

The use and misuse of guidance:
How Her Majesty's Government has controlled the population
during the coronavirus pandemic

working paper, comments invited: th@blackstonechambers.com

T. R. Hickman

I. Introduction

This paper elucidates a central feature of the United Kingdom Government's emergency response to the early stages of the coronavirus pandemic, namely, the manner that the Government coordinated individual behaviour through a potent fusion of public health advice and criminal law. This fusion has been effected through the Government's coronavirus guidance, published on the government website.¹ Initially a source of information about the virus, sanitary good practice and travel advice, the coronavirus webpage developed into the central repository of instructions for people in England² informing them what they should and should not do during the pandemic. Following the lockdown on 23 March 2020 the coronavirus webpage was used to set out detailed public health advice on social distancing and an authoritative source of information about the new legal rules (the "coronavirus guidance"). Yet rather than distinguishing between these two functions, the coronavirus guidance elided them, obscuring the nature of the instructions that the guidance contained.

I describe this phenomenon as the creation of normative ambiguity. Normative ambiguity refers to the way that the criminal law aspect of the regulatory scheme has a radiating effect creating implication that public health norms are (or may be) rules backed by criminal sanctions.³ Normative ambiguity can however also have the opposite effect: suggesting that legal rules are in fact public health advice the observance of which is a matter of individual judgment and discretion. As I will show, during the first and second lockdown phases of the

¹ <https://www.go.uk/coronavirus>

² The guidance was initially expressed as advice applicable to the whole of the UK but it was soon limited to England and each regional government now publishes separate own advice on its own webpage. To begin with, the guidance published by the devolved Governments mirrored that of the UK Government advice, but it has diverged in important respects over time.

³ In this paper I refer to public health advice. The public health advice promulgated by the Government is obviously a balance of health risks and wider social and economic considerations.

UK lockdown, the period between 23 March 2020 and 1 June 2020, the Government exploited normative ambiguity in the way it used the guidance as a means of tightening and relaxing the coronavirus lockdown by influencing people’s perception of the degree of individual choice and liberty that they had. This included the use of misleading statements, even in some cases outright untruths, in the coronavirus guidance. Whilst the government pursued this strategy for well-intentioned public health objectives, it resulted in a real lack of clarity as to what the law required and, more seriously still, by manipulating information that framed the choices people made about how to conduct their day to day lives during the emergency it failed to respect individual autonomy in a fundamental way.

This paper shows that during the first lockdown phase from 23 March 2020 the government traded-off the normative ambiguity in the coronavirus guidance to reinforce its stay at home message by suggesting the legal prohibitions were stricter than they were and that the scope for individual discretion was correspondingly narrower than it in fact was. It will be seen that this approach significantly shifted on 10 May 2020 when the Prime Minister announced in a televised address a policy change from “stay at home” to “stay alert”, which was accompanied by the publication of amended coronavirus guidance that was more open-textured and emphasised individual discretion. Whilst some important changes to the rules were made a few days later, the core legal rules remained the same but the government sought to encourage a more permissive attitude to them, exploiting the normative ambiguity in the guidance in a different way: by emphasising the responsibility of individuals to judge whether their conduct was appropriate and the degree to which they would take efforts to conform. This potent brew of normative froth exploded spectacularly in the last week in May, when the Prime Minister’s chief adviser Dominic Cummings admitted to having left his London residence on two occasions during the early phase of lockdown but was backed by the Prime Minister on the basis that he had acted legally and responsibly.⁴

This paper proceeds in the following way. Part II explains the phenomenon under discussion taking the change from the first to the second lockdown phase as an example. The paper then goes on in Part III to examine in more detail the various dimensions of the fusion of law and public health advice embodied in the coronavirus guidance, focusing on the period between 23 March 2020 and 1 June 2020. Part IV considers the implications of the Government’s approach. Part V concludes that the coronavirus guidance has been used by the

⁴ A. Tolhurst and J Johnston, “Boris Johnson says Dominic Cummings ‘acted legally, responsibly and with integrity’ in lockdown row” Politics Home, 24 May 2020.

Government a *sui generis* form of regulatory intervention during the emergency period in a manner that has failed to conform to basic principles of transparency.

II. The exploitation of normative ambiguity and the first lockdown relaxation

On 23 March 2020 the Prime Minister in a televised address announced the most stringent restrictions on liberty probably ever imposed in the United Kingdom. He said that the measures came into effect immediately and that the police would have power to enforce the rules. Following the Prime Minister's address, the UK Government's website was changed to include the following headline rules, reproduced at the head of each page of the coronavirus guidance thereafter:

Stay at home

- Only go outside for food, health reasons or work (but only if you cannot work from home)
- If you go out, stay 2 metres (6ft) away from other people at all times
- Wash your hands as soon as you get home

It then instructed people not to meet others, even friends or family.

On one level this was extremely clear. The instructions to the population were simple and straightforward. But there was a serious ambiguity lurking not far beneath the surface. The first instruction referred to a legal obligation, breach of which was a criminal offence.⁵ The second and third instructions were not legal obligations but public health advice. In terms of the 2 metre guidance, a clear statement of the status of that guidance as public health advice was later found buried in the Government's recovery strategy. It states that the Government, "recommends trying to keep 2 metres away from people as a precaution." This, it says, "is not a rule" Rather, the "key thing is not to be too close to people for more than a short period of time, as much as you can."⁶ In other words, the 2 metre guidance was public health advice to be taken into account, rather than a rule to be followed .

Yet by setting the instructions side by side without distinction, the fundamentally different nature of the instructions was obscured. People well understood that the lockdown

⁵ I address in Part III A the fact that the criminal offence was not in created until 26 March 2020.

⁶ Our Plan to Rebuild: The UK Government's COVID-19 recovery strategy, CP 239, 11 May 2020.

was enforced by law. There was thus an obvious implication that the instructions were each backed by law.⁷ This was accentuated by the fact that each of the instructions were framed as rules, whereas as we shall see at other time the government chose to frame the guidance in terms of recommendations or explicitly as advice.⁸ From the perspective of the ordinary citizen, there was no reason to think that the 2 metre guidance was not a rule of law. In New Zealand, for example, the lockdown rules which came into effect on 24 March 2020 included a 2 metre distance requirement when people were outside their home.⁹ This was an enforceable part of the criminal law prohibitions in New Zealand.¹⁰ The limited empirical evidence currently available indicates that this was in fact what most people thought to be the law too. A study by Halliday, Meers and Tomlinson has found that whilst 99% of the people surveyed claimed to know mostly or exactly what activities were permitted under the law during the first phase of lockdown, 94% of them erroneously thought that intentionally coming within two metres of someone outside the home was prohibited by law.¹¹ This is a staggeringly high percentage of people who confused public health advice for a legal rule, more especially given that it occurred amongst people who claimed to have a high degree of confidence that they knew what the law was.

The fusion of law and guidance thus gives the criminal law a radiating effect on surrounding public health advice. Whilst the messaging *appears* to be clear it in fact conveys

⁷ The impression was not dispelled, indeed was reinforced, by the body of the guidance as explained in Part III Bi.

⁸ A note on rules: It is sometimes said that a rule embodies an additional reason for compliance beyond its perceived intrinsic merit, namely that it is an injunction that has been expressed by an authoritative source. However, the same could be said of public health advice. For present purposes, I take the difference between rules and advice to be that advice unlike a rule permits a person to exercise judgment as to whether or not to follow it or whether it is inappropriate in the circumstance or outweighed by other considerations, whereas a rule is mandatory and must be followed. As Lord Clarke stated in *R (Alvi) v SSHD* [2012] UKSC, [2012] 1 WLR 2208, at [120]: “as a matter of ordinary language, there is a clear distinction between guidance and a rule. Guidance is advisory in character; it assists the decision maker but does not compel a particular outcome. By contrast a rule is mandatory in nature; it compels the decision maker to reach a particular result.”

⁹ Section 70(1)(f) Health Act Order dated 24 March 2020 provided that persons are required “to maintain social distancing” outside their residences (para 1(b)), and this is defined as meaning not being within 2 metres of other people (or if within 2 metres not being there for less than 15 minutes).

¹⁰ Businesses in Scotland, certain businesses in Wales and burial grounds in Northern Ireland are also required to take reasonable measures to ensure that a distance of two metres is maintained between persons on the premises and waiting to enter: Health Protection (Coronavirus, Restrictions) (Scotland) Regulations 2020 ([Scottish S.I. 2020/103](#)), regulation 4; Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020 ([Wales S.I. 2020/353 \(W. 80\)](#)), regulations 4 and 6; Health Protection (Coronavirus, Restrictions) (Northern Ireland) Regulations 2020, [regulation 4A](#)

¹¹ S. Halliday, J. Meers and J. Tomlinson, ‘Public Attitudes on Compliance with COVID-19 Lockdown Restrictions’, U.K. Const. L. Blog (8th May 2020) <<https://ukconstitutionallaw.org/2020/05/08/simon-halliday-jed-meers-and-joe-tomlinson-public-attitudes-on-compliance-with-covid-19-lockdown-restrictions/>>>

highly imperfect information as to the true nature of the instruction being given.¹² The result of this imperfect information is that it results in over-deterrence, which in the present context means people restricting their activities and social contacts believing the legal risks to be different to or greater than they in fact are. At one level such effects might be relatively minor. Consider for example a person who, thinking it to be a legal requirement, stops and steps aside in the street to ensure they keep 2 metres distance from a passer-by although they recognise that the public health risk of such fleeting proximity to be negligible. This is clear example of overdeterrence, although the consequences of this example are trivial. However, given the difficulty in maintaining 2 metres social distancing in many situations required to work or travel to work the impact of overdeterrence is likely to have an extremely significant impact on social life and economic activity. Indeed, by the end of May 2020 calls were growing from some quarters for the 2 metre rule to be changed to a 1 metre rule on the basis of its impacts on the economy.¹³

There is however a second form of normative ambiguity in play and can be illustrated by reference to the same example. The third of the three instructions is less obviously a rule of law since it is far less likely that there would be a law against neglecting to wash your hands when you get home. To a well informed and reflective person, the unenforceability of such a rule would point to it being public health advice rather than a legal requirement. This of course compounds rather than relieves the overall lack of clarity in the instructions. But just as the legal nature of a norm can have a radiating effect on associated non-legal norms, so the phenomenon can operate in the other direction: the advisory nature of a norm can imply that even sanction-backed rules are in fact only advisory.

Now consider the changes made to the coronavirus guidance and associated messaging following the Prime Minister's second televised address to the country on 10 May 2020. In that address, the Prime minister signalled a relaxation of some of the rules and encouraged people to return to work and to leave their house to spend time outside. The following day, and before any changes to the underlying law, the Government removed the three point headline instruction set out above and replaced it with the following text:

¹² It is possible to dissect the phenomenon of normative ambiguity more precisely to identify two forms of rule contamination on the surrounding public health advice. It is capable of suggesting both that public health advice is backed by law and, separately, that it takes the form of (public health) rules. Since the 2 metres rule in the example given is framed as a rule the point does not apply to the example under consideration. I leave this further dimension aside in the analysis that follows.

¹³ L. Buchan, Independent, Coronavirus: 2 metre distance rule should be reviewed to save hospitality sector, senior Tories tell government, 30 May 2020; A. Hancocok, "UK Pubs call for 2-metre social-distancing rule to be halved" Financial Times, 18 May 2020.

Stay alert

We can all help control the virus if we all stay alert. This means you must:

- Stay at home as much as possible
- Work from home if you can
- Limit contact with other people
- Keep your distance if you go out (2 metres apart where possible)
- Wash your hands regularly

Underneath these instructions it was stated that people should not leave their home if a person in the household has symptoms.

The first of the two bullet point instructions reflected legal requirements, the other three reflected public health advice. The emphasis shifted from clear firm injunctions to rules that involve greater personal discretion and which are framed in far more advisory terms. The overall message was also much more complex, suggesting a greater role for individual assessment. Rather than being told to stay at home apart from limited exceptions, people were told to stay at home “as much as possible”. Compared to the previous instruction, that represented a widening of the circumstances in which you could leave home and certainly one that conferred greater discretion on individuals to judge. Rather than people keeping 2 metres apart “at all times” the Government also adopted the more open textured and less emphatic requirement keep 2 metres apart “where possible”. The references to following the guidance “where possible” also emphasise an aspirational aspect and that people ultimately individuals have to judge how strenuously to attempt to comply with the rules and the extent to which they are applicable in the particular circumstances. A very vague instruction was also introduced, namely, to “limit contact with other people”. Not only is this extremely imprecise but it implied that some contact with other people *was acceptable* (particularly if contrasted with the previous instruction not to meet anyone, even friends or family). The clear injunction to wash hands as soon as you get home also became the unspecific and clearly advisory “wash hands regularly”.

Each of these changes taken on their own would have been of little significance. But taken together the changes transformed the impression given of the instructions. The underlying normative ambiguity created by the fusion of law and guidance remained present but the effect of the ambiguity was transformed. The polarity was reversed: the rules were presented as public health advice. This exploited the ability for the substantial advisory content within the coronavirus guidance to contaminate the legal rules (as opposed to the public health

advice being distorted by the legal rules). Since it is the nature of advice that it places responsibility on individuals to exercise judgment as to whether they consider it appropriate to follow the advice in the circumstances, this had an enabling and empowering effect on individuals.

This shift in approach was reflected in the change in message from “stay home”, designed to render the population inert, to the more active and empowering “stay alert”. This enabling message was graphically reinforced from a vivid colour change in the Government’s visuals from red (= stop) to green (= go).¹⁴



Fig: The UK Government’s coronavirus message before and after 10 May 2020

The televised address given by the Prime Minister on Sunday 10 May 2020 also exploited the normative ambiguity in the guidance in several respects to suggest that bonds were being untied and freedoms gradually restored. Thus the Prime Minister announced that as of 13 May 2020, “we want to encourage people to take more and *even unlimited* amounts of outdoor exercise” and stated that, “you can drive to other destinations” to take such exercise. He also stated, “you can play [outdoor] sports but only with members of your own household”. These statements exploited normative ambiguity because they implied that the rules were being changed when in fact each of these things that the Prime Minister mentioned were already permitted. The Prime Minister sought to capitalise on the fact that many people would have thought them to have been prohibited (or at least to have been sufficiently unclear as to whether or not they were prohibited to have been deterred from such activities).

The first of these quoted statements was actually very carefully worded. The coronavirus guidance had stated that only one form of exercise could be taken per day. But this

¹⁴ My analysis of the messaging draws on insights of Mike Galsworthy in a video published on twitter:

was public health advice not law. Many people, of course, would have assumed that this was law because of the effect of normative ambiguity.¹⁵ So whilst the Prime Minister's statement that people were being encouraged to take unlimited exercise accurately alluded to the fact that previously this had been *discouraged*, mostly people would understand this to be a change in the rules. The second and third statements were presented as changes in what persons are *entitled* to do but there had in fact been no restriction on driving to take exercise or playing sport outside with your household, such as football in the park.¹⁶ It later became clear that the Government would be allowing outdoor sports courts and venues to reopen and for people to engage in "recreation" for health reasons as well as "exercise", genuine changes, but even taking this into account it is clear that the Prime Minister's statement exploited the normative ambiguity that had been present in the coronavirus guidance to suggest that the rule relaxations were more extensive than they in fact were.¹⁷

The purpose of the change in the guidance on 11 May 2020 was clearly designed to encourage people to exercise greater freedom of action and to take greater personal responsibility for assessing whether their actions are appropriate. Within two weeks of the changes being made it was apparent that people were taking a far more flexible view of the rules, meeting in parks and gardens and exercising their discretion in making what they regarded as appropriate socially distanced contact with other people.¹⁸

Let us now turn to examine the respects in which normative ambiguity was present in the guidance and exploited by the Government in more detail and identify some of the more inappropriate ways that the Government exploited the fusion of public health advice and criminal law.

¹⁵ For inexplicable reasons, it *was* part of the legal prohibitions in Wales (replaced by a requirement to exercise in the local area on 11 May 2020).

¹⁶ The absence of a law against driving to take exercise was reflected in guidance published by the National Police Chief's Council guidance on reasonable excuse, published after some police forces were reported as discouraging people from travelling to open spaces. The guidance is no longer published but see D. Shaw, "Coronavirus lockdown: Police guidelines give reasonable excuses to go out", 16 April 2020, [bbc news](#).

¹⁷ The Prime Minister then emphasised that in enjoying these new freedoms: "you *must* obey the rules on social distancing. And to enforce those rules we will enforce the fines on those who break them." What however are the "rules on social distancing" that the Prime Minister was referring to? The most obvious "rule" on social distancing is the 2 metres guidance and this was clearly what the reference was to, as well as possibly the prohibition on gatherings. However as explained the 2 metres guidance is not an enforceable rule.

¹⁸ See e.g. J Harker and D Smith, "Have people stopped following the lockdown rules?" 22 May 2020 < <https://www.examinerlive.co.uk/news/uk-world-news/people-stopped-following-lockdown-rules-18292009> >

III. Normative ambiguity unpicked

A. Information, Advice and Law

Until 23 March 2020 the government pursued an explicitly advisory approach to tackling the coronavirus pandemic. In the very early stages, the Government response took the form of travel advisory notices issued by the Foreign Office and advice on personal hygiene issued by NHS England. Resources and information were published on the <https://www.go.uk/coronavirus> webpage. This developed into advice on what to do if you developed symptoms and included a link to NHS England's information on contact tracing.¹⁹ As events unfolded, information was included on self-isolation for infected persons, more extensive travel advice, guidance for organisations and information on the number of confirmed UK cases.²⁰ On 16 March 2020 the Government published more wide-ranging advice addressing social distancing, particularly for persons over seventy and those with certain underlying health conditions. The advice included advice to work at home where possible, avoid gatherings, including with friends or family, avoid pubs and restaurants and for vulnerable people to withdraw from social contact. The guidance confidently stated that the, "advice is likely to be in place for some weeks".

It appeared as if the Government would seek to navigate the emergency without resort to legal compulsion, in much the same way that Sweden has done. But that abruptly changed on 23 March 2020 when the lockdown measures were announced and the nation was instructed to stay at home under compulsion of law. The coronavirus guidance was updated to include a "guidance on staying at home and away from others". The guidance gradually became more extensive, covering a range of topics and a FAQs section was added on 29 March 2020 that was often added to (this remains the case at the time of writing). By 31 May 2020 the coronavirus guidance addressed a number of topics, including self-isolation for persons with symptoms of coronavirus, employment and financial support, schools and childcare. The lockdown rules on that date were presented in the sections on "staying alert and safe (social distancing)" an evolved version of the original guidance on staying at home, and in "what you can and can't do", a development of the FAQ section. Whilst the guidance was initially stated

¹⁹ Eg 5 March 2020. The self-isolation guidance was initially called the "stay at home" guidance but this was later changed when stay at home became the general message.

²⁰ Eg 13 March 2020.

to apply UK-wide, it later provided links to the websites of the three regional governments which contain separate guidance applicable in Wales, Northern Ireland and Scotland.

The legal basis for the promulgation of the coronavirus advice is not mentioned but the Secretary of State for Health has power to provide “information and advice” to the public for the purpose of “protecting the public in England from disease”.²¹ The legal status of such information and advice is that it is non-binding. It does not have the force of law and therefore is not enforceable in the courts. No sanctions attach to a failure to follow information or advice issued under statutory powers. The framing of information or advice as “guidance” does not change its character. In *Laker Airways Ltd v Department of Trade*, Roskill LJ stated that, “guidance is assistance in reaching a decision proffered to him how has to make that decision, but that guidance does not compel any particular decision” Lawton LJ stated that guidance “has the implication of leading, pointing the way...”.²² A public authority can provide guidance to “explain, amplify or supplement” a statute where appropriate, but it cannot contradict the objectives of a statute or misstate the law. If it does so, this will be an error of law that the courts will declare to be erroneous if a claim is brought before them by an interested citizen.²³

The Secretary of State for Health has separate and distinct power to issue regulations to combat outbreaks of disease under the Public Health (Control of Disease) Act 1984. Pursuant to this power, the Secretary of State issued the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020/350 (“the regulations”), requiring certain businesses, premises and facilities to close or restrict their operations, and requiring people to stay at home.²⁴ The regulations also prohibited gatherings in public places of more than two people from different households. The regulations came into effect at 1pm on 26 March 2020 and very similar

²¹ National Health Service Act 2006 s.2A. It is not known if this was the power that the Government has relied upon in promulgating the coronavirus guidance but it is the most likely candidate.

²² [1977] QB 643, 714 at 725. *R (Alvi) v SSHD* [2012] UKSC, [2012] 1 WLR 2208, at [120], quoted above note 8 (Lord Clarke); *R v Director of Passenger Rail Franchising, ex p. Save Our railways*, [1996] CLC 589, 597: “Guidance is advice which the recipient should heed and respect; it should ordinarily be followed but need not if there are special reasons for hot doing so.” (Macpherson J)

²³ Ibid 699 (Lord Denning MR) Lord Bridge at *Gillick v West Norfolk and Wisbech Area HA* [1986] AC 112 193 stated: “We must now say that if a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non statutory in form, advice which is erroneous in law, then the court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the error of law by an appropriate declaration.”

²⁴ For a discussion of the regulations see T. Hickman, E. Dixon and R. Jones, “Coronavirus and Civil Liberties in the UK”, 6 April 2020 << <https://coronavirus.blackstonechambers.com/coronavirus-and-civil-liberties-uk/> >> and T. Hickman, ‘Eight ways to reinforce and revise the lockdown law’, U.K. Const. L. Blog (15th April 2020) (available at <https://ukconstitutionallaw.org/>)

regulations came into effect in other parts of the United Kingdom shortly thereafter.²⁵ The legal rules set out in the regulations were backed by fines and enforcement powers, including the power of arrest and the power for the police to physically return people to their homes. The regulations had to be approved by Parliament (in the case of the Welsh, Northern Irish and Scottish regulations, by the relevant devolved legislature), although since the urgency procedures in the 1984 Act were used such approval occurred well after the regulations were made.²⁶ The regulations were first substantially amended on 13 May 2020, most notably to allow people to leave the house to engage in recreation for their physical or mental wellbeing.²⁷ A further substantial amendment occurred on 1 June 2020 when the regulations were changed to prohibit people staying overnight outside their home and allowing gatherings of up to six people. The present analysis is concerned with the period up to the change on 1 June 2020.

The core provisions enforcing the stay at home rules were contained in regulation 6 of the regulations. Regulation 6 provided, as enacted, that: “6.—(1) During the emergency period, no person may leave the place where they are living without reasonable excuse.” Subsection (2) then provided that “a reasonable excuse includes the need” to “obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household) or for vulnerable persons and supplies for the essential upkeep, maintenance and functioning of the household, or the household of a vulnerable person, or to obtain money, ...” (6(2)(a)). It also included the need: “to take exercise either alone or with other members of their household”. A number of other specific excuses were also listed, including to seek medical assistance, to travel for work or provide voluntary services where this was not reasonably practicable to be done from home.

There are therefore two entirely separate power sources underlying the coronavirus guidance: there is power for the Secretary of State to issue regulations setting out new criminal laws and there is power to issue non-binding information and advice. The decision to make some requirements a matter of law and others advice has probably in part been influenced by the limits on the Secretary of State’s powers to make regulations under the 1984 Act. So for example, the Secretary of State is expressly prevented from using regulations to impose

²⁵ See above note 10 for the references. The Northern Ireland regulations were made pursuant to the Public Health Act (Northern Ireland) 1967 and the Scottish regulations pursuant to Schedule 19 of the Coronavirus Act 2020. The Welsh regulations came into effect at 4pm on 26 March 2020, the Scottish regulations came into effect at 7.15pm, the Northern Irish regulations 11pm on 28 March 2020.

²⁶ Since Parliament had risen for recess before the regulations were laid, a motion for their approval was not debated by the Commons until 4 May 2020 and approved by the Lords on 14 May 2020.

²⁷ Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020/350

quarantine obligations on people thought to be infected with disease: quarantine must be imposed by a magistrate, so the rules on self-quarantine for 7 or 14 days where persons exhibit symptoms of Covid-19 cannot be made enforceable under the 1984 Act and must therefore be advisory.²⁸ But this is not a complete explanation for why some rules are advisory and some are founded in law, even in relation to the core social distancing rules. The 2 metres guidance, for instance, could have been made a legal condition on persons being outside their home.²⁹

Having identified the underlying power sources for the coronavirus guidance we now look more closely at the coronavirus guidance itself.

B. The Coronavirus Guidance

It is possible to identify at least three different types of instruction contained in the guidance. First, the coronavirus guidance sets out public health advice. This has no legal force and at most could give rise to social opprobrium for those who chose not to follow it.³⁰ Secondly, the coronavirus guidance contains information about the legal rules imposed by the Regulations. This information constitutes (or purports to constitute) descriptive statements of the law. For example, it records legal rules requiring restaurants and cafes to close. Such statements might of course be simplified descriptions of the legal rules. Thirdly, the coronavirus guidance contains statements which represent the Government's interpretation of the law or its view as to how the law should be applied. Examples include what constitutes "exercise" and what constitutes a "reasonable excuse" for leaving one's home.

This third aspect of the guidance is a more controversial than the first two because the interpretation of the criminal law is not a matter for the government. Under the UK's constitutional arrangements the Government has no role in interpreting or enforcing the law –

²⁸ 1984 Act, ss.45F and 45D(3). The Government would have needed to enact primary legislation for these rules to be enforced by the criminal law or use the Civil Contingencies Act 2004.

²⁹ On the government's broad interpretation of section 45G(2)(j) of the Public Health (Control of Diseases) Act 1984 a prohibition on persons being within 2ms of each other would seemingly have been possible as a restriction on where a person goes and with whom he has contact. The New Zealand rule is cited above note 7.

³⁰ This statement requires some qualification in the context of employers and other persons who owe a duty of care to others. In such a context, public health advice can have important indirect legal effects by framing judgements about what constitutes reasonable steps to take to comply with a duty of care. A person or business that follows public health advice is likely to be able to make out a good defence in fact to a charge of negligence. Compliance with government guidance is also likely to be required or prudent to ensure compliance with business and premises insurance policies. This aspect of the fusion of law and guidance and the ability for guidance to have indirect legal effects represents a very important part of the way that guidance can in practice enforce social distancing measures. The correlation between guidance and legal liability is not however direct and many businesses in the UK had taken steps going beyond the government guidance well before there was any advice or direct legal compulsion to do so. Since my focus is on the aspects of the regulations applicable to private individuals, I leave aside this issue.

those functions belong to bodies independent of Government: the courts and the police and prosecution authorities respectively. Indeed, it is central to our constitution that the Government cannot either purport to dispense with criminal laws, including by committing to not enforcing them in certain situations, or introduce new ones without the sanction of Parliament.³¹ The Government's statements on what the law requires are therefore opinions which cannot provide a defence to prosecution, still less widen the ambit of a criminal prohibition. Nor are they binding on the police of the Crown Prosecution Service. In practice, however, the Government's guidance is likely to be taken into account when enforcement and prosecutorial decisions are made.³²

Let us now unpick in more detail the various ways in which the coronavirus guidance generated normative ambiguity in the period up to 1 June 2020.

i. Elision of information about the law, legal advice and public health guidance

The principal source of the normative ambiguity created by the coronavirus guidance was the juxtaposition and in places complete elision of information about legal rules on the one hand and public health advice on the other. No clear lines were maintained between these different types of instruction. It was not possible for people to know, without a high level of sophisticated legal knowledge, whether statements contained in the coronavirus guidance are statements of law, interpretations of the law or public health advice.

Some examples of this have already been provided in Part II. A further example of a pure piece of public health advice in the section "what you can and can't do" was the statement that when using a vehicle to use a journey that is permitted, you should only travel with members of your household.³³ There were however no legal rules that materially governed the use of private vehicles by two people from different households, e.g. a car share. Despite being presented in emphatic terms, the entire section of guidance was pure public health advice.

³¹ See *R (Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961, [2014] UKSC 38, [2015] A.C. 657 considering the proper constitutional limits on the Director of Public Prosecutions using guidance on enforcement of the criminal law.

³² The College of Policing published separate guidance for police forces in England and Wales in an "Understanding the Law" section of its Coronavirus information on its website, including a useful publication on its views as to the meaning of reasonable excuse (no longer published). A collection of advice and guidance is to be found at << <https://www.college.police.uk/What-we-do/COVID-19/understanding-the-law/Pages/default.aspx> >>

³³ Coronavirus Guidance as at 14 May 2020. "**1.8 Can I share a private vehicle with someone from another household?** No. You can only travel in a private vehicle alone, or with members of your household."

In some cases law and public health advice were interwoven not only in the same section of guidance but in the same sentence. Take the guidance on leaving home to go shopping. Up to 10 May 2020 the coronavirus guidance stated that a person could leave home to go “shopping for basic necessities, for example food or medicine, which must be as infrequent as possible”. The statement that a person can leave home for shopping for basic necessities for example food or medicine was a statement of the law. But the subsequent statement that this must be as infrequent as possible was not a statement of law it was public health advice.

This elision of law and public health advice was not offset by any clear statement as to what aspects of the guidance were legally enforceable and which were not. On the contrary, the position was quite the reverse. In the section of the guidance setting out the rules requiring persons to stay at home, after stating that people must be 2 metres apart from anyone outside their household, it stated: “These measures must be followed by everyone”. The introductory section of the guidance had also made clear that the police “will be given powers to enforce” the staying at home rules, business closures and prohibition on gatherings. This clearly implied that all of the instructions in the social distancing and stay at home guidance at that time were enforceable despite the fact they included instructions that have never been subject to legal restriction: the 2 metres guidance, the stated limit on exercising only once per day, and the requirement that shopping be as infrequent as possible, were backed by law.

A cynical and sophisticated reader of the guidance might have picked up the deliberate nuance in the words “will be given” as a reference to the fact that the police did not in fact have power to enforce the rules. Most people however would simply have taken this to be making clear that the instructions were based on law and the police would be enforcing them. The coronavirus guidance also stated that the “measures are effective immediately”. The reality however was very different. Until 1pm on 26 March 2020 the entirety of the UK lockdown was advisory and no legal rules were in place at all. Indeed, the regulations were not even published in draft form before they were made. Public lawyers spent the intervening period perplexed as to what laws the government could be using to enforce the rules. It became clear that there were none. The UK lockdown on 23 March 2020 was based on a gigantic bluff.

After the regulations were published and came into effect the task of seeking to relate them to the instructions in the coronavirus guidance represented a complex and technical

exercise.³⁴ There was no alteration to the structure or wording of the coronavirus guidance to separate or identify those parts that were enforceable under the regulations.³⁵ The clear impression given was that the rules set out in the guidance on staying at home were backed by law, when in fact important aspects of the instructions were not and reflected public health advice. This is how the coronavirus guidance remained throughout the critical period of late March and April.³⁶

On 3 May 2020 a change was made to the section addressing police enforcement which represented the first effort to draw attention to the fact that not all of the rules were backed by law. It stated that police authorities “have the power to enforce the requirements set out in law if people do not comply with them.” More significantly, it introduced a more prominent statement in the first section of the rules on staying at home which stated that “[k]ey parts” of the measures are “underpinned by law, which sets out clearly what you must and must not do”.³⁷ This at least indicated that not all of the coronavirus guidance was underpinned by law. The reference to “law” included a hyperlink to the Government’s legislation database.

Even at this late stage, neither statement actually identified *which* of the instructions were backed by law and which were not and the guidance itself continued to refer indiscriminately to law and public health advice. The exercise of seeking to unpick one from the other was left to individuals to undertake. It is however obvious that the vast majority of people, even if they ventured beyond the news media to read the coronavirus guidance in the first place, would have gone no further and certainly would not have spent time seeking to

³⁴ See Hickman, Dixon and Jones above note 24 for an analysis published more than a week after the regulations were published. There was not much else published analysing the regulations, but see Lord Sandhurst QC, Anthony Speaight QC, “Pardonable in the Heart of the Crisis – But we must urgently return to the Rule of law” Society of Conservative Lawyers, 4 April 2020.

³⁵ On 26 March 2020, the final section of coronavirus social distancing guidelines *was* changed to include a statement that if a person leaves home or gathers in a public space “for any reason other than those specified”, the police may take action. The purpose of this section appear to have been to warn people that police had powers to disperse gatherings and return people home, rather than being any effort to distinguish laws from advice, which it did not do (It was for example clear that other parts of the guidance other than those referred to, for example, were backed by law, such as that relating to the closure of businesses.) The reference was actually highly misleading as the guidance only “specified” four reasons for leaving the home when the regulations listed thirteen in addition to the catch-all “reasonable excuse”.

³⁶ In the question and answer section of the guidance introduced on 29 March 2020 stated:

“22. What will happen to me if I break the rules?”

We appreciate all the effort people are putting into containing the spread of coronavirus which will help protect our NHS and save lives.

If you breach the regulations, the police may:....”

The regulations and their contents were not specified. Most people would have taken the reference to the “rules” and the “regulations” to be to the coronavirus guidance itself.

³⁷ This more prominent statement was removed from 11 May 2020.

examine primary legal provisions in their unfamiliar native form in an effort to establish which parts were backed by law. Whilst these references may have raised doubts in peoples' minds about whether instructions in the guidance were reflective of the criminal law, they were very far from adequate to make clear to the ordinary reader of the guidance which instructions reflected legal obligations and which did not.

There was also a further problem. The coronavirus guidance did not identify the relevant law. Regulations were referred to but the title of the regulations was not given. For an unskilled person to seek to find the relevant regulations would itself be a significant task, more especially as they were amended from time to time. Unfortunately this difficulty was aggravated by the fact that the two hyperlinked references to "law" and a further hyperlinked reference to "regulations" introduced in mid-May, actually hyper-linked to the wrong coronavirus public health regulations. The link was to regulations concerned with detention, isolation and screening of persons suspected of being infected.³⁸ The reference to the "law" in the guidance was thus utter gobbledygook. It is perhaps telling that no one appears to have picked up on the error (suggesting nobody followed the links or if they did soon gave up in despair) as the wrong law was hyperlinked until 14 May 2020.³⁹

The net effect was that for a person without specialist legal knowledge and a good deal of time, there was simply no way of countering the incorrect messaging within the guidance by cross-checking the coronavirus guidance with the operative legal provisions.

ii. Exploiting ambiguity in legal terms including the "reasonable excuse" exception to the prohibition on leaving home

As we have seen, the coronavirus guidance has included the Government's interpretation of the law as well as information as to what the law is. This took on a particularly important dimension in relation to the core prohibition on people leaving their home because this legal rule was subject to ambiguous open-ended exception: people could leave and be outside their home if they had a "reasonable excuse".⁴⁰ Whilst the law itself specified certain reasons for leaving home that constituted "reasonable excuses", such as food shopping or going

³⁸ The Health Protection (Coronavirus) Regulations 2020, SI 2020/129.

³⁹ The change may or may not have been prompted by a tweet by the author pointing out that the post-10 May 2020 regulations included a hyperlink to the wrong regulations.

⁴⁰ Coronavirus (Restrictions) (England) Regulation, regulation 6.

to work, these provisions themselves embodied terms with broad scope for interpretation, perhaps most obviously, the meaning of “exercise” and later “recreation” for reasons of health and wellbeing. In addition to this, the list was not exhaustive and therefore the overriding legal requirement and therefore the boundary of individual liberty between 26 March 2020 and 1 June 2020 was the concept of “reasonable excuse”.

However, the concept of reasonable excuse admitted of a very broad range of possible meanings. It could have been understood to permit only very limited situations in which a person might lawfully be outside their home, such as technical and fleeting instances beyond the list set out in the regulations - stepping off a doorstep to clap the NHS or retrieving an item left in a car parked in the street might be examples - or situations where there is some clear necessity that required a person to leave the house. Alternatively, it could have been understood broadly and by reference to the underlying public health rationale, to allow any non-frivolous activity outside the home that does not give rise to a public health concern, for example, sitting with an easel in the park painting a picture of sunrise or taking the kids to feed the ducks. Such could be “reasonable” reasons for being outside the house in the context of a pandemic since they allow social distancing to be observed. The concept admits of a range of interpretations between such outer limits.

Added to these issues of vagueness, the concept was capable of changing over time. This is because the list of permitted activities was relevant to understanding the general exception of reasonable excuse: the more restrictively the permitted exceptions were framed the more restrictively the concept of reasonable excuse was likely to be understood. As the list of permitted reasonable excuses was adjusted, so the wider concept of “reasonable excuse” was capable of taking on a new form. Thus, after the 13 May 2020 amendments to the regulations permitted people to leave their home for recreation to further their physical or mental wellbeing. Given that people could leave the house for such purposes, it was more obviously reasonable to engage in other activities outside, such as leaving the house to borrow an item from a neighbour or go and sing happy birthday outside a friend’s house.

The vagueness of the concept of reasonable excuse and the ambiguity present in other terms thus provided a platform for the Government to provide an overlay of guidance by which it effectively widened or narrowed the exception.

Thus, the guidance originally portrayed the exception as both finite and exceptionally limited. On 23 March 2020 the coronavirus stated:⁴¹ “You should only leave the house of one

⁴¹ “Staying at home and away from others. 1: Staying at home.”

of four reasons”. It then listed shopping for basic necessities which “must be as infrequently as possible”, one form of exercise per day, medical need, and work. That was all.

The statement was inaccurate for a number of reasons. Most fundamentally, as we have seen, at this time there were in fact no legal restrictions in place that could have reflected these four reasons for leaving the house. But even when the regulations came into force several days later, they listed *thirteen* specific reasons for leaving home as well as the general exception of reasonable excuse. The guidance at this point was changed to state that people, “should only be away from [their] home for very limited purposes:”. But it then listed the same four purposes and did not refer either to the fact that many other reasons for leaving home were allowed or that any other reasonable excuse was permitted.⁴² Worse, the section of the guidance which posed the question “What will happen to me if I break the rules?” stated that if a person left home “for an reason other than those specified” the police could take action including imposing fines. The guidance was clear: there were four reasons for leaving home and it was an offence to leave home for other reasons.

Indeed, the coronavirus guidance in the relevant period did not use the words “reasonable” or “excuse”. The reason was because the Government wanted to ensure that people stayed at home. That might have been entirely sensible public health advice but the coronavirus guidance created the impression that the law was far more stringent than it was and limited the scope of individual autonomy and liberty to a much greater extent than it actually did.

It was only on 1 May 2020, almost *six weeks* after lockdown, that the guidance first informed individuals (in the FAQs section) that the four reasons were exceptions “and a fuller list is set out in the regulations.” This was however a short and delphic statement. The reference to “the regulations” was unexplained and it was not stated that the stated exceptions were examples of a broader exception of reasonable excuse. So whilst the guidance was less misleading, it was no more informative.⁴³

The guidance also provided a narrow and inaccurate description of several of the individual exceptions listed in the guidance, as has already been touched upon. Thus, in relation to exercise it stated that a person could take “one form of exercise a day, for example a run, walk, or cycle - alone or with members of your household”. The messaging was reinforced by Government statements in the media, such as Environment Secretary Michael Gove MP who

⁴² This was also reflected in the page headed “Staying at home: what you can and can’t do” and “Coronavirus FAQs: what you can and can’t do” FAQs that were added on 29 March 2020.

⁴³ Upon the announcement on 10 May 2020 of the first lockdown easing, the guidance was changed. At this point the word “regulations” was hyperlinked. Unfortunately to the wrong regulations.

stated that a walk of up to an hour, a run of 30 mins or a cycle of 30-60 minutes was what the rules envisaged.⁴⁴ This was a very restrictive interpretation of the regulations, indeed an inaccurate interpretation of them. There was no prohibition on playing games such as golf, football or tennis, doing yoga or stretching in the park, or many other forms of exercise, as long as they were with members of the same household. There was no limit on the length of time a person could exercise or how many times per day they could do so. Despite the breadth of the exception, the Government guidance portrayed it in a very different way. Again, this may have been good public health advice but it departed from the requirements of the law.

It was not only the exercise exception that was subject to glossing by government guidance. Another example is provided by the guidance on leaving home to go shopping. From 23 March 2020 to 10 May 2020 this stated:⁴⁵

“You should only leave or be away from your home for very limited purposes:

- shopping for basic necessities, for example food and medicine, which must be as infrequent as possible”

This gave the impression of very restrictive rule and indeed that unnecessary trips to the shops would be a criminal offence. However, in truth the first sentence that follows the bullet point included both a statement of the law (in the first clause) and then a statement of public health advice (in the second). The introductory statement before the bullet point is (a very narrow) interpretation of the exception. This example thus embodies each of the three different types of statement that have been identified above - descriptions of the law, interpretation of the law and public health advice – woven together *within the same sentence*.

On 11 May 2020 this guidance was changed to read:⁴⁶

“You should stay at home as much as possible. The reasons you may leave home include:

- Going to shops that are permitted to be open – to get things like food and medicine.

⁴⁴ “Michael Gove tells joggers to limit exercise stints to 20 minutes amid coronavirus lockdown” J. Johnston, PoliticsHome, 29 March 2020 < <https://www.politicshome.com/news/article/michael-gove-tells-joggers-to-limit-exercise-stints-to-30-minutes-amid-coronavirus-lockdown> >

⁴⁵ FAQs what you can and can't do, No. 1

⁴⁶ FAQs what you can and can't do, No. 1.2

This change, though subtle, was significant. The public health advice was still present: it had become “stay at home as much as possible”. This was more obviously public health advice.⁴⁷ Reference to the legal rule is also made, but this has changed significantly, so that it presents the law in much more permissive terms, emphasising that the reasons for leaving home “include” shopping and is not limited to “basic necessities”. These changes were made without there being any change to the underlying legal provisions. It is an example of how the coronavirus guidance at different times presented the same legal provisions in different ways. The reason for the change in presentation was to reflect the Prime Minister’s upbeat message in his 10 May 2020 televised address to the nation and to encourage people to take a more permissive view of the rules. Whilst changes to the rules were made a few days later, no changes were made to the law that justified the rephrasing set out above.

An interesting example of the Government adopting the opposite technique – i.e. that of portraying an exception more broadly than it actually was – is provided by an amendment that was made to the guidance following the threat of legal challenge by parents of children with autism and learning disabilities. The proposed claimants made the point that it was not realistic for them and their children to stay inside other than for exercise once per day. This resulted in a change to the guidance. The FAQs added the question, “Can I exercise more than once a day if I need to due to a significant health condition?” To which the answer was given that you could. If health condition routinely requires a person to be outside their home more than once per day to “maintain [their] health” then that person could continue to leave the house for this purpose. It continued:

“This could, for example, include where individuals with learning disabilities or autism require specific exercise in an open space two or three times each day - ideally in line with a formal care plan agreed with a medical professional.”

The effect of this was use the guidance to expand the concept of exercise beyond any sensible understanding of that concept. The object of the change to the guidance was to permit people with children with health needs to take recreation outside (and probably for the parent’s benefit as well as the child’s). This was an entirely laudable objective. But it was achieved in a manner that manipulated the role of the guidance by allowing outside activity as exercise that was not

⁴⁷ As indicated by the words “as much as possible” and by the separation with the following sentence which sets out a clear statement of a rule and exception.

in truth within the exercise exception.⁴⁸ Rather than utilise the concept of reasonable excuse, which might have suggested other more wide-ranging exceptions, or amend the regulations to add a clear and self-standing exception, the Government essentially used the guidance to create an exception that did not exist. This is another example of the Governments' presentation of the law being distorted by public health advice.

iii. The portrayal of public health advice as rules

Another feature of the coronavirus guidance that contributed to the blurring of the relationship between legal obligation and public health guidance was that public health advice was sometimes presented as a recommendation and sometimes presented as a rule. This exacerbated the ambiguity as to the status of the instruction in question because rules are generally, at least in this context, the product of law and certainly give the impression that they must be followed.⁴⁹

IV. Implications of the fusion of law and guidance

The previous discussion has shown how in the critical period between 23 March 2020 and 1 June 2020 the coronavirus guidance elided the criminal law and public health advice, obscuring the nature of the instructions given to the population. This was not a unique feature of the English coronavirus guidance. It was (and remains) also a feature of the guidance in other parts of the UK. This is partly a reflection of the fact that the regional governments adopted the central UK guidance and extremely similar lockdown regulations were introduced at the same time in each region. Many of the examples discussed in this paper are therefore also found in the guidance promulgated by the regional governments. For example, the Scottish Government has, like the UK Government, stated in its guidance that exercise can only be taken once a day, whereas this was no more a legal requirement in Scotland than in England. On 11 May 2020

⁴⁸ It might have been better expressed as falling within the exception “to avoid injury or illness” (r.6(2)(m)) but this is also not at as the exception is not directed at avoiding illness but managing long-term existing conditions.

⁴⁹ For example, the Coronavirus Guidance 30 March 2020 stated:

Rule: “if you live alone and have symptoms of coronavirus illness, however mild, stay home for 7 days...”

Rule: “If you go out, stay 2ms away from other people at all times...”

Advice: “We advise you to stay local and use open spaces near to your home were possible ...”

Advice: “You are strongly advised to delay moving house ...”

the Scottish government announced an easing of the lockdown and changed its guidance to state that exercise could be taken “as often as you like, as long as you observe social distancing rules”. This appeared under the statement that you should only leave home “for very limited purposes”, a carry-over from the UK Government guidance. For most people, this would appear to be a change in the law, a view reflected in the headline of *The Scotsman* newspaper which read, “First Minister lifts exercise rule in Scotland’s lockdown” and contained the strapline, “Scots will now be allowed to go out more than once a day”.⁵⁰ But the law had not changed, only the public health advice. Similarly, the reference to “social distancing rules” (and an accompanying video showing individuals outside the house with 2 metres radius circles around them) suggested that compliance with the 2 metres guidance was a condition of the law. As in England, this was not the case.

This method of governance through a fusion of public health advice and criminal laws has several benefits from the perspectives of the UK Government and regional executives. It provides scope for governments to afford greater potency to their public health advice through the suggestion that it is backed by the force of law. Correspondingly, when it suits the government, it enables them to emphasise individual discretion and responsibility as part of a more permissive public health situation. Achieving this through changes to guidance rather than law has the benefit of versatility by enabling a considerable degree of rule-modification without incurring the political and logistical costs of formal amendment to the underlying law, and by also enabling the Government to use behavioural science advice on effective messaging to present the law and public health advice to achieve desired behavioural change.

There is also a deeper more fundamental aspect of the advantage gained by governments in adopting this technique. The fusion of law and guidance operates a mechanism for centralising power in the hands of the executive that would otherwise be more widely dispersed within our constitutional arrangements. Thus, as we have seen, the Government has no constitutional role in interpreting the criminal law. Only the courts can pronounce on the meaning of the criminal law. Other public authorities whose responsibility it is to enforce the criminal law can and do sometimes produce guidance on their understanding and approach to the criminal law, namely, the police and prosecuting authorities. But the Government has no role in enforcing the law either under the general law or under the regulations. The separate and prior task of making law, especially criminal law, is one which rests primarily with Parliament (and regional legislatures in the context of the regional governments). Whilst the

⁵⁰ Catherine Salmond, *The Scotsman*, 10 May 2020

Government does have powers delegated by Parliament to make law, these must still be laid before and approved by Parliament. Even the promulgation of public health advice is not something that the government would ordinarily do. Public health advice is ordinarily provided by the health service at a national or local level. The NHS has a website that sets out detailed advice on a very wide range of public health issues and indeed this was a resource that was initially used by the Government to provide public health advice in response to the coronavirus pandemic, before public health advice and legal regulation became folded together. The coronavirus guidance has operated as a method of concentrating these ordinarily diffuse sources of power and authority – interpreting the law, making the law and promulgating public health guidance - in the Government’s hands. This has enabled the government to promulgate a *sui generis* system of rules and exceptions to fit the prevailing public health situation. This distinctive and highly potent form of emergency rule sits outside the legal regime established by Parliament for emergency governance, contained in the Civil Contingencies Act 2004. It represents the creation of a new and unanticipated form of regulatory intervention.

The costs and implications of the approach that the UK Government has taken are substantial. It reduces the role of Parliament and regional legislatures in setting the rules and it generates confusion and misunderstanding about the rules and their status. This is reflected in the numerous examples, particularly in the early stages of the lockdown, of police forces enforcing public health advice rather than law, such as the actions of Derbyshire police publishing drone footage on twitter seeking to prevent people driving to take exercise.⁵¹ The level of misunderstanding of the nature of the instructions being promulgated by the Government in the general population is reflected in other results of the survey conducted by Halliday, Meers and Tomlinson, which found that 56% of the people surveyed thought that driving to open spaces was banned, when it was not. Similarly, 76% thought shopping more than once per day was banned, when it was not.⁵²

The most significant detriment of this approach has however been the failure to respect individual autonomy. It has been shown that the Government has used the coronavirus guidance as a means of communicating a particular perspective and interpretation of the legal rules and their relationship to public health advice to the population at large. In this way the Government has sought to “frame” individual choice. It has been shown that the this framing

⁵¹ *BBC News*, [“Stay local to exercise, says government”](#) H. Shearing, (27 March 2020); and see *The Times*, [“Lord Sumption warns against police overstepping limits”](#) (31 March 2020)

⁵² Above note 8.

has failed to make clear the respects in which individual choice is restricted by law and the respects in which individuals remain free to choose how to behave but are encouraged to take into account public health advice. People are therefore unable to make properly informed decisions with a clear understanding of what the law says (and what it does not) and what the public health guidance is. The vast majority of the population would take their instructions either directly from the coronavirus guidance or the reporting of them in the media. They cannot be expected to engage in the complex and time consuming task of consulting other sources to identify and clarify the Government's instructions.

Of course, this impact on individual autonomy occurred in an effort to combat a major public health crisis and it might be argued that it is therefore justified.⁵³ There can however be no justification for providing inaccurate or misleading information to the population, even in an emergency. As has been explained at least some important aspects of the coronavirus guidance merit this description. The Government has itself emphasised the desirability of transparency and clarity in responding to emergencies. In 2013 a Cabinet Office publication on responding to emergencies emphasised that policies, plans and practices should be explained to the public "comprehensively, clearly and consistently, in a transparent and open way."⁵⁴ Some of the errors in the guidance was sufficiently misleading and inaccurate that the courts would probably had stepped in correct the portrayal of the law, had they been asked and had the timeframes allowed.⁵⁵

We must finally consider one further aspect of the phenomenon under consideration: its relationship to the concept of nudging. After all, there *are* circumstances in which governments can legitimately chose to present information in a manner that frames individual choice knowing and intending that it will influence behaviour in a predictable and desired way even where this is intended to lead people to overstate risks. This can occur, for example, when producers of foodstuffs are required to present information in a certain way, e.g. the fat content of products as 10% fat rather than 90% fat free, or where the government presents the risk of death from a certain behaviour as increasing tenfold rather than increasing from 0.001% to 0.01%, or the use of vivid unpleasant imagery on packaging.⁵⁶ Such techniques are some of

⁵³ That does not take away from the fact that it is important to appreciate that there has been a substantial impact on individual autonomy which requires justification.

⁵⁴ Responding to Emergencies, The UK Central Government Response, Concept of Operations, Ch. 6 Responding to an emergency arrangements in England, 2013, para. 2.5.

⁵⁵ See *Gillick*, above note 23.

⁵⁶ C. R. Sunstein, "The Ethics of Nudging" *Yale Law Journal*, Vol 32 (2015) 414

the techniques known as “nudges”. Nudging is a recognised form of governance in the UK and elsewhere.⁵⁷ However, the phenomenon under examination in this paper is fundamentally different from nudging. A nudge leaves a choice open.⁵⁸ It is distinct from a regulatory intervention which prohibits conduct or imposes economic disincentives on a certain choice of behaviour.⁵⁹ The imposition of a criminal law framework under the regulations is a regulatory intervention that prohibits certain activities. By obscuring the scope of those rules in order to control people’s perception of the scope of individual autonomy the Government is engaging in a form of regulatory governance, not a form of nudging.

No doubt, the Government’s approach has been influenced by insights of behavioural science, the same insights that inform nudges.⁶⁰ But by exploiting normative ambiguity the Government is not using the coronavirus guidance to nudge. It is using it to control and dictate individual choice. To this must be added the fact that, as we have seen, through the coronavirus guidance the government has been able in effect to assume authority ordinarily diffused and spread between different branches of the state. The Government’s presentation of the rules is thus regarded as authoritative. Because the coronavirus guidance has not provided clear statements of the law and maintained a clear separation of information about the law and public health advice, it has distorted and obscured the true scope of individual choice.

At the end of May 2020 this issue took an unexpected turn when the Prime Minister’s chief adviser, Dominic Cummings, was revealed to have left London with his wife and child on 27 March 2020 to travel to Durham to stay close to his parents on their estate. In an unprecedented televised public statement made in an effort to explain his actions, Mr

⁵⁷ The concept was popularised by R Thaler and C Sunstein, *Nudge* (2008). See for a good summary, House of Lords Science and Technology Committee, *Report on Behavioural Change, Second Report of session 2010-12* HL 179, Chapter 2, including a reference to the Government’s view that nudging excludes information and promotional forms of non-regulatory interventions as these do not involve promoted choice. R. Baldwin, “From Regulation to Behavioural Change: Giving Nudge the Third Degree” *Modern Law Review* (2014) 77(6) 831

⁵⁸ House of Lords Science and Technology Committee, above note 56, at 2.3. Thaler and Sunstein’s well known definition is: “...any aspect of the choice architecture that alters people’s behaviour in a predictable way without forbidding any options or significantly changing their economic incentives.” (*Nudge*, p.6)

⁵⁹ The House of Lords Science and Technology Committee, above note 56, helpfully distinguishes between the following interventions: Regulatory governance (restrict/eliminate choice); fiscal measures (incentives/disincentives); other incentives and persuasion; and choice architecture (nudges). This builds on the Nuffield Ladder of Interventions (*Public health: the ethical issues*, Nuffield Council of Bioethics (2007)).

⁶⁰ A key lesson learnt from the swine flu pandemic was identified in Government contingency plans as “the potential to use insights from behavioural science better.” Department of Health, England and Health Departments of the Devolved Administrations of Scotland, Wales and Northern Ireland, *UK Pandemic Influenza Communications Strategy 2012*, Page 16. The Government’s reliance on behavioural science insights in its response to the coronavirus outbreak became controversial in later March when it was reported that the delay in imposing lockdown measures was based on advice that people would suffer “behavioural fatigue”. This led to a number of behavioural scientists writing an open letter in protest. See R. Chataway, “Can we ‘nudge’ away Coronavirus?” 20 March 2020, BVA Nudge Unit <<https://bvanudgeunit.com/can-we-nudge-away-coronavirus/>>

Cummings also admitted to having travelled to Barnard Castle on 12 April, to test his eyesight, in a car with his wife and young child. The revelations provoked a media storm and enormous amounts of public anger when the Prime Minister pronounced that he was satisfied Mr Cummings had not broken the law and had exercised his judgment appropriately.⁶¹ He said that the trip to Durham had been motivated by a concern about childcare as Mr Cummings' wife had been unwell and Mr Cummings himself feared he might succumb to the coronavirus. Mr Johnson stated that, Mr Cummings, "followed the instinct of every father and every parent". For the population at large it appeared that a different law was being applied to Mr Cummings than to everybody else. But the intensity of public anger was a product of the manner that the coronavirus had been used by the Government to overstate the stringency of the criminal law in the first place. In the early phase of the lockdown the coronavirus guidelines had been clear that there were four reasons only for leaving home, shopping, working, exercise and medical need and that leaving home other than for the specified reasons would be unlawful. The population had taken the guidance at its word and had followed it with great personal sacrifice. The guidelines had given no indication that there was room for an element of individual discretion or judgment and by suggesting that it had been open to Mr Cummings to exercise his judgment as a parent in deciding to leave home, the Prime Minister's position seemed incomprehensible. The root issue exposed by the Cummings affair was not the unequal application of the law, but the fact that the Government's response to the pandemic had failed to respect individual autonomy and the right of individuals to reach their own considered judgments as to what was required to comply with the law and appropriate to conform to public health advice.

Conclusion

This paper has sought to explain how the United Kingdom Government's response to the coronavirus pandemic has involved the coordination of individual behaviour through a potent fusion of public health advice and the criminal law. That fusion has been exploited by the Government to allow it to control the public understanding of the restrictions on individual freedom and correspondingly the scope for individual choice and judgement. Whilst aspects of this phenomenon have been subtle and unobjectionable other aspects highlighted in this paper

⁶¹ See e.g. note 4 above.

have been egregious and have misrepresented the scope of the criminal law restrictions to the population.

The Government has used the coronavirus guidance as a new, *sui generis* form of emergency regulatory intervention which sits outside the system of emergency government set out by Parliament. How such a form of emergency governance is best regulated is a matter that requires urgent consideration particularly as the coronavirus guidance continues to perform the central role of communicating instructions to the population in England and similar guidance applies in other parts of the United Kingdom.

The analysis of the coronavirus guidance set out in this paper suggests that, at a minimum, such guidance needs to conform to the following principles of transparency to enable people to accurately understand the rules that they live by: (1) the guidance should clearly distinguish information about the law from public health advice; (2) the underlying legal instruments should be clearly and accurately identified and an accurate link to a copy of the and up-to-date law should be provided; (3) information about the law should be accurate and complete; (4) where the law is too complex to be set out in full the fact that the account is partial should be made clear and key parts of the law (such as the “reasonable excuse” exception) should not be omitted; (6) guidance should make clear when opinions are offered about the interpretation of the law and the status of such opinions; (7) guidance should not suggest that instructions are based on law when they are not.

These principles might be thought to be rather obvious. If that is so, then it is even more appalling that in the critical period between 23 March 2020 and 1 June 2020, during the most severe restrictions on individual liberty in modern times, the coronavirus guidance failed to comply with every one of them.