Protesting in Pandemic Times
COVID-19, Public Health, and Black Lives Matter

Binoy Kampmark

Abstract: The COVID-19 pandemic raised questions about reconciling health priorities with the exercise of certain liberties and rights. Public safety has come into conflict with matters of mobility, freedom of expression, and the right to protest. How can the threat of viral transmission be reconciled with the urgency of political protests, such as in the Black Lives Matter movement? This article discusses various approaches, referring to debates in the United States and Australia, where law enforcement authorities and politicians warned against protest marches, generally citing the protection of public health as a qualifying exception. Numerous epidemiologists, while acknowledging risks, argued that a calculus of risk be deployed, citing public health as a variegated, multi-layered concept. A similar balancing act was deployed in Australian courts. Such reasoning led to accusations that public health science had been politicized. Striking the balance remains a pragmatic approach to holding such gatherings during times of pandemic.

Keywords: Black Lives Matter, coronavirus, COVID-19, liberties, pandemic protests

On December 31, 2019, a pathogen outbreak was noted in Wuhan, Hubei Province. It was quickly given the name SARS-CoV-2, a severe acute respiratory syndrome within the coronavirus family (Lescure et al. 2020). On January 24, 2020, the first patient in Europe was diagnosed with the 2019 coronavirus disease (COVID-19). The disease is the product of zoonotic infection allegedly drawn from wet markets. The rapid spread of the virus, and the emergence of the COVID-19 disease, led to a global public health experiment. International travel was curtailed; stay-home orders against nonessential movement were imposed. Physical
distancing measures and restrictions on social, political, and public gatherings were implemented. The introduction of intrusive measures on public movement across the globe placed activists and protesters in a dilemma. To protest on the streets could result in fines and imprisonment. To not protest might constitute abject surrender. This necessitated either finding alternative methods of protest or an open defiance of such regulations.

The killing of George Floyd, an African American man, by a Minneapolis police officer on May 25, 2020, prompted huge protests across the United States and more globally, shining a light on police brutality (“How George Floyd’s Death” 2020). But these protests challenged pandemic regulations. The issue of public health broadened beyond its traditional confines as a scientific, medical issue. It became central to the sociopolitical context of protest, taking into account racial violence and structural inequalities. To what extent might such gatherings, normally permitted, be either prevented or controlled by the state? Might rights of free assembly and speech be somehow reconciled with health and safety imperatives? The discussion that follows considers the approach of the authorities and the protesters in both US and Australian contexts, with regards to the 2020 Black Lives Matter (BLM) protest wave. These, it should be said, also took place alongside a global debate on the role of protest in states of pandemic.

Public Health as an Exception to Civil Rights

The “bacteriological revolution” spurred on by the discoveries of Louis Pasteur (1822–1895) and Robert Koch (1843–1910) created the impetus for a new public health regime. With it came the introduction of civil restrictions, including the imposition of quarantines on those suffering infections. While the use of quarantines to target the transmissibility of disease was not new, having already become the basis of measures used by European states in the fifteenth century, modern germ theory added scientific credibility to such measures. That did not stop some degree of skepticism and suspicion from followers of “anticontagionism” (Ackerknecht 2009). The discovery of infectious bacteria by Koch and Pasteur also caused alarm that quarantines would disrupt the free movement of goods and people (Bayer 2007). Pioneering public health advocates, such as Herman Biggs (1859–1923) and Mitchell Prudden, the former being general medical officer in the City of New York’s Department of Health, were particularly strident in advocating firm
health measures, even against the exercise of liberties. In the view of Biggs, everything that might improperly interfere and imperil the comforts and enjoyment of life, including those detrimental to health “may become the subject of action on the part of the Board of Health” (qtd. in Bayer 2007: 1099). This inaugurated a species of medical authoritarianism—compulsory vaccination programs, quarantine measures, and health surveillance designed to control disease transmission—which gave birth to its own rash of protests. In the 1890s, Milwaukee in Wisconsin saw the breaking out of riots from the largely German population against the dedicated application of the state’s mandatory vaccination law (Bayer 2007).

In the miscellany of international and regional human rights conventions, the protection of health retains a dominant, privileged position, the qualifying exception to the exercise of human rights touching on, for instance, free speech and rights to assembly. The European Convention on Human Rights enumerates the right to freedom of peaceful assembly and freedom of association with others under Article 11; but it also grants the signatory state power to make overriding laws that constitute exceptions to the exercise of those rights. Article 11(2) of the same document makes it clear that restrictions are not to be placed upon the exercise of such rights except in certain enumerated circumstances, including those made “for the protection of health or morals or for the protection of the rights and freedoms of others” (Council of Europe 1950). Restrictions have been held to be valid by the European Court of Human Rights in cases compelling prisoners to clean their cells or soldiers to have their hair cut so as not to have it touch their collars (Greer 1997: 24).

The imposition of onerous public health directives to curb epidemics has its recent international precedents. The response of the United Nations Security Council in September 2014 to the outbreak of Ebola in Resolution 2177, adopted on September 18, noted that “the unprecedented extent of the Ebola outbreak in Africa constitute[d] a threat to international peace and security” (Feinberg et al. 2015: 383). The Ebola virus and its infliction of thousands of deaths had “prompted questions about international bodies imposing measures to prevent and protect the population, sometimes at the expense of freedom of movement or other rights” (Feinberg et al. 2015: 383).

The lockdown regimes across the United States, Australasia, and Europe have similarly used regulations to control and criminalize gatherings of a certain number to suppress COVID-19 transmission. Until May 31, 2020, gatherings of more than three or more people in a public
space were criminalized under British law (Health Protection [Coronavirus Restrictions] [England] Regulations 2020, Reg. 7). These were relaxed on June 1, 2020, with Regulation 7 amended to permit outdoor gatherings of six or less people. The law would still apply to gatherings of seven or more people outdoors irrespective of whether it was in exercise of a lawful right to assembly or whether the COVID-19 laws were being followed specific to that protest (for instance, practicing social distancing).

Two instances where protests were organized in defiance of existing COVID-19 restrictions provide appropriate case studies of tensions between the application of public health measures and the legitimate exercise of civil and political rights. First, the United States, with constitutionally enshrined rights to lawful assembly and free speech, furnishes a striking example of a clash between public health directives and the defiance of protesters, notably in the context of the BLM protests. Second, Australia, where the George Floyd protests created a bellowing inspiration for renewed protests against police brutality. The Aboriginal man David Dungay Jr., a twenty-six-year-old who perished in Long Bay prison in 2015, had also died at the hands of law enforcement. It was said that Dungay had also repeated, at least words to the same effect, and futility, of Floyd: “I can’t breathe” (Foster 2020).

The Australian example is interesting for somewhat different reasons than the US example. For one, the right to protest has no formal grounding in its domestic law. Every tier of government from local bodies to the Commonwealth of Australia can stifle, regulate, and adjust how people gather and where they gather. States within Australia have enacted various anti-protest laws designed to break up rallies and invalidate gatherings. The only obstacle they face is an emaciated, frail concept known as the implied right to freedom of political communication and a fragile common law right to public assembly. For all that, Floyd’s plight, suitably adjusted to Australian conditions, inspired various rulings in Australian courts that deserve our attention.

In both the United States and Australia, critics of the BLM protests have insisted that public health considerations trump rights to physical assembly. To march was to be irresponsibly facilitating transmission and undercutting the credibility of the lockdown regime. Ironically enough, such criticism often came from quarters initially skeptical about the dangers of COVID-19. Protesters, in response, claimed that such risks could be minimized by following epidemiological advice (such as utilizing face masks, social distancing, and hand washing).
Liberation and Health: Protest and Pandemic in the United States

The squaring of public health policy vis-à-vis the effective containment of a pandemic and rights to protest has revealed a deep tension in reconciling seemingly irreconcilable objects. Health containment strategies toward viral spread stress isolation, small gatherings, quarantine, and restraints on movement. The right to protest entails movement, assembly, and freedom to gather in concentrated numbers, posing potential public health risks in times of pandemic. Globally, lockdown and coronavirus legislation was passed ostensibly to contain coronavirus transmission, instituting a mixed collection of control and repressive regulations that varied in their severity in terms of limiting protest. In some cases, coronavirus legislation directly targeted dissent itself, including criticism of government measures to combat the pandemic. In Hungary, the Orbán government passed legislation “unrelated to fighting the virus and more concerned with fighting critics, the opposition and free speech” (Varga 2020). In the Philippines, similar laws targeting the spreading of purported misinformation on the nature of the virus and government responses to it were passed, punishing offenders with two months of jail and fines up to one million pesos (Aspinwall 2020).

In April 14, 2020, the police department in Raleigh, North Carolina, tweeted its view that, “Protesting is a non-essential activity” (National Coalition Against Censorship 2020). In response to such measures, groups such as the National Coalition Against Censorship rejected the view that pandemic regulations legitimizied a “suspension of First Amendment rights. People must be free to express disagreement with government decisions, even when it involves criticism of essential public health measures” (2020). Public health regulations were necessary but should be “narrowly tailored” to permit public assemblies to take place, be it in terms of social distancing, the size of the assemblies, and the wearing of protective equipment.

The prolonged stay-home measures marked by state regulations propelled the organization of anti-lockdown protests across the United States. Car demonstrations took place in Arizona, California, and Michigan against stay-home orders (Detroit Free Press, 2020). In Texas, a group of conservative activists penned an open letter to President Donald Trump in April arguing that “Americans manage their own risks. Each one of us can determine for ourselves how best to proceed.” In their view “many state and local governments” were “using wrong and confusing data to strip Americans of basic liberties, and to advance
tyranny at an alarming rate” (Scott et al. 2020). Trump tweeted enthusiastically that certain states should accordingly “liberate” themselves in defiance of the stay-at-home rules in place to contain viral transmission (Miller and Sedensky 2020). When asked by state governors what, exactly, he meant, Trump remained vague. But the message was clear enough for many: the commander-in-chief had proclaimed himself in league with protesters against the pandemic regime.

The presence of such opposition paved the way for the fury that followed Floyd’s death on May 25. It generated a global protest movement reflecting upon “a history of systemic racism and police brutality” (Ramsden 2020). In so doing, it also emboldened protesters to seize the chance to draw attention to broader social ills, despite the fears and risks associated with the transmission of COVID-19 (Ramsden 2020). The consequential BLM protests troubled certain members of the epidemiological and public health community, but they did so from multiple perspectives. Trevor Bedford of the Fred Hutchinson Cancer Research Center admitted that Floyd’s killing “cements the element[ary] ‘rightness’ of the Black Lives Matter cause” (Bedford 2020a) but also turned his attention to the consequences of engaging in mass physical protest without adequate protections. The “societal benefit of continued protests must be weighed against substantial potential impacts to health” (Bedford qtd. in Harmon and Rojas 2020). Each day of protests, he roughly assessed, would yield three thousand new infections. Given estimates with the transmission rate as it then stood, this would lead to fifteen thousand to fifty thousand infections, with fifty to five thousand deaths. A snowballing effect might ensue: shouting, the use of tear gas, packed jails, all serving to “increase transmission potential” (Bedford 2020b).

This potential link between protest and infection was given further prominence by Oklahoma State footballer Amen Ogbongbemiga, who announced that he had contracted COVID-19 after participating in “a protest in Tulsa and being protective of myself.” With that came a warning: “Please, if you are going to protest, take care of yourself and stay safe” (Ogbongbemiga 2020).

Though the George Floyd protests took place outdoors, the potential spread of coronavirus at the gatherings was compounded by a number of factors, summarized by Thomas A. Russo, infectious disease specialist at the Jacobs School of Medicine and Biomedical Sciences at the State University of Buffalo. Large crowds with individuals gathered in proximity for long periods would provide ideal conditions for viral transmission. The performative element of the protests—agitation,
chanting, and shouting—all served to generate “more respiratory secre-
tions than if they were having a quiet conversation.” Many would not
be sporting full personal protective equipment, such as masks or eye
protection (Russo 2020).

Epidemiologists such as Russo and Bedford’s labors of estimation
were praised by several colleagues but also drew criticism for potentially
emboldening those opposing civil rights and reformist agendas (Harmon
and Rojas 2020). The risk of contracting COVID-19 was subjected to an
evaluative exercise of comparative dangers to public health. One danger
took a non-human, non-institutional form—the virus itself; the other,
the very human, defective nature of institutions, such as the police
and instances of structural violence. Interpreted as such, concepts such
as racism and police brutality were themselves reconstituted as public
health risks, to be subject to an actuarial risk analysis.

The emergence of the BLM protest movement from 2013 encour-
aged reconsiderations of public health, seen by commentators such
as Hannah L. F. Cooper and Mindy Fullilove as previously “silent on
the consequences of excessive police violence for health and health
equity” (2016: 1). The first BLM protests had arisen as a response to the
July 2013 acquittal of George Zimmerman, a civilian who shot Trayvon
Martin, an unarmed teenager. This subsequently developed into a new
movement challenging the impunity of police violence, over-policing in
communities, racial disparities, and economic and political inequality
(Williamson et al. 2018). New methodologies have since broadened the
focus, including Public Health Critical Race Praxis in understanding the
effects of such violence, centering policing within the context of public
health policy (Gilbert and Ray 2016).

The George Floyd protests sparked a challenging test of public health
variables. On the one hand was the initiative of a vocal protest move-
ment to draw attention to the inequities of policing power in the United
States. With this came a trenchant critique of broader structural inequal-
ities. On the other hand were the dangers present to public health in
exercising such rights in defiance of stay-at-home directives and the
potential of a surge in infections. Those seeking to impose such restraint
orders risked being accused of hypocrisy in the event that they permit-
ted exceptions. Those working in public health, it soon transpired, were
willing to give the protesters a measure of exoneration for breaching the
lockdown regime, arguing that not protesting against instances of police
violence was itself a factored health risk.
Epidemiological Balancing

Eleanor Murray, an epidemiologist based at Boston University, suggested that public health be seen through a broader prism of threat and risk, a hierarchy of priorities. “Racism and police violence are major threats to public health in this country, and protest is one of the only options available to people who have been systematically disenfranchised” (Harmon and Rojas 2020). Epidemiologist Jennifer Nuzzo of the Johns Hopkins Center for Health Security urged an evaluation of “risks and benefits of efforts to control the virus” but came to what she considered a solid conclusion. “In this moment the public health risks of not protesting to demand an end to systemic racism greatly exceed the harms of the virus” (Nuzzo 2020).

Former director of the Centers for Diseases Control and Prevention Tom Frieden similarly argued that the risk of pandemic spread occasioned by the protesters was “tiny” relative to those threats to health “created when government acts in ways that lose community trust” (Harmon and Rojas 2020). Buffalo University infectious disease specialist Russo, while expressing some concern at the potential transmission risks of the coronavirus, suggested a number of mitigating factors. While offering no guarantee against infection, at least such measures lessened the chances of spread. Mask and eye protection should be worn; distances between protesters (the six-foot rule) kept; and attention paid to “staying to the periphery and upwind of the protest” (Russo 2020). “The safest way to protect loved ones is to immediately and religiously wear a mask for three weeks post-protest, given the incubation time and infectious window for this virus, if self-quarantining is not an option” (Russo 2020). Physician Bill Miller similarly suggested mitigation and surveillance strategies, including the need for the mass testing of participants. “Testing everyone that participated in demonstrations would be useful in communities where many news cases are being reported every day” (Miller qtd. in Aubrey et al. 2020).

Biologist Carl T. Bergstrom also weighed into the debate on whether the BLM protests were unpardonable health risks or virtuous acts of civic duty (Rufo 2020). As an authority on pandemic planning and network misinformation, he acknowledged that attending such protests did pose a risk of coronavirus spread (Bergstrom and West 2020). Notwithstanding that he “wholeheartedly support[ed] the protests nonetheless” (Bergstrom 2020a). Crowds and crowded conditions were “concerning—and singing and shouting” created “large crowds of respiratory droplets” (Bergstrom 2020b), but he considered another potentially graver
transmission risk: that posed by aggressive policing. “Police tactics, from tear gas to pepper spray to kettling to incarceration of demonstrators, exacerbate matters substantially” (Bergstrom 2020c).

The moral calculus of approving BLM protests as an epidemiological exception in the scheme of public health did not impress conservative critics such as Jonah Goldberg. The pontifications of a public health elite, he suggested, risked bankrupting the credibility of their expertise. Writing in The Dispatch, Goldberg suggested that individuals such as Frieden were part of a moralizing cadre of “public health experts and earnestly righteous media personalities who insisted that easing lockdown policies was immoral, that refusing to social distance or wear masks was nigh upon murderous” (2020). Protests were “profane,” except when it came to advancing the cause of Floyd, whose death had served as a “Great Awokening” for health specialists. When conducted for progressive causes, such gatherings were suddenly appropriate, “glorious and essential—if they agree with what you’re protesting about” (Goldberg 2020).

Christopher F. Rufo of the conservative Center on Wealth and Poverty, a think tank based at the Discovery Institute, was similarly withering in his claim that public health experts had selectively promoted “progressive exceptions” to the science, taking issue with “anti-lockdown protests as ‘anti-scientific’” and churchgoers attending services in defiance. “The same doctors and nurses who once shamed churchgoers released petitions in support of BLM and marched with tens of thousands of protesters in the streets.” COVID-19 transmission was seen as “the lesser of two evils” over the “public health threat” of racism. “In other words, public-health experts rejected science in favour of progressive politics” (Rufo 2020).

Subsequent modeling by epidemiologist Jeffrey Shaman on rates of transmissibility of the BLM protests, with specific reference to New York COVID-19 numbers, suggested negligible change in case infections (Berger 2020). According to Rodney Rohde of the Texas State’s College of Health Professions, the minimal change in infection rates could be explained by a few factors: the protests being held outdoors as opposed to enclosed spaces, enabling a “fresh circulation of air”; the “antiviral effects of the UV in sunlight, as well as the virus’s fragile nature with desiccation” (Rohde qtd. in Berger 2020). For Shaman, any resurgence would have to be attributed to a matrix of factors. “The protests are not in and of themselves going to drive the resurgence in cases. This is associated with all the new opportunities that are providing a way for people to get together and pass the virus to one another” (Shaman qtd. in Harmon and Rojas 2020).
The first empirical study of its kind to examine the coronavirus spread in the context of the BLM movement published by the National Bureau of Economic Research found little evidence of a surge in COVID-19 (Dave et al. 2020). Data collected by the authors in 315 of the largest US cities examining the impacts of mass protest on social distancing and the growth of COVID-19 between May 26 and June 20 yielded no evidence of increased case numbers. “We conclude that predictions of broad negative public health consequences of Black Lives Matter protests were far too narrowly conceived” (Dave et al. 2020). Instances of stay-at-home behaviors were found to have increased, with social distancing behavior being more heavily practiced after the protests. While the authors conceded that protests might have caused an increase in COVID-19 in some cases, they had “little effect on the spread of COVID-19 for the entire population of the counties with protests during the more than three weeks following protest outset” (David et al. 2020: 25).

**Black Lives Matter Down Under: Protests and Pandemic in Australia**

The case of Australian protest during the COVID-19 pandemic offers both a mirror and a counterpoint to the US example. While the United States enjoys strong constitutional protections of freedom of assembly and speech, Australia conversely lacks any formal, human rights protections pertaining to these categories. There is no constitutional, personally vested right to lawful assembly or free speech, merely an implied restraint on government power in terms of communication on matters of political interest (Australian High Court 2010, 31; 2019). It is, in the words of Australian High Court Justice Michael McHugh, “a freedom from laws that effectively prevent members of the Australian community from communicating with each other about political and government matters” (Australian High Court 1997: 622). Australia is a signatory to core international conventions on the subject but has not incorporated the provisions into domestic law (Gotsis 2015: 5). Unconvincing arguments have been made claiming that the Magna Carta has preserved a residual common law right to assembly, but the successful litigation record against local regulations limiting, for instance, protesters’ rights to camp overnight in cities’ central business districts is poor at best (Australian Federal Court 2014).

Organizers of protests in Australia must often seek the permission of local authorities governed by state laws regulating lawful assembly.
The lack of clear constitutional protections to protect free speech and assembly permits such authorities the means of constraining the populace at the behest of parliaments. State parliaments are also permitted to pass laws and enact regulations contrary to the international human rights conventions ratified by the Commonwealth government. “The Commonwealth’s ratification of the ICCPR [International Covenant on Civil and Political Rights],” reasons Justice Keane in *Tajjour v New South Wales*, “did not affect the ability of the States to enact legislation contrary to that Convention” (Australian High Court 2014: para. 249).

The imposition of police-enforced stay-home orders across Australian states did cause some share of consternation. Victorian State politician Tim Smith was particularly colorful in his use of language. “In Victoria with control freak wowsers like [Premier] Dictator Dan [Andrews] running the show, you can’t even sit down for a coffee, let alone a beer” (Smith 2020). But a grudging acceptance marked by the motto “We are all in this together” led to what was, initially at least, seen as a successful containment policy. Instances of protest and assembly were heavily penalized. In April, one man was arrested and twenty-six protesters fined AU$43000 for staging car convoy protests in Melbourne to draw attention to the situation of refugees in detention facing an increased risk of contracting COVID-19 in confined quarters (O’Sullivan 2020).

The death of George Floyd served as an incitement for Australian activists to protest against police brutality and indigenous inequalities, even in the face of restrictive stay-home orders. Casting a long shadow over the protest narrative was the fate of David Dungay, an Aboriginal man whose last reported words in Sydney’s Long Bay jail in 2015 at the hands of six police officers were identical to Floyd’s: “I can’t breathe” (Anthony 2020). Sharing common ground with arguments made in the United States, the issue of police brutality was seen in broader, structural terms. “Police brutality is not an insular event—it is a result of a system that wants to actively fragment First Nations and Black Communities in order to dampen the voices of dissent and keep its power” (qtd. in Foster 2020). Despite a limited understanding of the anemic protections for protest and assembly, protesters considered the liberty a standing one needing no approbation from the authorities. “We do not need permission to protest,” noted one on the “Stop All Black Deaths in Custody” Facebook page (McKinnell et al. 2020).

Ahead of organizing nationwide protests on June 6, 2020, a number of organizing bodies, after initial interest, expressed reluctance to continue. Public health risks loomed large. The Indigenous Social Justice Association, the Anticolonial Asian Alliance, and the Autonomous...
Collective Against Racism withdrew. Alternatives methods of support and solidarity were suggested in lieu of physical gatherings.1 “Remember there are many many other ways you can use your voice, your money and your time to support this cause both today and into the future” (Best 2020). Less taxing, and supposedly less dangerous, methods of protest were suggested. Funds could be donated to the George Floyd Memorial Fund and the Justice for David Dungay Junior charity. Petitions seeking “Justice for George Floyd” and to “Prevent Another Aboriginal Death in Custody” could also be signed (Best 2020).

**Legal Balancing**

A miscellany of Australian legal groups did not see the pandemic regulatory framework as insuperable for protesters. According to the Human Rights Law Centre (2020), “The legal right to protest is fundamental to our democracy. Protests hold governments to account and make our country better. While the powerful few are able to write cheques or call friends in high places, protests are how the visible or ignored can become seen and heard by government.” Nicholas Cowdery, president of the New South Wales (NSW) Council for Civil Liberties, acknowledged “the public’s rights to protest” as “a vital civil liberty that serves very valuable purposes in the advancement of democracy.” But these were to be “exercised responsibly, so as not to cause avoidable harm.” Protesters and authorities had “to ensure that public health measures in place are observed while the right to protest is exercised.” Regulators had to “ensure that appropriate discretion is exercised in the enforcement of rules” (Cowdery in Human Rights Law Centre 2020). O’Sullivan of the Castan Centre for Human Rights Law at Monash University also took the position that protest could still take place during a stringent lockdown without compromising public health. “Specifically, I do believe there is a way to protect public health while simultaneously allowing a form of protest,” he noted (O’Sullivan 2020).

These views were duly tested in the NSW courts. Despite the customary rigidity and general reluctance of Australian judicial officers to endorse the validity of mass protest, the NSW decisions showed certain sympathetic pronouncements regarding the BLM movement. Despite finding for the police commissioner, and invalidating the June 6 protest, Justice Desmond Fagan of the NSW Supreme Court conceded that “the public interest in free speech and assembly and the facilitation of public gatherings at which views on matters of public importance may gather together and show their strength, to demonstrate their solidarity on a
particular issue.” Such a right was “of great importance in a democracy such as that enjoyed in Australia” (Commissioner of Police v Bassi 2020: para. 17). The cause of drawing attention to what was perceived “as unequal treatment of indigenous people in this country by police and concern with respect to deaths of indigenous people that have occurred whilst in custody” along with concern of high incarceration rates was “one that is widely supported in the community and with great strength of feeling” (Commissioner of Police v Bassi 2020: paras. 18–19). The right was not extinguished but merely held over for public health reasons, a point that did not sit well with protest organizers. Assistant Police Commissioner Michael Willing was ready for the defiant. “Police will be out in numbers to enforce that decision. We will consider any option, we have sufficient resources and expertise” (Visontay 2020).

Justice Christine Adamson, in a decision on July 4 on a separate application to protest, reached a different outcome to that of Justice Fagan. The risk of viral transmission, she accepted, was low. Public interest in free speech and freedom of association took precedence over public health arguments submitted by the Police Commissioner (Commissioner of Police [NSW] v Gray 2020). “Demonstrations in public spaces remain a powerful method of advancing particular causes to governments and the general community, as well as engendering a feeling of solidarity among participants and those associated with them who may be unable to be present” (para. 59). It followed that any protester participating would be immune from prosecution for otherwise breaching the State’s COVID-19 orders limiting public gatherings to no more than twenty individuals.

Later that month, another effort to organize a BLM protest was initiated by Padraic Gibson. Again, the NSW Supreme Court became the forum for a test of will. The NSW police commissioner sought to prohibit a public assembly in the Sydney district on July 28 “citing concerns about the health and safety of participants, police and other members of the public in the context of a COVID-19 outbreak” (Commissioner of Police (NSW) v Gibson 2020: para. 1) The decision, while going against the protesters, acknowledged the importance of continuing the protests. Justice Mark Ierace accepted “a risk of momentum being lost in this campaign if public demonstrations in support of the ‘Black Lives Matter’ movement, in the Australian context, do not continue to be held.” (para. 81). But the current evidence, as submitted by Dr. Jeremy McAnulty, Executive Director of Health Protection of the NSW Department of Health, showed that NSW was “on the knife-edge of a further escalation in community transmission of the virus” (para. 82). The judgment
also offered protesters some measure of logistical hope. The justice feared the timing of the protest—taking place on a weekday lunchtime in the center of Sydney’s business district. Pedestrians not otherwise associated with the protest would have to move through the gathering “making social distancing more difficult.” The pedestrians might not, for instance, be equipped with masks for protection (para. 83).

**Infected Protesters**

In Australia, the push for protest marches during the pandemic was also greeted with disdain by those lamenting what was seen as the death of reasonable restraint. The conservative paper *The Australian* suggested that common sense met its end “the moment tens of thousands demonstrated side-by-side in the middle of the pandemic” (Ferguson 2020). States within the Australian Commonwealth had “failed the most basic test and in the case of Victoria, appeared to be turning a blind eye to the activism” (Ferguson 2020). Another paper, owned by the same proprietor (Rupert Murdoch), the *Herald Sun*, also warned that Victorians, having “sacrificed so much to keep each other safe during the coronavirus pandemic” risked having that “hard work … undone by Melbourne’s Black Lives Matter protest” (Tavan 2020).

Notably, many publications and certain politicians who expressed concern about the protests had also understated the dangers posed by COVID-19 in their initial appraisal of the pandemic (Bolt 2020b; Wren 2020). Scientific skepticism was rife in their initial reporting, questioning the veracity of public health assessments. Writing in March, conservative blogger and Sky News host Andrew Bolt noted that the virus had, to date, “killed just seven Australians. But three years ago we kept partying as 1255 died from a particularly severe flu” (Bolt 2020b). He subsequently saw the BLM protests as a rebuffing exercise against strict pandemic policies, proving that “a lot of people have had enough … are demanding change. And for that I thank those protesters on Saturday who broke all the virus rules” (Bolt 2020a).

The date of June 6, 2020, was latched upon as a critical point, given a resurgence of COVID-19 cases in the state of Victoria. While shoddy quarantine regulations for returned travelers, policed by poorly trained and equipped personnel, were seen as the primary cause of the second infection wave (Schneiders 2020), public health arguments were fashioned against BLM protesters. There was particular interest in linking protesters who took part in the June 6 BLM events to infections that subsequently broke out in public housing apartments in Melbourne.
According to *The Australian*, Victorian health authorities had “confirmed a link between two COVID-19 cases in people who attended the Black Lives Matter protest and the cluster of at least 242 cases in public housing towers in the city’s inner northwest” (Baxendale 2020).

With protests being planned for July 28 in Sydney, NSW Police Commissioner Mick Fuller expressed a view fueled by the spike in Victorian numbers. “From our perspective it was obviously big numbers in Victoria, a number of people who came to the protest were living in those vertical towers so that certainly is enough for me” (qtd. in Fordham 2020). The assessment by the Victorian Department of Health and Human Services proved more cautious: the fact that some of the protesters were residents in the tower complexes did not conclusively prove they were responsible for further transmission (Kontominas 2020). As in the United States, the nexus between increased transmission of COVID-19 in a second surge and the protests was not convincingly made.

**Reconciling Public Health and Public Protest**

The protester did not prove to be a dying species during the twenty-first century’s first pandemic. The restrictive, even authoritarian, measures of curfews, stay-home orders, and quarantines did have their containing effects. But the BLM movement drew out the various contradictions in the disposition of public health authorities toward the political legitimacy of such protests and the potential dangers posed by viral transmission. The epidemiological dogmatism that had marked the approach of such public health officials as Biggs was supplanted by a more nuanced, sympathetic approach to the exercise of fundamental human rights. Traditional medical authoritarianism was softened by actual evaluations of health risks with recommended safeguards, seen through a broader human rights prism. Protests could still take place, subject to clearly defined regulations. To not permit them would have been to neglect an opportunity to draw attention to social, structural ills that might themselves be seen as public health threats. This was also a point accepted in Australian jurisprudence acknowledging the urgency of protesting the plight of indigenous peoples. Health matters were important but so were entitlements to public assembly. Activist groups and nongovernmental organizations agreed (Langton 2020; National Coalition Against Censorship 2020).

This stance drew accusations for their selectivity. Science, went this argument, had been politicized by progressive politics, endangering the
public while selectively favoring some protesters. To date, empirical and anecdotal studies on the protests in the United States and Australia on the subject of Black Lives Matter show no evidence of increased transmission (Berger 2020; Dave et al. 2020; Kontominas 2020). This has scuppered, to some extent, criticisms of the BLM movement in both countries. To date, the growing material on the subject suggests that protests in times of pandemic are, for all their recognized risks, possible.

__Binoy Kampmark__ is a senior lecturer in the School of Global, Urban and Social Studies, RMIT University, Melbourne. He was a Commonwealth Scholar at Selwyn College, University of Cambridge and is a contributing editor to *CounterPunch*. Email: bkampmark@gmail.com

**Notes**

1. For a discussion of alternatives, including virtual protests during the COVID-19 pandemic, see Jarman and Ognenovska 2020.
2. The decision was overturned in the superior court and the protest permitted to take place, as the appeal court explained, not for a consideration of “competing public interests of great importance” but because of the original understanding of why permission was granted for the protest under the Summary Offences Act 1988 (NSW): *Raul Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109.
References


Australian High Court. 2014. *Tajjour v New South Wales* HCA 35.

Australian High Court. 2019. *Comcare v Banerjee* HCA 23.


Commissioner of Police (NSW) v Basi. 2020. NSWSC 710.


