-rights.org.uk/pdfs/policy08/supplementary-evidence-to-jchr-protest-and-private-land-.pdf (accessed 6 March 2014). See also *Appleby v the UK* (ECHR).

68. See D Mead *The New Law of Peaceful Protest* (Oxford: Hart Publishing, 2010); D Mead 'A chill through the back door? The privatised regulation of peaceful protest' (2010) Pub L 100; D Mead 'Of kettles, cordons and crowd control – *Austin v Commissioner of Police for the Metropolis* and the meaning of "deprivation of liberty"' (2009) Eur Hum Rts L Rev 345; D Mead 'Strasbourg succumbs to the temptation 'to make a god of the right to property' (2003) 8 J Civ Lib 98; A Layard 'Shopping in the public realm: a law of place' (2010) 37(3) J L Soc'y 412; A Layard 'Protecting (urban) public spaces', paper given in the ESRC series *The Public Life of Private Law*; available at http://backdoorbroadcasting.net/2014/05/antonia-layard-protecting-urban-public-spaces-playing-by-the-rules-or-playing-out/ (accessed 4 February 2015); A Layard 'A right to public space' LSE Blogs; available at http://blogs.lse.ac.uk/constitutionuk/2014/03/31/a-right-to-public-space/ (accessed 4 February 2015); A Bottomley and N Moore 'From walls to membranes: fortress polis and the governance of urban public space in 21st century Britain' (2007) 18(2) Law & Critique 143. It is also worthwhile mentioning the Defend the Right to Protest group: http://www.defendtherighttoprotest.org (accessed 4 February 2015).

what a different framework generates in terms of our understanding of the crowd moments in law. The human rights answer, as we well know, works by balancing abstract rights in a particular context. It operates on a number of different terrains: the legitimacy of state intervention; the necessity of the state's interest in maintaining (its) order; the (construction of a) public that requires peace; and the (limited) democratic right to express dissent and to assemble. As many critics have noted, these produce a series of blind spots.[69] The conventional framework in *Austin* and *Bauer* of free speech and association will tend to repeat similar questions with different tonalities, no matter how brilliant the author. One will privilege security or public order; another will insist on assembly and speech. All the while, similar blind spots remains. In this context, I insist, the critical move is precisely to decontextualise the decisions from their legal disciplinary frameworks, and instead focus upon the material similarity of the subject involved: the crowd. This shift of focus generates different questions, and refuses the presuppositions of human rights.

One of the key problems that the human rights framework renders largely invisible is the question of the interspersal or indistinction of normalcy and exception in police strategy. Human rights tends to pose an on/off switch when it comes to emergencies. The point has been made *ad nauseum* by Agamben and his followers that it is never this simple. They look instead to Benjamin's 'real state of exception' that we learn from the 'tradition of the oppressed'.[70] This 'real state of exception' transcends the liberal questions of declared and undeclared emergency. It is the situation in which we live, according to Benjamin. This means that some will be subjected to exceptional powers and most will remain unaware. Now we do not have to go all the way with Agamben to see this. Without his pessimism (or ontological rendering of the question), Bonnie Honig's compelling analysis in *Emergency Politics* is underscored with an understanding that exceptionality is rarely simply encapsulated by emergency legislation. What is more, she insists, exceptionality can be contested in a myriad of democratic ways.[71] However, key to understanding the contestation of exceptional power is its visibility as an exceptional moment. As any good liberal will insist, there is no question of emergency in either *Austin* or *Bauer*. The courts do not refuse to hear argument because of an Art 15 declaration. The issues are litigated and human rights are discussed (or not). Yet this is precisely the point of Agamben et al, that the genuinely exceptional power is to strip someone of protection *while they are before the law*. As I have said, we do not need to travel all the way to the absolute (ontological) character of the homo sacer. The crowds in *Austin* and *Bauer* are included in the law in so far as their 'crowdness' is precisely what excludes them from its apparent protection. It sounds as though the 'Law of Crowds' is some cipher for another repetition of the interminable debate about exceptionality. I want to insist that it is not. There is a complex relation between norm and exception in the 'Law of Crowds', just as there is in public law, human rights or policing in general. By rendering the question of crowds simply as exceptionality,

69. Douzinas, above n 1; W Brown *States of Injury* (Princeton, NJ: Princeton University Press, 1995); W Brown and J Haley (eds) *Left Legalism/Left Critique* (Durham, NC: Duke University Press, 2002); Agamben, above n 7.

70. W Benjamin, in G Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005) p 57, see also C McQuillan 'The real state of emergency: Agamben on Benjamin and Schmitt' (2011) 18 Stud Soc & Pol Thought 96.

71. See, for instance, her analysis of Louis Post's subversion of the first red scare by holding an administrative rationality to a juridical standard of process and proof. B Honig *Emergency Politics* (Princeton, NJ: Princeton University Press, 2009) pp 65–86.

we miss the nuance of the submerged politico-legal field, a nuance to which this paper has been attentive.

Instead of rejecting the 'Law of Crowds' for a human rights argument, or reducing it to a question of emergencies and exceptionality, let me suggest a more moderate critical framework. In the very different context of an article on the law around the Peterloo massacre, legal historian Michael Lobban notes:

> in the crisis of 1819, by taking a new set of facts – the collective behaviour of political crowds – and putting them into different technical forms, the courts were able to consider new questions, and thereby to determine new types of political crime not used hitherto. This helps us to understand the relationship between law and society in the early nineteenth century.[72]

His point is very simply that we must carefully note how the relation between law and society changes when new democratic modes of dissent and new technical forms emerge. We might reframe that in a more Foucauldian manner by asking about the shifting nature of political (and legal technologies). I am suggesting that by focusing on crowds, which are in a certain sense a political technology, we can see the novelty of kettling and aggravated trespass as a response to new 'multitudinous' crowds. In kettling, the police's desire is to generate a controlled, clinical environment in which the crowd would be staged. The language of the kettle is instructive here, with its lines of police surrounded by 'sterile zones' that are cleansed of protestors. The metaphor is of a Petri dish in a laboratory, where the bacteria (of the crowd in protest) are analysed under perfect conditions – because for all the discussion of it, kettling is not a deterrence strategy (unlike aggravated trespass); it is a key strategic move of determining the terrain upon which the confrontation with the police will occur. This is invaluable, precisely because the routine public order policing occurs around football matches, where the police have a detailed understanding of where the likely flashpoints are. Also with this control comes an ability to deploy 'Forward Intelligence Teams' of evidence gatherers and other modes of surveillance. Up until 2013, the police made it clear that 'the process of obtaining identification [by collecting names and addresses of those in the kettle] was "part and parcel of the containment". It was part of the lawful controlled release policy and a "necessary but very brief adjunct to the containment"'.[73] This was declared unlawful in *Mengesha*,[74] but with the increasing power of facial identification software, real-time data processing and computer systems that do not require names to be searchable, this is far less significant than we might imagine. Thus, the kettle provides control and data for the police, and a spectacle of the crowd. In this sense, the broad rhetoric of the good and bad protestors makes sense. The crowd's demonisation is a fundamental part of the strategy itself. The police understand that the kettle draws out violence, but this violence is then capturable either as information that can be used subsequently, or as an arrestable offence.

In *Bauer*, this delineation between good and bad protestors would be meaningless, because there is no one goaded to violence. UK Uncut chant and sing and play. The crowd seem like good democratic citizens, discussing the problem of tax avoidance with the shoppers as fellow citizens. This, after all, is precisely their strategy. As distinct

72. M Lobban 'From seditious libel to unlawful assembly: Peterloo and the changing face of political crime c1770–1820' (1990) 10(3) Oxford J Legal Stud 308.
73. *Mengesha* [2013] EWHC 1695, at para 11.
74. Ibid.

from bodies being flung at police lines, UK Uncut seem innocuous – fun-loving, even. What good would a rhetoric of violent human nature be here, where these subjects' aggravating factors are playing with beach balls and opening umbrellas? In this context, the court had to begin to develop a fluid and dynamic concept of the crowd, which could articulate with the uncertainty of randomly selective prosecutions, generating a sense of jeopardy for those who undertake such protests. The solution that Moses LJ comes up with is the deployment of fine technical delineations that hide what is basically a blanket criminalisation on any and all protest in private space. And thus, we can begin to see that the trial itself is the point. The crowd as an atmosphere-machine to be interpreted within the discretion of the police and the prosecutors places the crowd as what is known by the police and prosecutors. In this way the crowd itself is reversed; no longer is it a democratic empowerment – for good or bad. Instead, it is the object of juridical knowledge; its sense is always to be interpolated by the functionaries of the criminal justice system.

The 'Law of Crowds' is, first, a way of thinking about the relation between novelty in protest and legal technicality. However, it also opens on to a much broader and perhaps more significant question of the relation between law and order. It is about the contestation of political order on the streets. It underlines the essential question of democracy – when do the people speak? This is a question that liberal democracy claims to settle through periodic elections and the establishment of frameworks of civil society and public discourse. In this, the idea is simply that the people may no longer directly manifest themselves. However, when the crowd comes on to the streets and claims to be the people, this closure is contested. The 'Law of Crowds', in its political sense, is thus about extra-systemic contestation and augmentation.[75] Or, in the most extreme of cases, it is about constituent power.[76] This paper has emphasised the crowd as *turba*, underlining its turbulent nature. However, to understand this question of extra-systemic contestation, we need to return to the other two Latin terms that I introduced at the outset: *multitudo* (number) and *vulgus* (class). Theoretically and historically, *turba*, *multitudo* and *vulgus* have a complex relation with *populus* (people) and *polis* (city/polity). The 'Law of Crowds' opens this bigger question once more, but this time it privileges the crowd as the *site* of investigation, rather than the *polis* or *populus*. Thus, rather than focusing upon the production of the (idea of the) people, the question becomes of the crowd in its relation to an extant political order, and its production of a different one.

The 'Law of Crowds' is thus more than a submerged field. It is a play on the traditional legal discipline. The 'Law of Crowds' is a double genitive. The crowd is at once the subject of law (the law as it pertains to crowds), in the sense that the crowd is subjected to law. Subjection to law means that law writes the subject; it gives sense to the crowd. The legal subject is the subject as it is generated in law. Thus, Lord Hope's human nature or Lord Justice Moses' dynamic crowds allow us to glimpse the crowd that law understands. However, alongside this first sense of being subject to law, we can also identify the 'Law of Crowds' as a way of thinking about the crowd as the

75. See H Arendt *On Revolution* (New York: Viking Compass, 1965); and B Honig *Political Theory and the Displacement of the Politics* (Ithaca, NY: Cornell University Press, 1993). See also M Wenman *Agonistic Democracy* (Cambridge: Cambridge University Press, 2013) pp 218–262.

76. See M Loughlin and N Walker (eds) *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2007); and J Frank *Constituent Moments* (Durham, NC: Duke University Press, 2010).

creative agent that produces new law (the law that crowds create or perhaps take possession of). This is the relation between the crowd (as *turba*, *multitudo* and *vulgus*) and the people; it is a way of thinking about constituent power as both revolt and augmentation.[77] The 'Law of Crowds' is thus a way of thinking about recent events, such as Occupy, the Arab Spring, the *Indignados* and all of the other crowd phenomena around the world. It frames law as the site of a series of creative and destructive processes. It is careful with the legal nuance, while refusing to be confounded by the claims to pure normativity without exception. I suggest therefore that the 'Law of Crowds' – in this setting at least – is nothing more or less than a different way of thinking about the question of democracy itself.

77. Arendt, Honig and Wenman, above n 75.