

2013

A Requiem for Protest: Anglo-American Perspectives on Protest Post-9/11, 46 J. Marshall L. Rev. 455 (2013)

Christopher Newman

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [European Law Commons](#), [First Amendment Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Christopher Newman, A Requiem for Protest: Anglo-American Perspectives on Protest Post-9/11, 46 J. Marshall L. Rev. 455 (2013)

<https://repository.law.uic.edu/lawreview/vol46/iss2/3>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

A REQUIEM FOR PROTEST: ANGLO-AMERICAN PERSPECTIVES ON PROTEST POST-9/11

CHRISTOPHER J. NEWMAN*

I. INTRODUCTION

It is axiomatic to suggest that the terrorist attacks on September 11, 2001 in the U.S. and the subsequent War on Terror¹ have had a “profound impact upon civil liberties and civil rights,” specifically within England and Wales and the U.S..² Much has been made of the repeated challenges to threats to liberty,³ the rule of law,⁴ and other such weighty constitutional issues. While there has been some discussion of protest, the focus, understandably, tends towards mass protest rather than on developments within the low-level public order law.⁵ This

* Dr. Christopher J. Newman, BA (Hons), PG Dip Law, PG Dip Legal Practice, PhD, Senior Lecturer in Law, University of Sunderland. Email chris.newman@sunderland.ac.uk

1. Oliver Burkeman, *Obama Administration Says Goodbye to ‘War on Terror’*, THE GUARDIAN (Mar. 25, 2009), <http://www.guardian.co.uk/world/2009/mar/25/obama-war-terror-overseas-contingency-operations>. The scope of the *War on Terror* was made explicit in the speech made by President George W. Bush on May 1, 2003. In a speech delivered from the deck of the USS Abraham Lincoln President Bush declared the military phase of the Iraq invasion had ended. In this speech, he stated that overthrowing Saddam Hussein was “one victory in a war on terror that began on September 11, 2001, and still goes on.” *Id.* It was reported that the Obama Administration would not continue to use the phrase, however it remains a useful term to describe the period of time in which the respective governments enacted significant amounts of anti-terrorism and related legislation. *Id.*

2. Christopher Dunn, *Balancing the Right to Protest in the Aftermath of September 11*, 40 HARV. C.R.-C.L.L. REV. 327, 327 (2005).

3. See generally Ben Middleton, *Rebalancing, Reviewing or Rebranding the Treatment of Terrorist Suspects: the Counter-Terrorism Review 2011*, 2011 J. CRIM. L., 225 (U.K.) (discussing the liberties of those suspected of terrorism).

4. See generally Adam Tomkins, *National Security and the Role of the Court: A Changed Landscape*, 126 LAW Q.REV. 543 (2010) (U.K.) (analyzing judicial review of national security); AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE U.K. HUMAN RIGHTS ACT (2009) (discussing the Human Rights Act and important cases brought since its inception).

5. See generally Helen Fenwick, *Marginalizing Human Rights: Breach of the Peace, “Kettling”, the Human Rights Act and Public Protest*, 2009 PUB. L. 737 (U.K.) (outlining the law and police efforts in response to mass protest in

discussion will examine the key legal developments, in the USA and the English legal systems respectively, surrounding individual protests that have arisen since the attacks of September 11, 2001.

A variety of themes will be examined, from the activities of peace campaigners camped outside the U.K. parliament, to the small, but notorious, demonstrations that have occurred at the funerals of military service personnel.⁶ The treatment of these protestors, and the subsequent reaction of the courts, will be examined as a specific example of how low-level public order and free expression have an almost symbiotic relationship. The reason behind this particular field of inquiry is two-fold. The primary reason is that it is a peculiarly (but not exclusively) “Post 9/11” phenomenon. Additionally, the extreme content of the protestor’s message at a funeral makes it “difficult to imagine more outrageous and provocative speech.”⁷

Turenne states “[t]he right to freedom of expression is typically asserted when a person is charged with a public order offence concerning the manner of a protest and his behavior during a demonstration.”⁸ This statement was made in connection with English public order law, and the role of the courts in protecting political protest from being suppressed by disorderly conduct statutes cannot be ignored in any analysis of low-level public order.⁹ It is contended, however, that this discussion benefits from an examination within the context of the United States. One leading commentator asserts that the courts in the United States “give particularly strong protection to political speech,” by virtue of the First Amendment.¹⁰ A “conceptual cornerstone” of the United States Constitution¹¹ is that the courts can strike down any legislation that interferes with freedom of speech. The United States’s perspective, therefore, provides the clearest and most direct restriction upon low-level public order legislation.

the United Kingdom).

6. See *Bill That Restricts Military Funerals Awaits Obama’s Signature*, CNN (Aug. 3, 2012), <http://www.cnn.com/2012/08/02/politics/military-funerals-protests> (discussing the actions of protestors that led to the creation of law restricting protest at funerals).

7. S.R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575, 575 (2007).

8. Sophie Turenne, *The Compatibility of Criminal Liability with Freedom of Expression*, 2009 CRIM. L.R. 866, 866 (U.K.).

9. See generally ERIC BARENDT, FREEDOM OF SPEECH 268-311 (2d ed. 2005) (discussing access to public places for speech purposes).

10. *Id.* at 155.

11. *Id.* at 2.

II. WHEN RIGHTS COLLIDE: U.S. AND ENGLISH PERSPECTIVES ON THE HOSTILE AUDIENCE

There is an inherent tension at the heart of any discussion on public order law.¹² There may be a vehement protestor, whose protest is dramatic and offensive. For instance, when considering demonstrations that occur at military funerals, however, many may be deeply offended by such a protest. The consequence of this is that the activities of protestors may fall within the ambit of disorderly conduct offences. Therefore, fundamental to this discussion is the attitude of the courts when low-level public order offences are used to suppress, or at least restrict, an individual's right to protest in such circumstances.

When considering the balancing act between expression and order, the problem of the so-called "hostile audience" or "heckler's veto"¹³ raises acute difficulties. In such a case, the exercise of free speech causes the listener to become agitated and possibly violent. Such a problem is not unique to the English jurisdiction and is particularly relevant in a public order arena, where, not the speaker, but an audience may be committing a public order offense. In *Forsyth County v. Nationalist Movement*,¹⁴ the Supreme Court of the United States held that to base a statutory restriction upon the reaction of a listener to the speech is not content-neutral and any measures to abridge speech, however unpopular it might be, would be unconstitutional.

The English position is characterized by what has been referred to as "an unfortunate lack of consistency."¹⁵ The approach of the court in situations where the audience seeks to use violence against an inherently peaceful protest can first be found in *Beatty v. Gilbanks*.¹⁶ The court in *Beatty* stated that it is the duty of the police to deal with those using violence rather than persons exercising their lawful right to protest.¹⁷ This orthodoxy held sway for nearly fifty years but was a marked contrast to the decision of the Divisional Court in the later case of *Duncan v. Jones*.¹⁸

Despite being decided on slightly different facts, the court in *Duncan* held that a protestor could be convicted for doing a lawful act (i.e., protesting) if they know that doing that act may cause

12. See generally Hammond v. DPP, [2004] EWHC (Admin) 69, (explaining the tension in the context of the case as it relates to offensive protests).

13. BARENDT, *supra* note 9, at 300.

14. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

15. DAVID MEAD, *THE NEW LAW OF PEACEFUL PROTEST* 329 (2010).

16. *Beatty v. Gilbanks*, [1882] 9 Q.B. 308 (Eng.) (discussing the duty of the police in protest situations).

17. BARENDT, *supra* note 9, at 303.

18. *Duncan v. Jones*, [1936] 1 K.B. 218 (Eng.) (discussing the court's changing views).

another to do an unlawful act.¹⁹ While the majority of courts have followed the *Duncan* reasoning,²⁰ there is a concern that the definitive legal position has not been sufficiently clear to make an outcome predictable to any potential protestor.²¹ The following critique of two significant protest cases in the post-Human Rights Act era is illustrative of the ambivalent position held by the courts in relation to protecting unpopular speech.

III. LOW-LEVEL DISORDER: THE ENGLISH LEGISLATIVE APPROACH

From an English perspective, the operative statutory provision that will be examined is section 5 of the Public Order Act 1986 which, *inter alia*, provides that:

A person is guilty of an offence if he—uses threatening, abusive or insulting words or behaviour or disorderly behaviour, or displays any writing, sign or other visible representation which is threatening, abusive or insulting, within sight or hearing of a person likely to be caused harassment alarm or distress.²²

The *actus reus* of § 5 is that the threatening, abusive or insulting behavior or disorderly conduct²³ of the accused must be within the sight or hearing of someone likely to be caused harassment, alarm or distress²⁴ There is no need for the conduct to be directed at any particular victim but (unlike other more serious offences under the 1986 Act²⁵) the person who is likely to be caused harassment, alarm or distress must actually witness the conduct, even if it is by CCTV²⁶ or on the Internet.²⁷ The *mens rea*,

19. See *Duncan*, [1936] 1 K.B. 218 (noting that the violence came from people who Duncan was trying to stir into political action); MEAD, *supra* note 15, at 329; see *Beatty*, [1882] 9 Q.B. 308 (explaining that the clash was between the Salvation Army and a group who opposed them, the Skeleton Army.).

20. MEAD, *supra* note 15, at 329.

21. *Id.* at 223.

22. Public Order Act, 1986, c. 64, § 5(1) (Eng.).

23. See *Brutus v. Cozens*, [1972] UKHL 6, [1973] AC 854 (Eng.) (holding that these words should be given their ordinary meaning, and whether behaviour had been “insulting” was a question of fact for the finders of fact at trial to determine).

24. See PETER THORNTON ET AL., *THE LAW OF PUBLIC ORDER AND PROTEST*, 36-44 (Oxford University Press, 2010) (discussing further why the accuser must either be within sight or hearing range of a victim for conviction purposes).

25. See, e.g., Public Order Act 1986, c. 64, § 3(1) (Eng.) (noting that conduct to be committed for affray, a more serious crime under the Public Order Act of 1986, must be directed at a person).

26. See DAVID ORMEROD, SMITH & HOGAN *CRIMINAL LAW*, 1075. (Oxford University Press, 12th ed. 2008). (discussing the holding *Rogers v. DPP*, (1999), unreported 22 July DC).

27. See *generally* *S v. CPS*, [2008] EWHC (Admin) 438, [2008] A.C. 46 (Eng.) (discussing how a person seeing a photograph coupled with the

found in § 6(4) of the 1986 Act, is that the accused must either intend for his words or behavior to be threatening, abusive or insulting or intend for his conduct to be disorderly or be aware that it may be.²⁸ The range of conduct that is prohibited includes disorderly behavior.

Additional offences, involving the regulation of protest around Parliament must also be considered.²⁹ The English approach to managing such low-level disorder is heavily rooted in the criminal law, but despite the appearance of codification there is, in fact a hydra of multifarious provisions.³⁰ There is a range of legislative and common law provisions utilized by police during a protest to deal with low-level disorder.³¹ Such analysis will provide insight into whether the regulation of protest is being unduly influenced by the “normalization” of emergency laws to deal with issues specifically arising out of the War on Terror.³²

Research into the operation of § 5 of the Public Order Act 1986, initially conducted in the 1990s indicated that, disorderly conduct provisions were not widely deployed as a means to police protest.³³ The constitutional position within the English legal system has changed since the time of that research with the enactment of the Human Rights Act 1998, which gives further effect to the rights articulated in the ECHR. It has been asserted that, since the enactment of the 1998 Act, the courts in the legal system of England and Wales are showing an increasing willingness to give strong protection to a protestor engaging in political speech.³⁴

IV. DEFENSES TO SECTION 5 OF THE 1986 ACT

A protestor, prosecuted under section 5 of the 1986 Act, would seek to utilize the defense under section 5(3)(c) of the 1986 Act claiming that his conduct was reasonable.³⁵ Mead explains that

knowledge that is had been posted on the public internet could be grounds for distress, harassment or alarm).

28. See *DPP v. Clarke*, (1991) 94 Cr. App. R. 359 (Eng.) (illustrating objective and subjective awareness under 5(3) and 6(4) respectively).

29. Serious Organized Crime and Police Act, 2005, c. 15, §§ 132-135 (Eng.).

30. See generally, Public Order Act 1986 (Eng.) (illustrating an example of the English’s codification of criminal law offenses).

31. See e.g., *Regina v. Howell*, [1982] Q.B. 416 (Eng.) (illustrating a commonly utilized multifarious provision in the context of the power to arrest to prevent a Breach of the Peace).

32. See generally P.A.J. Waddington, *Slippery Slopes and Civil Libertarian Pessimism*, 15 POLICING & SOC’Y 353 (2005) (providing a critical discussion of the issue of the perils of normalization).

33. HOME OFFICE, POLICING LOW-LEVEL DISORDER: POLICE USE OF SECTION 5 OF THE PUBLIC ORDER ACT 1986, Report, 1995, H.L. 195 (U.K.).

34. BARENDT, *supra* note 9, at 160.

35. See generally Benn Middleton & Christopher J. Newman, *Any Excuse for Certainty: Examining the Operation of the Defence of ‘Reasonable Excuse,*

“[t]he specific reasonable conduct defence [sic] under both § 4A and § 5 ought to mean greater protection for peaceful protest. Surely it must always be ‘reasonable’ conduct peacefully to exercise a Convention right”³⁶

The essence of this defense, in the context of a protest, is that for the courts to criminalize the prohibited conduct would violate the defendant’s rights in respect of statutorily guaranteed rights to free expression.³⁷ This defense is given extra potency when considered alongside the interpretive duty of the English Courts under section 3 of the Human Rights Act 1998.³⁸

The Human Rights Act 1998 also puts in place a specific duty³⁹ on all public bodies to act in a way which is compliant with the rights enshrined in the ECHR. As such, courts and police alike have to be ever more mindful of the rights provided under Article 10 and Article 11. These Articles incorporate qualifications that allow the state to restrict the rights of the individual in the interests of national security, providing the restrictions are proportionate and necessary in a democratic society.⁴⁰ The traditional orthodoxy was that judges were unwilling to interfere (and in some cases even enquire) where national security issues are raised by the state.⁴¹ The apparent threat to civil liberties after the commencement of the War on Terror has seen the English judiciary taking a much more interventionist approach in respect of anti-terrorism issues.⁴²

In respect of individual protest, and whilst not wishing to stray into an analysis of particular methods of policing, there is a need to explore the legal dimension of this dynamic with police officers being imbued with the same legislative guardianship role

74 J. CRIM. LAW 472 (2010) (discussing possible defenses).

36. MEAD, *supra* note 15, at 233.

37. See European Convention for the Protection of Human Rights & Fundamental Freedoms Art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf (stating that “[e]veryone has the right to freedom of expression” which includes the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority” but that the exercise of such freedoms may be subject to restrictions necessary in a democratic society).

38. See Human Rights Act, 1998, c. 42, § 3 (U.K.) (providing that primary and secondary legislation must be read and given effect in a way which is compatible with the Convention rights, so far as possible, regardless of contrary authority on the question).

39. Human Rights Act, 1998, c. 42, § 6 (U.K.).

40. Human Rights Act 1998, c. 42, § 2, sch. 1 (U.K.).

41. See *e.g.* R v. Sec’y of State for the Home Dep’t, *Ex parte Hosenball*, [1977] 3 All E.R. 452 (Eng.) (holding that the rules of justice were liable to be modified where national security was at risk).

42. See *generally* A Sec’y of State for the Home Dep’t, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.) (appeal taken from from Eng. and Wales) (demonstrating the apogee of this intervention of the judiciary).

on Convention rights as the judiciary.⁴³ They are required to make decisions regarding free expression and liberty within society, but at the same time expected to remain mindful of their duties to keep the peace and protect the safety of themselves and members of the public. It is submitted that the attitude of the courts within England and Wales in the years following the 9/11 terrorist attacks has been marked by a certain complicity in this approach. Whilst judgments have stated an eagerness to promote the rights of protestors,⁴⁴ this is rarely at the expense of challenging public order legislation.⁴⁵

Much of the popular protest that has occurred in England and Wales has been focused on the military action in Iraq and the War on Terror, and it is submitted that the courts in England and Wales have traditionally acquiesced to the police in matters of maintaining public order. Within the United States, that cultural dynamic is reversed and protest is viewed as a fundamental part of the political process. The First Amendment reflects a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . .”⁴⁶ Balanced against this, however, is the undeniably profound impact that the terrorist attacks have had upon civil liberties in the U.S.⁴⁷ This inquiry will look at the way in which the relationship between public order and protest with the U.S. has evolved as a result of the terrorist threat.

V. CROSS-JURISDICTIONAL PERSPECTIVES ON THE FIRST AMENDMENT AND EXTREME PROTEST

The right to free speech is seen as a central tenet of the constitutional process by virtue of the aforementioned First Amendment, which states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁴⁸

43. Human Rights Act, 1998, c. 42, § 6 (U.K.).

44. See *Laporte, R v. Chief Constable of Gloucestershire*, [2006] UKHL 55, [2007] 2 A.C. 105 (H.L.) [92] (on appeal from Eng. and Wales) (stating that “in a country which prides itself on the degree of liberty available to all citizens the law must take this curtailment of her freedom of action seriously.”).

45. See *generally* *Austin v. Comm’r of Police of the Metropolis*, [2009] UKHL 5, [2009] 1 A.C. 564 (H.L.) (appeal taken from Eng. and Wales) (dismissing an appeal by claimant who was confined by police for several hours per crowd control measures undertaken to maintain public order).

46. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

47. *Dunn*, *supra* note 2, at 327.

48. U.S. CONST. amend. I. There is a symbiotic relationship between the First Amendment and the Fourteenth Amendment, which *inter alia* requires states to acknowledge the rights articulated in the Bill of Rights in respect of

It has been noted that “rarely has such an apparently simple legal text produced so many problems of interpretation”.⁴⁹ When discussing conflicts between free speech and the requirements of low-level public order, therefore, the role of the higher courts becomes crucial.⁵⁰ The history of these higher courts is rich indeed and too voluminous to be considered at any great length within this discussion.⁵¹ In general, the dominant approach adopted by the Supreme Court can be categorized as requiring the delineation of certain categories of speech that are deemed to be protected according to the subject matter. In addition to content regulation, there are additional matrices that require examination of the physical location: where the speech actually occurs and the kind of regulation that is at issue. Within the protected categories of speech there is also a hierarchy of speech, whereby the content of the speech is graded according to its perceived desirability.⁵²

VI. “HONORING THE FALLEN”: PROTEST AND THE RIGHTS OF MOURNERS

When examining protests within the U.S. context, the approach that the courts take can be summarized by the following, “[s]peech concerning public affairs is more than self-expression; it is the essence of self-government.”⁵³ Broadly speaking, when the court decides that the discussion is a matter of public concern⁵⁴ then the speech will enjoy the protection of the First Amendment. Speech on matters of public concern may not be protected if it constitutes speech that the court has accorded no protection, such as obscenity or “fighting words.”⁵⁵ Although First Amendment protection is undoubtedly a powerful shield for free expression, the courts have provided a framework whereby those officials seeking to regulate protests can do so whilst not offending First Amendment principles. The legislative mechanisms by which

all individuals within that state. This is known as the “Incorporation Doctrine”.

49. BARENDT, *supra* note 9, at 48.

50. Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 795 (2000).

51. See generally ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (detailing further the history of the higher courts and free speech).

52. BARENDT, *supra* note 9, at 48.

53. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)).

54. See *U.S. v. Nat'l Treasury Emp. Union*, 513 U.S. 454, 461, 466 (1995) (holding that a citizen-plaintiff's lectures were protected as comments on matters of public concern).

55. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)) (identifying fighting words as a category of unprotected speech because of their tendency to inflict injury or incite an immediate breach of the peace).

protests can be regulated in the U.S. jurisdiction are normally subject to the discretion of individual cities, districts, and states.

Any concept of regulation within the U.S. jurisdiction must first be set against the competing notions of content-based and content-neutral restrictions.⁵⁶ The First Amendment specifically addresses Congress, restricting its legislative activity. The Supreme Court has held that restrictions placed by the government upon freedom of speech apply to all branches of the state government by virtue of the Due Process Clause⁵⁷ of the Fourteenth Amendment.⁵⁸ Therefore both state and federal legislators, judiciary and enforcement officers have to be mindful of any restrictions upon a protest.

A content-based restriction places limits upon the subject matter of the protest, proscribing certain statements or images. Content-neutral restrictions apply to all protestors irrespective of the topic of their protest and usually refer to the methods or locations employed by all protestors. Hare gives the following example: “A law prohibiting all public statements on abortion would be content-based whereas a statute which penalized all use of sound amplification equipment within 100 yards of a hospital, is content-neutral.”⁵⁹

Content-based restrictions are given more severe judicial scrutiny than content-neutral ones.⁶⁰ Where the state wishes to restrict the content of a protest, in order to overcome the First Amendment hurdle, the restrictive law or provision is subject to “strict scrutiny”⁶¹ in that it must serve a compelling state interest and be narrowly tailored to achieve that end.⁶² The intent of the legislator or originator of the restriction is not relevant, nor is the fact that the restriction might be addressing a genuine, unrelated

56. E. Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (Spring 1996).

57. U.S. CONST. amend. XIV, § 1 (stating “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”).

58. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the 14th Amendment from impairment by the states.”).

59. Ivan Hare, *Method and Objectivity in Free Speech Adjudication: Lessons from America*, 54 INT’L. & COMP. L. Q. 49, 51 (2005).

60. *Regan v. Time Inc.*, 468 U.S. 641, 648-49 (1984).

61. Elizabeth Craig, *Protecting the President from Protest: Using the Secret Service’s Zone of Protection to Prosecute Protestors*, 9 J. GENDER RACE & JUST. 665, 684 (2006).

62. Hare, *supra* note, 59 at 52.

aim.⁶³

Content-neutrality is only part, although a significant part, of the matrices that courts use when examining restrictions upon protests. There are three judicial doctrines which are perhaps the most pertinent when examining the restrictions that can be placed upon the regulation of protest by police and local authorities: “the doctrine of prior restraint, the doctrine governing licensing schemes of First Amendment activity,” and so-called “time, place, and manner” restrictions.⁶⁴ These doctrines are well established,⁶⁵ and the terrorist attacks of September 11, 2001 have placed a new focus on the restrictions that the state may place upon protest.⁶⁶ The fear is that heightened judicial deference to terrorism related concerns might see the judiciary fail to challenge over burdensome restrictions.⁶⁷

There exists a heavy presumption against the constitutional validity of prior restraint.⁶⁸ The complete banning of protest activity enjoys the highest level of constitutional protection and to date the Supreme Court of the United States has never sustained a prior restraint.⁶⁹ As previously stated, this tension is never more apparent than when trying to deal with protests at the funerals of combat veterans. Such protest tests the limits of state regulation in light of the First Amendment. The year 2012 saw legislative action by the U.S. Senate and the House of Representatives to try and mitigate some of the distress caused by funeral protests with the enactment of the Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012.⁷⁰ This provision seeks to prevent any intentional activity that “is not part of such funeral and that disturbs or tends to disturb the peace or good order of such funeral.”⁷¹ It amends the federal criminal code and provides for a restriction upon the time of protest at veterans funeral⁷² and

63. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991).

64. *Dunn*, *supra* note 2, at 329.

65. *Id.*

66. *See* Waddington, *supra* note 32, at 353 (commenting on the increased restrictions on civil liberties after September 11, 2001).

67. Nick Suplina, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations and Terrorism*, 73 GEO. WASH. L. REV. 395, 397 (2005).

68. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

69. *Dunn*, *supra* note 2, at 330.

70. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, H.R. 1627, 112th Cong. (2012).

71. 18 U.S.C. § 1388(a)(1)(B)(i) (2012).

72. *Id.* § 1388(a) (declaring that U.S. law prohibits any protest during the period beginning 120 minutes before and ending 120 minutes after a funeral service).

also on the place of the protest.⁷³

The right of an individual to protest and freely express their opinions has been well protected by the Supreme Court.⁷⁴ Whilst the relatively recent Lejuene Families Act is, as of yet, untested before a U.S. court, it may have a potentially chilling effect upon protest, despite a clear rationale and purpose behind the provision. In addition to this latest federal provision, there has been a range of responses to ‘anti-war’ protest by the American legislators and judiciary both on a state and federal level after the terrorist attacks.⁷⁵ It has been stated that the terrorist attacks highlighted American vulnerability in a way that had never been done before. This vulnerability, in turn, saw radical changes to law and policy within the United States.⁷⁶ The fear of a terrorist attack provides a potent counter-interest to that of the right to protest. Whether this added potency has led to courts in both England and the United States to adopt a more reactionary position when faced with low-level public order convictions will now be considered.⁷⁷

VII. THE ENGLISH PARLIAMENT, PROTEST AND THE WAR ON TERROR

Within the English legal system, one of the more disquieting developments following the terrorist attacks has been the creation of “place specific restrictions” upon protest, a phrase used by Mead⁷⁸ to describe legal restrictions which criminalize protest in a specific place or regulate that protest, requiring the protestor to obtain some form of permit to protest. A protestor who obstructs the highway, an offence contrary to § 137 Highways Act 1980, is committing a place-specific protest offence. *Arrowsmith v. Jenkins*⁷⁹ established that such an offence could be shown by intentional presence on the highway whereby an obstruction was caused, rather than intent to cause an obstruction. The European Court of Human Rights (ECHR) held, in the case of *Patyi v. Hungary*,⁸⁰ that where a static protest does not cause an

73. *Id.* § 1388(a)(1)(A) (prohibiting any protest from being less than 300 feet from the service itself).

74. *See generally*, *Cohen v. California*, 403 U.S. 15, 18 (1971) (discussing first amendment freedoms and actions that constitute free speech).

75. H.R. 1627, 112th Cong. (2012). It is acknowledged that the activities of the Westboro Baptist Church (the principle target of this legislation) is not, of itself, directed against the military activity of the United States. However there is little doubt that the provision could be deployed against antiwar protestors and must, therefore, be viewed in the context of a broader post-9/11 statutory response by the U.S. Government.

76. Suplina, *supra* note 67, at 396.

77. Turenne, *supra* note 8, at 866.

78. MEAD, *supra* note 15, at 138.

79. *Arrowsmith v. Jenkins*, [1963] 2 Q.B. 561 (discussing the establishment of an offence contrary to § 137 Highways Act 1980).

80. *Patyi v. Hungary*, Eur. Ct. H.R. 21 (2008) (discussing protest law under

obstruction,⁸¹ then such a protest should be permitted.

One particular static protest that has become a very public demonstration of opposition to the War on Terror was the campaign of Brian Haw.⁸² Haw occupied a part of Parliament Square opposite the main gates of the Houses of Parliament in opposition to government policy in Iraq and the general conduct of the government as regards to countering terrorism. Attempts to remove Haw by Westminster City Council were unsuccessful.⁸³ The coming into force of §§ 132-138 of the Serious Organized Crime and Police Act 2005, “specifically curtails the right to protest within a one kilometer radius of Parliament.”⁸⁴ Specifically, § 133 of the 2005 Act requires that any person intending to protest or organize a demonstration in the vicinity of Parliament must apply to the police for authorization to do so.⁸⁵ A dedicated, low-level public order offence of organizing, taking part in or carrying on a demonstration in a public place in the designated area if appropriate authorization has not been given was included within the statute to ensure that Haw could be arrested and removed⁸⁶

This statute means that the Commissioner of Police⁸⁷ may impose conditions⁸⁸ that he feels are necessary to prevent hindrance to the operation of Parliament⁸⁹ or to prevent serious disorder.⁹⁰ These requirements resonate with the terms of the Public Order Act 1986 in relation to the general statutory

the European Court of Human Rights).

81. *See id.* (ruling that a gap of 5m allowed pedestrian access and did not cause an obstruction).

82. *See* Matthew Taylor, *Brian Haw, Veteran Peace Campaigner, Dies Aged 62*, THE GUARDIAN (June 19, 2011), <http://www.guardian.co.uk/uk/2011/jun/19/brian-haw-peace-campaigner-dies> Brian Haw died on the June 19, 2011 of lung cancer, the attempts to evict him from Parliament Square having been unsuccessful to the end of his life. *Id.* The future of the “Peace Camp” and the legislation governing protest around Parliament is still uncertain. *Id.* The provisions of the Serious Organized Crime and Police Act remain in force at the time of writing. *Id.*

83. *See generally* Westminster CC v. Haw, [2002] EWHC (QB) 2073 (Eng.).

84. Jon Robbins, *Right to Protest: Protesting Too Much?*, THE LAW SOCIETY GAZETTE (Jan. 18, 2007), <http://www.bindmans.com/news-and-events/news-article/protesting-too-much>.

85. Serious Organised Crime and Police Act (SOCPA), 2005, c.15 § 133(1) (U.K.).

86. *Id.* §132(1).

87. *Id.* §134(2).

88. *Id.* §134(3).

89. *Id.* This includes hindering any person wishing to enter or leave Parliament. *Id.*

90. *Id.* The conditions must, in the Commissioner’s reasonable opinion, be necessary to prevent serious public disorder, serious damage to property, disruption to the life of the community, a security risk in any part of the designated area or a risk to the safety of members of the public. *Id.*

provisions governing protests and assemblies, and both of these statutory provisions can diminish or neutralize the impact of a procession or assembly. In order to combat the presence of existing protestors, including (prior to his death) Brian Haw, a statutory instrument⁹¹ was promulgated to amend the provisions of § 132(1) to include continuing demonstrations as well as new demonstrations.⁹²

It was contended in *R (Haw) v. Secretary of State for the Home Department*,⁹³ that his demonstration started before the 2005 Act came into force. The High Court held that, as the protest had been occurring prior the coming into force of the 2005 Act, there was no requirement for him to obtain the authorization of the police. The subsequent hearing at the Court of Appeal⁹⁴ overturned the decision by the High Court and ruled that Parliament had clearly intended to regulate all demonstrations within the designated area no matter when they started.⁹⁵ The court focused, not upon the protest itself, nor indeed was there any substantive discussion surrounding freedom of expression. Instead, the court looked, primarily, at the interpretative issues surrounding the legislation. Although the scale of his occupation of Parliament Square was dramatically curtailed,⁹⁶ Brian Haw's protest remained subject to new conditions imposed by the police.⁹⁷

In *Tucker v. DPP*,⁹⁸ Haw's co-campaigner, Barbara Tucker, was convicted under § 132 of the 2005 Act for carrying out an unauthorized protest in Parliament Square. The Administrative Court rejected her contention that Haw had invited her to join his protest, and therefore, she did not require additional authority. Furthermore, the court held that the permit requirements of part

91. Article 4(2) Serious Organized Crime and Police Act 2005 (Commencement No. 1, Transitional and Transitory Provisions) Order (SI 2005 No. 1521 C66).

92. *Id.* The provision states that “[t]he references in sections 132(1) (demonstrating without authorisation in a designated area) and 133(2) (notice of demonstrations in a designated area) of the act to a demonstration starting are to take effect as if they were references to demonstrations starting or continuing on or after 1st August 2005.” *Id.*

93. *Regina (Haw) v. Secretary of State for the Home Department, Commissioner for the Metropolitan Police Service*, [2005] EWHC (Admin) 2061, [4], [2006] 2 W.L.R. 50 (Eng.) (discussing the fact that the demonstration predated the 2005 act).

94. *Regina (Haw) v. Secretary of State for the Home Department*, [2006] EWCA (Civ) 532, [23], [2006] 3 W.L.R. 40 (Eng.) (overturning the decision by the High Court).

95. SOCPA § 132 (6).

96. THORNTON, *supra* at note 24, at 132.

97. *Id.* The scale of the camp was reduced to three-square meters in size and many of the posters and placards were removed.

98. *Tucker v. DPP*, [2007] EWHC (Admin) 3019 [8-9], (Eng.) (discussing the protest that lead to the conviction).

four of the 2005 Act were not incompatible with the provisions of Article 10 and 11 of the ECHR.⁹⁹ The decision to prosecute Haw under § 134 of the 2005 Act for breach of the conditions imposed by the Commissioner was overturned by the Divisional Court in the case of *DPP v. Haw*.¹⁰⁰ It held that the conditions imposed were demonstrated to be unworkable¹⁰¹ and, as such, were plainly not reasonable and did not satisfy the test of certainty required when considering whether the restrictions on Convention rights were “according to law.”¹⁰²

VIII. *BLUM*: THE DEFINITIVE JUDGMENT

The definitive judgment on the provisions of the Serious Organized Crime and Police Act 2005 was made in relation to two separate protests. In *Blum v. Director of Public Prosecutions And Other Appeals*,¹⁰³ the Divisional Court heard consolidated appeals following the conviction of four protestors for conducting unauthorized protests. Stephen Blum and Aqil Shaer were part of a demonstration organized by the “Stop the War Coalition”, specifically against the provisions of §§ 132-138 of the 2005 Act. Police deployed these provisions during the protest of Milan Rai and Maya Evans, which occurred in October 2005. Evans stood opposite Whitehall and read out the names of all British soldiers who had been killed in Iraq whilst Rai read out the names of Iraqi citizens who had died in the conflict. In each case, the demonstrators knew that authorization would be required, and were given the opportunity by police to end their protest. Indeed, it was noted by Waller L.J. that, “the demonstrations were peaceful and good-humored The demonstrations were as much as

99. *Id.* at [8].

100. See *DPP v. Haw*, [2007] EWHC (Admin) 1931 [1], [2008] 1 W.L.R. 379 (Eng.) (overturning the decision to prosecute Haw).

101. *Id.* at [14]. The conditions stipulated are as follows:

The site associated with your demonstration (including banners, placards etc.) will not exceed 3 metres in width, 3 metres in height and 1 metre in depth. The site should at no time prevent pedestrian movement along the footway. Your property (including banners, placards etc.) must be supervised at all time with diligence and care, in a manner that ensures that nothing can be added to your protest site without your immediate knowledge. You must not use articles in connection with your demonstration that can conceal or contain other items. You must maintain your site in a manner that allows any person present to tell at a glance that no suspicious items are present. If members involved in your demonstration are to exceed 20 in total you must give six clear days’ notice to the operations officer at Charing Cross Police Station. If requested by a police officer in uniform, you must confirm whether persons present are part of your demonstration or not.

Id.

102. *DPP*, [2007] EWHC 1931 (Admin) [45].

103. *Blum v. DPP*, [2006] EWHC (Admin) 3209, [1-4], [2007] A.C.D. 40.

anything a demonstration against the requirement that authorization should have been required to demonstrate in Parliament Square and/or in Whitehall.”¹⁰⁴

The four protestors sought to argue, at first instance, that § 132 of the 2005 Act was not compatible with Articles 10 and 11 of the ECHR and, as such, the court should act according to § 3 of the 1998 Act and read down § 132 of the 2005 Act.¹⁰⁵ It was also argued that under § 6(1) of the 1998 Act, it would be unlawful for the court to convict the appellants.¹⁰⁶ In each case, this argument was rejected, with the court finding that the relevant sections of the 2005 Act were indeed compliant with the Convention.¹⁰⁷ In the subsequent appeal, the protestors changed tack. They argued that all public bodies have to justify whether, at each stage of the criminal process, the decision to arrest, charge and convict was necessary and proportionate given that in each case the demonstrations had been both peaceful and good humored.¹⁰⁸

The appellants argued that the state, in its various public authority guises, should have looked not only at the failure to obtain the requisite authorization, but also at the conduct of the demonstrators. This line of reasoning was rejected and the appeal was dismissed. The court held that once it is accepted that the authorization procedures within the 2005 Act are compatible with Convention rights, it is not legitimate to ask the court to look at the unauthorized conduct.¹⁰⁹ Similarly, Parliament must be entitled to impose sanctions for not seeking authorization otherwise the finding that the sections are compatible is illusory.¹¹⁰

IX. PROTEST WITHIN THE U.K. AND THE WAR ON TERROR

The dilemma caused by dissenters is not the primary mischief that § 5 of the 1986 Act was designed to counter.¹¹¹ It just happens

104. *Id.* at [9].

105. *Id.* at [15].

106. *Id.*

107. *See id.* at [16] (holding that each of the appellants failed to prove that § 132(1)(a) and (b) were not compliant with Articles 10 and 11 of the European Convention on Human Rights).

108. *Id.* at [17].

109. *See Ziliberg v. Moldova*, HUDOC, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68119> (Jan. 1, 2005) (holding that states do have a right to require authorization for demonstrations to ensure effective policing).

110. *Blum v. DPP*, [2006] EWHC (Admin) 3209, [29] (Eng.).

111. *See Andrew Geddis, Free Speech Martyrs or Unreasonable Threats to Social Peace?—“Insulting” Expression and Section 5 of the Public Order Act 1986*, 2006 P.L. 853, 873 (U.K.) (indicating that certain expression falls within the definition of anti-social conduct, as opposed to the provision being strictly to regulate certain speakers).

that a particularly vocal demonstrator is able to fall within the general area of antisocial behavior.¹¹² Even before the events of September 11, 2001, it was for a police officer to decide that an essentially peaceful protest falls within the ambit of § 5, due to the potential for that protest to be threatening, abusive or insulting and likely to cause harassment, alarm, or distress. That protestor can then be arrested and her or his participation within that protest can be ended.¹¹³

The breadth of interpretation available to the courts in relation to these terms provides for a broad range of behavior that may be prohibited under § 5. In order to express the depth of feeling, and indeed to make an impact with the protest, it may be necessary to use language that offends or distresses.¹¹⁴ Sedley L.J. crystallized this issue when he stated, “[f]ree speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.”¹¹⁵

It is true to say that such concerns are not limited to the protests regarding the War on Terror and subsequent military entanglements.¹¹⁶ When looking at the view taken by the English courts in matters relating to the rights of protest, the case law prior to the 9/11 attacks seemed to suggest that political protest would enjoy the protection of the courts. In *Percy v. DPP*¹¹⁷, the group being insulted was comprised of American citizens working on a U.S. Air Force Base, and the individual was protesting against the Star Wars Missile Defense program.¹¹⁸ Although the reasoning in this case represented a very narrow finding by the Divisional Court, it was nonetheless held that a criminal conviction was a disproportionate way of dealing with the circumstances of that case.¹¹⁹

The case of *Norwood v. Director of Public Prosecutions*¹²⁰ provided the English courts with a suitable test in respect of

112. *Id.*

113. A.T.H. SMITH, OFFENCES AGAINST PUBLIC ORDER 116 (1987).

114. See Barry McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1383 (2006) (stating that the reason why First Amendment protection is so strong in the U.S.A. is to promote rigorous debate).

115. *Redmond-Bate v. DPP*, [1999] EWHC (Admin) (Eng.).

116. See *Geddis*, *supra* note 111, at 864-866 (discussing a case in which § 5 applied to a public protest of same-sex relationships).

117. *Percy v. DPP*, [2001] EWHC (Admin) 1125 (Eng.).

118. *Id.* at [2].

119. David Ormerod, *Public Order: Appellant Defacing American Flag at American Air Base—Appellant Convicted of Using Behaviour Likely to Cause Harassment, Alarm or Distress*, 2002 CRIM. L.R. 835, 835 (U.K.).

120. *Norwood v. DPP*, [2003] EWHC (Admin) 1564 (Eng.) (detailing the facts of the case).

distasteful protest. Norwood was convicted under section 31 of the Crime and Disorder Act 1998¹²¹ for the racially aggravated version of the offence under section 5 of the 1986 Act.¹²² The appellant had displayed a poster, containing “Islam out of Britain” and “Protect the British people” in very large print.¹²³ He also displayed a reproduction of a photograph of one of the twin towers of the World Trade Center in flames and a Crescent and Star surrounded by a prohibition sign.¹²⁴ Norwood was a member of the British National Party¹²⁵ and he contended that his actions were reasonable and as such protected by the “objective defence of reasonableness” in section 5(3)(c) of the 1986 Act.¹²⁶ Auld L.J. held in *Norwood* that: “in effect that the appellant’s conduct was unreasonable, having regard to the clear legitimate aim, of which [section 5 Public Order Act 1986] was itself a necessary vehicle, to protect the rights of others and/or to prevent crime and disorder.”¹²⁷

X. *ABDUL V. DPP: BRITISH FUNERAL PROTEST*

A case that provides a mirror image of *Norwood* is that of *Abdul v. Director of Public Prosecutions*.¹²⁸ The defendant was part of a group of protesters who had attended a parade to celebrate the homecoming of British service personnel.¹²⁹ As part of their protest, they brandished placards, chanted slogans such as “British soldiers burn in hell,” and called the soldiers “murderers, rapists and baby-killers.”¹³⁰ In turn, they were threatened and abused by members of the public.¹³¹ The protest had been planned in conjunction with the local police and on the day the protestors had complied with police directions throughout.¹³² Furthermore, they had not been warned about their behavior, nor been asked to desist.¹³³ The protestors were not arrested at the time of the protest.¹³⁴ Instead the decision to prosecute was not taken until

121. Crime and Disorder Act, 1998, c. 37, § 31, (Eng.).

122. *Norwood*, [2003] EWHC (Admin) 1564 at [40] (Eng.); Public Order Act, 1986, c. 64, § 5, (Eng.); See also DPP v. Johnson, [2008] EWHC (Admin) 509 (Eng.) (providing details on the operation of this offence).

123. *Norwood*, [2003] EWHC (Admin) 1564 at [6] (Eng.).

124. *Id.*

125. *Id.* at [7].

126. *Id.* at [37].

127. *Id.* at [40].

128. *Abdul v. DPP*, [2011] EWHC (Admin) 247, [2011] H.R.L.R. 16 (Eng.) (detailing a case on British funeral protests).

129. *Id.* at [12]-[13], [15], [18].

130. *Id.* at [16].

131. *Id.* at [19].

132. *Id.* at [13], [18]-[19].

133. *Id.* at [19].

134. *Id.* at [20].

months later, following the viewing of hours of video footage and in consultation with the Complex Trial Unit of the Crown Prosecution Service.¹³⁵

The court held that the words and behavior of the protestors in *Abdul* crossed the threshold of legitimate protest.¹³⁶ The court held that the agreement of the police in facilitating the protest and the conduct of the police on the day of the protests amounted to neither an unequivocal acceptance that the defendants would not be prosecuted nor an acceptance that they had been behaving lawfully.¹³⁷ Here, the threat of violence that was missing from *Norwood* seems to indicate that a central concern of the courts in such cases is focused around the prevention of public disorder rather than enabling protestors.¹³⁸ As Barendt points out, where the speeches or general behavior are designed to provoke violence from opponents then prosecution and conviction becomes likely¹³⁹ even where the protest has initially peaceful aims.¹⁴⁰

The decision in *Abdul* would have been consonant with this if the arrest had not been some months after the protest had occurred.¹⁴¹ That the court found the words used by the defendants were abusive or insulting is not surprising. Similarly, it is entirely foreseeable that the conduct was within the sight and hearing of someone who may be caused harassment, alarm, or distress. The defendants had a point that they felt was legitimate. At trial, one of the defendants stated that his intention had been to raise awareness so that politicians should be questioned about their decisions.¹⁴²

Even though they had chosen to shout as well as carry their message on placards, the prosecution relied only upon the defendant's verbal conduct.¹⁴³ After fully cooperating with the police and responding to all instructions given it is difficult to see how else the defendants in *Abdul* could have made their protest.¹⁴⁴

135. *Id.*

136. *Id.* at [52].

137. *Id.*

138. THORNTON, *supra* note 24, at 410.

139. BARENDT, *supra* note 9, at 303.

140. *Duncan v. Jones*, [1936] 1 K.B. 218 at 222-224 (Eng.).

141. *See generally Abdul*, [2011] EWHC (Admin) 247, [2011] H.R.L.R. 16 (Eng.) (detailing a case on British funeral protests).

142. *Id.* at [21].

143. *Id.* at [20].

144. *Compare id.* at [52] (holding “potentially defamatory” and “inflammatory” remarks go “beyond the legitimate expression of protest”) *with Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)) (stating “[i]f there is a bedrock principle underlying the First Amendment, it is that the [United States] government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

The decisions in *Norwood*¹⁴⁵ and *Abdul*,¹⁴⁶ discussed *supra*, show that after the 9/11 terrorist attacks the English courts were prepared to distinguish political opinion from speech that they felt crossed the boundaries of legitimate protest.¹⁴⁷ In many ways these protestors, although expressing different viewpoints, illustrated the courts' intolerance toward those who promulgated extreme positions about the war on terror. *Norwood*'s "reasonable conduct" defense was rejected by the court, which held that § 5 was itself a statute designed to protect the rights of others, specifically those in the Muslim community.¹⁴⁸ In *Abdul*, the court held that compliance with the police was not enough to provide legitimacy for words that fell within the ambit of § 5.¹⁴⁹

Individual protest cases, such as *Norwood* and *Abdul*, demonstrate that within England and Wales, regular low-level public order offenses threaten to dissipate the rights of those who seek to offer contrary opinions "*post 9/11*".¹⁵⁰ One of the fundamental challenges facing the English legal system emanates from the state's utilization of existing legislation to suppress speech and opinions.¹⁵¹ This, of course, is not a problem unique to issues relating to the actions of terrorist groups and the wider conduct of the War on Terror by the government.¹⁵²

The reaction to government policy surrounding the War on Terror has encouraged individual and collective protest that, at times, has encompassed the entire range of reactions mentioned by Sedley L.J. in *Redmond-Bate*.¹⁵³ This poses a particular challenge for the policing of such protest. The Convention imbues the same principles of legislative guardianship to both police officers and the judiciary.¹⁵⁴ Yet, they are required to make decisions regarding

145. *Norwood*, [2003] EWHC (Admin) 1564.

146. *Abdul*, [2011] EWHC (Admin) 247.

147. *See id.* at [49] (distinguishing "legitimate protest" from speech that "threat[ens] public order"); *Norwood*, [2003] EWHC (Admin) 1564 at [34] (holding that speech "likely to . . . cause[] harassment, alarm or distress" is not protected speech).

148. *Norwood*, [2003] EWHC (Admin) 1564 at [40].

149. *Abdul*, [2011] EWHC (Admin) 247 at [33].

150. *See supra* text accompanying notes 1-7 (discussing the state's desire to restrict speech).

151. *Id.* (discussing the state's use of legislation to restrict offensive speech).

152. *See, e.g.*, *Dehal v. CPS*, [2005] EWHC (Admin) 2154 [9] (balancing an individual's right to free expression against another individual's right not to be caused harassment, alarm or distress).

153. *Redmond-Bate*, [1999] EWHC (Admin) 733 at [20] (noting "free speech includes not only the inoffensive, but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having . . .").

154. *See* Human Rights Act, 1998, ch. 42, § 6(2) (Eng.) (defining "public authority" to include both courts and "any person certain of whose functions are functions of a public nature . . .").

free expression and liberty within society, whilst at the same time remaining mindful of their duties to keep the peace and protect the safety of themselves and members of the public.¹⁵⁵

This dilemma is not unique to the English legal system. In relation to the protection of protest in the U.S., Dunn stated that: “In reality, a person’s ability to protest has little to do with nine justices in black robes; it instead is governed by police officers standing on the street with handcuffs, guns, and only the most oblique understanding of or interest in legal niceties.”¹⁵⁶

This serves to underline at least part of the reason behind limited amount of judicial consideration given to low-level public order disputes, and is a problem common across both jurisdictions. Much of the regular maintenance of public order is done at such a low level that no real records are kept and a true picture of the attitudes of those who actually police and administer low-level public order is simply unattainable.¹⁵⁷

XI. FUNERAL PROTESTS IN THE USA: “POST 9/11” PARADIGM SHIFT

The English criminal cases provide an illuminating comparator to a form of protest that has emerged in the United States, and in particular, with the recent decision in the case of *Snyder v. Phelps*.¹⁵⁸ This case, which has attracted considerable notoriety on both a national and international level, concerned the activities of the Westboro Baptist Church and the “fire and brimstone” preaching of First Minister, Fred W. Phelps.¹⁵⁹ Phelps and some of his parishioners (who were, in fact, other family members) picketed the funeral of Marine Lance Corporal Matthew Snyder, carrying placards stating “Thank God for Dead Soldiers”, “Semper Fi, Semper Fags, coming home in body bags” and “God Is Your Enemy.”¹⁶⁰

The protest conformed to local ordinances in respect of protests at funerals¹⁶¹, and the family of Snyder confirmed that

155. See, e.g., *Abdul*, [2011] EWHC (Admin) 247 at [49] (describing these balancing factors).

156. Dunn, *supra* note 2, at 328-29.

157. This difficulty also bleeds in to the collation of meaningful statistics on public order arrests, prosecutions and disposals. At the time of writing, there is no meaningful statistics to compare across the jurisdictions.

158. *Phelps*, 131 S. Ct. 1207 (2011).

159. See *Louis Theroux Returns to America’s Most Hated Family*, BBC, <http://www.bbc.co.uk/news/entertainment-arts-12924568> (last updated Apr. 4, 2011) (detailing the Westboro Baptist Church and its objectives).

160. McAllister, *supra* note 7, at 575.

161. Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Respondents at 3, *Phelps*, 131 S. Ct. 1207 (noting that “[t]he police directed them to a 20- by 25-foot area behind a plastic fence, located on public land that was 1000 feet from the church. Respondents stood where the police directed them.”).

the service was not disrupted. The protest only came to the attention of Snyder's father a few weeks after the funeral when, in searching for his son's name on the Internet, he came upon a description of the protest by the Westboro Baptist Church which expressed the view that Snyder's family "raised him for the devil."¹⁶²

Snyder's family filed a civil action alleging, *inter alia*, tort claims of intentional infliction of emotional distress. The Supreme Court, by a majority of eight to one¹⁶³ overturned the original finding of liability by a Maryland jury and instead held that First Amendment provides protection from tort liability for those who stage a peaceful protest on a matter of public concern near the funeral of a military service member.¹⁶⁴ Chief Justice Roberts stated:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.¹⁶⁵

It is, perhaps, unsurprising that, in addition to Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012¹⁶⁶ a majority of state legislatures have chosen to enact statutory provisions that "mute and conceal from mourners' sight the protestors and their provocative messages."¹⁶⁷ Many of these are so called "time, place and manner" restrictions, which create a buffer zone around the locations of the funeral service.¹⁶⁸ Some states, however, such as Florida have chosen instead to enact specific criminal sanctions, whereby it will be a crime for a defendant to willfully interrupt or disturb an assembly of people meeting for the purpose of acknowledging the death of an individual who was a member of the armed forces of the United States.¹⁶⁹ The State of Virginia goes one step further and

162. *Phelps*, 131 S. Ct. at 1226.

163. *Id.* at 1207 (noting the holding). Roberts, C.J. delivered the opinion of the Court with Justices Scalia, Kennedy, Thomas, Ginsberg, Breyer, Sotomayor and Kagan concurring and Justice Alito dissenting. *Id.*

164. *Id.* at 1207.

165. *Id.* at 1220.

166. Honoring America's Veterans and Caring for Camp Lejeune Families Act, H.R.1627, 112th Cong. (2012).

167. See McAllister, *supra* note 7, at 576 (stating that some forty states together with the federal government have now "funeral picketing" statutes).

168. The actual concept of buffer zones to enable otherwise offensive speech to occur is not novel, nor is it a post-9/11 phenomenon. These zones are often employed to deal with adult bookstores and other such controversial establishments.

169. FLA. STAT. § 871.01.

incorporates “disrupting any funeral, memorial service . . . if the disruption prevents or interferes with the orderly conduct of the funeral,” into the general disorderly conduct provision.¹⁷⁰

Despite these criminal statutes, the decision in *Phelps* represents a civil law solution, which may not be pursued within the other jurisdictions; therefore the focus would switch from the individual seeking punitive damages to the state seeking to impose criminal sanctions upon the protestors from the Westboro Baptist Church. The English legal system has no bespoke legislation, either in the Public Order Act 1986, or in any other statutory provision, to deal with disruption at a funeral service. The power to regulate demonstrations comes from Part 2 of the Public Order Act 1986, but this only gives punitive powers where the defendants violate the terms of any conditions imposed by the police. In the case of *Phelps*, the protestors clearly complied with the preemptive restrictions imposed by the police, and they did not disrupt the funeral so they would not have fallen within the terms of the Virginian or Florida statutes.

It is almost inconceivable that, had the incident occurred in England, the protestors in *Phelps* would have escaped criminal prosecution under § 5 of the 1986 Act. In considering the prohibited *actus reus* elements required for an offence under § 5, and following the finding of the court in *Hammond*,¹⁷¹ the words and visible representations used within the protest may well have been viewed by the court as being threatening, abusive or insulting.¹⁷² Unless the protest had gone completely unnoticed then the behavior of the protestors, although away from the main funeral protest, was still within the presence of someone who is

170. VA. CODE ANN. § 18.2-415 (discussing disorderly conduct in a public place). This provision states *inter alia* that:

a person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he . . . B). Willfully [sic] or being intoxicated, whether willfully [sic] or not, and whether such intoxication results from self-administered alcohol or other drug of whatever nature, disrupts any funeral, memorial service, or meeting of the governing body of any political subdivision of this Commonwealth or a division or agency thereof, or of any school, literary society or place of religious worship, if the disruption (i) prevents or interferes with the orderly conduct of the funeral, memorial service, or meeting or (ii) has a direct tendency to cause acts of violence by the person or persons at whom, individually, the disruption is directed.

Id.

171. *Hammond v. DPP*, [2004] EWHC (Admin) 69, (Eng.).

172. See THORNTON, *supra* note 24, at 115 (stating that under § 5(1) of the 1986 Act there need be only one of the three elements (e.g. the behaviour need only be threatening, abusive or insulting)); see generally *Brutus v. Cozens*, [1972] UKHL 6 (analyzing the test and interpreting the meaning of the above phrases).

liable to be caused harassment, alarm or distress.¹⁷³ The case of *S v. DPP*¹⁷⁴ shows that English courts are quite willing to prosecute using § 4A and § 5 if the conduct is witnessed at all, even if this is via the Internet some time later. Having established that the conduct was indeed threatening, abusive or insulting, for an offence to occur under § 4A, all that would need to be demonstrated was that Mr. Snyder Sr. had suffered harassment, alarm or distress for the offence to be complete.¹⁷⁵

Undoubtedly, the defendants in *Phelps* would have tried to invoke the specific defense under § 5(3)(c) of the 1986 Act and claim that their behavior was reasonable, probably with reference to the rights of freedom of thought, conscience and religion under Article 9 of the ECHR¹⁷⁶ and the freedom of expression under Article 10 of the ECHR.¹⁷⁷ This, again, highlights one of the key difficulties with low-level English public order law. It is likely that an English court will decide, as they did in *Hammond* and *Abdul*, that the activities of Westboro Baptists go beyond legitimate protest and uphold a conviction.

That the courts may reach such a decision is troubling from two perspectives. The first area of concern, as alluded to in *Hammond*, is that it may be that there is no effective way in England for Phelps and his like to express their beliefs, as distasteful as these beliefs might be.¹⁷⁸ A second but wholly interrelated issue is in respect of the actual difficulties any legal adviser would face in advising Phelps. It is for the legal adviser to decide whether to try and persuade the court that the content of the message was reasonable, or instead focus not upon the message but instead highlight the reasonableness of the conduct in delivering the message. This uncertainty reinforces the notion that low-level public order provisions (especially § 5) in England grants capricious power to the executive arm of the state. This, in turn, sees arbitrary decisions being made by the courts based on an ad-hoc balancing of rights and circumstances instead of having the

173. *Holloway v. DPP*, [2004] EWHC (Admin) 2621, [5] (Eng.).

174. *See generally S v. DPP*, [2008] EWHC (Admin) 438 (Eng.) (showing that English courts willing to prosecute using § 4(A) and § 5).

175. *See* Public Order Act of 1986 (showing no evidence of violence or threat of violence is necessary under § 4A or § 5 merely the requirement that the behaviour causes harassment, alarm or distress).

176. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 37, at Art. 9 (stating that everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance).

177. *Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 37.

178. *Geddis*, *supra* note 111, at 873.

requisite certainty that is essential for criminal liability.¹⁷⁹

XII. FREE SPEECH ZONES: CONTENT NEUTRAL CONTROVERSY

The importance of the case of *Phelps* is that it provides an important illustration as to the way in which low-level public order issues in America are dealt with in a “post-9/11” legal landscape. An essential aspect of the defense in *Phelps* was that the protest had complied with the preemptive ordinances that governed protest at funerals.¹⁸⁰ The comparison with the English case of *Abdul* is clear, in which the protestors complied with police directions and yet the protest still attracted criminal liability. The majority of states are content to employ time, place and manner restrictions to deal with funeral protests. These controls retain a link to low-level public order in so far as any breach of such a restriction will likely to result in the individual protestor being arrested and charged with disorderly conduct.¹⁸¹

Absolutist civil libertarian arguments aside, few people would object to the restrictions placed on the members of the Westboro Baptist Church in order to facilitate a peaceful funeral service. Funerals are not alone in attracting time, place, and manner restrictions. Perhaps the most controversial and contested of these restrictions are the so called free speech zones which received widespread public attention due to their use after September 11, 2001, where the President of the United States, George W. Bush, had attracted significant domestic criticism for his policies in relation to the War on Terror.¹⁸²

Free speech zones have played a prominent role within academic debate surrounding the chilling effects of government restrictions resulting from the terrorist attacks. The concept of free speech zones was actually a product of the student protests of the 1960s, where student protest was very much a campus-based phenomenon.¹⁸³ The case law is, however, relatively recent,

179. See generally, Joseph Raz, *The Rule of Law and Its Virtue*, 93 *LAW QUARTERLY REV.* 195 (1977), reprinted in Joseph Raz, *THE AUTHORITY OF LAW: ESSAYS ON LAW & MORALITY* 210 (1979) (arguing that the making of particular laws should be guided by open and relatively stable general rules). The principle that laws should be stable and an individual should be able to know when he has committed a criminal offence is a recognized element of the rule of law. *Id.* Joseph Raz presents perhaps the most celebrated, contemporary articulation of this notion.

180. *Phelps*, 131 S. Ct. at 1213 (2011).

181. See generally *Freedom Under Fire: Dissent in Post 9/11 America*, AM. CIVIL LIBERTIES UNION, (2003), http://www.aclu.org/files/FilesPDFs/dissent_report.pdf (outlining restrictions to protests in various cities and states nationwide).

182. Joseph D Herrold, *Capturing the Dialogue: Free Speech Zones and the “Caging” of First Amendment Rights*, 54 *DRAKE L. REV.* 949, 951 (2006).

183. *Id.* at 956.

reflecting the wider use of these zones in the aftermath of the War on Terror. The lawful authority for the establishment of these zones comes from § 1752 of the U.S. Code,¹⁸⁴ which gives the Secret Service the authority to create restricted access zones preceding presidential visits.¹⁸⁵ Violation of these zones is punishable by either a fine of not more than \$1000 or a period of imprisonment for not more than a year.¹⁸⁶ This puts it within the realm of other low-level public order offences and yet, as a federal offence with one-year imprisonment, it is at the more serious end of the low-level spectrum.

First Amendment doctrinal issues have already been the subject of analysis¹⁸⁷ and this inquiry will now examine these issues within the context of free speech zones and why they have the potential to evoke much controversy. The first concern is that they are actually not concerned with presidential security and instead they are seeking to keep protestors away from presidential appearances and photo opportunities¹⁸⁸ Coupled with this, it has been argued that the nature of the restrictions imposed by the Secret Service very often pose a significant danger to those who are within the designated zones. In *Service Employee International Union*¹⁸⁹, it was held by the court that the government had a duty to protect all persons at political conventions and not merely the delegates. This duty extended to all protestors.¹⁹⁰

Therefore, while the provisions of §1752 have not been found to be unconstitutional *per se*, there have been significant limits placed by the courts as to the nature of the zoning that the Secret Service can impose. In *Stauber v. City of New York*,¹⁹¹ it was held that anything amounting to a caged area (an enclosed pen etc.) would be an unacceptable imposition or as one commentator stated, somewhat pejoratively, “[c]ages are a means of punishment, not a means to regulate the public discourse of a democratic society.”¹⁹²

Although the physical limitations are significant, they tie in

184. 18 U.S.C. § 1752 (2012).

185. Craig, *supra* note 61, at 666.

186. 18 U.S.C.A § 3056 (West 2008).

187. See BARENDT, *supra* note 9, at 48-55; see also Hare, *supra* note 59 (discussing the English perspective).

188. Craig, *supra* note 61, at 660.

189. *Serv. Employee Int'l Union v. City of Los Angeles*, 114 F. Supp. 2d 966 (C.D. Cal. 2000) (discussing the duty to protect protestors).

190. Herrold, *supra* note 181, at 963.

191. *Stauber v. City of New York*, 2004 WL 1593870 (S.D.N.Y. July 16, 2004) *amended*, 2004 WL 1663600 (S.D.N.Y. July 27, 2004) (involving a wheelchair bound demonstrator not being allowed to leave a four-sided enclosed pen for protestors despite complaining of an illness and the need to use the restroom).

192. Herrold, *supra* note 181, at 980.

with a potentially more sinister aspect of free speech zones. There appears to be a growing implicit acceptance that protestors criticizing the government policy during the War on Terror pose a threat to the security of the President. This, in turn, leads to an implicit alignment of those who protest with those who pose a terrorist threat.¹⁹³ Sitting alongside this, are concerns that, (despite appearing to be a content-neutral, time, place and manner restriction) zones that are placed far away from the President serve, effectively, to silence the communication of protestors.¹⁹⁴

An example where the use of protest zones was not upheld is to be found in the case of *Goldhamer v. Nagode*.¹⁹⁵ The defendants were holding a peaceful demonstration outside a military recruitment stand in Chicago. They were handing out leaflets and speaking to passers-by in opposition to military recruitment. Officers from the police department formed a line between the protesters and the booth, and ordered the defendants to move to a designated zone or be arrested pursuant to city disorderly conduct ordinance. They refused to do so, insisting that they were exercising a peaceful protest. They maintained that moving to the dedicated protest zone would diminish the impact of their protest and were arrested. Upon appearance at the state court, the charges against the defendant were dismissed.¹⁹⁶

Despite this example of judicial activism in respect of overburdensome regulation of protest, the concerns regarding restrictions on the grounds of national security remain genuine. As with the situation in England, as evidenced by *Abdul* and *SSHD v. Lord Alton of Liverpool*,¹⁹⁷ the predilection of the higher courts in respect of low-level protest and public order is to yield to the persuasive power of the terrorism-prevention arguments of the state.¹⁹⁸ However, as one commentator has pointed out in respect of America, “[p]ersistent challenges by activist groups have led to bad law on the books It is crucial that activist groups realize for the time being, courts are not a friendly forum for their permit-denial.”¹⁹⁹

Given the instability of the law regarding low-level public order in England, this difficulty is clearly common to both

193. Michael J Hampson, *Protesting the President: Free Speech Zones and the First Amendment*, 58 RUTGERS L. REV. 245, 253 (2006).

194. Dunn, *supra* note 2, at 355.

195. *Goldhamer v. Nagode*, 2008 WL 4866603 (N.D. Ill. Aug. 4, 2008) (noting a case where the use of protesting zones was not upheld by the court).

196. *Id.*

197. *SSHD v. Lord Alton of Liverpool*, [2008] EWCA (Civ) 443, [3] (Eng.) (concerning the appeal taken by the People’s Mojahadeen Organisation of Iran (PMOI) to be removed from terrorist organization list pursuant to the Terrorism Act 2000).

198. Suplina, *supra* note 66, at 427.

199. *Id.* at 428.

jurisdictions, although the protection afforded to speech by the First Amendment clearly shields protestors in the U.S. to a much greater degree. As has been established in *Abdul* and *Hammond*, the only way a protestor in England and Wales will find out if his or her conduct has been reasonable is by a challenge at court, by which time the chance for protest may have passed.

XIII. BREACH OF THE PEACE: A U.K. “SUI GENERIS” PUBLIC ORDER PHENOMENON

Thus far, the examination within both jurisdictions has been limited to the low-level ‘pro-active’ measures designed to ensure that processions and assemblies can be managed so as to prevent both serious and low-levels of public disorder. However, these provide only a partial picture of the way in which public order law is deployed to ensure that protest does not cross from being the legitimate airing of a grievance to threatening or actually causing disorder.

According to A.T.H. Smith, however, at the very center of the (English) public order law sits the *sui generis* phenomenon of “the breach of the peace.”²⁰⁰ Lord Bingham in *Laporte*²⁰¹ stated that:

Every constable, and also every citizen, enjoys the power and is subject to a duty to seek to prevent, by arrest or other action short of arrest, any breach of the peace occurring in his presence, or any breach of the peace which (having occurred) is likely to be renewed, or any breach of the peace which is likely to occur.²⁰²

Breach of the peace is woven into the fabric of English public order law and is the *genesis particle* of the English legal system’s approach to regulating low-level criminality.²⁰³ It must be emphasized that this provision is by no means limited to dealing

200. A.T.H. Smith, *Protecting Protest—A Constitutional Shift*, 66 CLJ 253, 253 (2007) (commenting on R (Laporte), UKHL 55, [2007] 2 A.C. 105).

201. Laporte was a protestor on a coach travelling to an air force base to protest about military action in Iraq. *See generally* R (Laporte), [2006] UKHL 55, [2007] 2 A.C. 105, (Bingham L.J.) (discussing the facts of the case). The police stopped the coach before arriving at the base and found a number of items such as masks, spray paint and a smoke bomb. *Id.* at [11]. Additionally, there was police intelligence that members of an anarchist group called the “Wombles” were travelling with the group and seeking to radicalize the demonstration. *Id.* at [6]. The police concluded that a breach of the peace would occur when the protestors arrived at the RAF base. *Id.* Instead of waiting until a breach of the peace was imminent and arresting the protestors, the police turned the coaches around and escorted them back to London. *Id.* at [12]. Neither Laporte nor her fellow passengers were permitted to leave the coach until it arrived in London. *Id.*

202. *Id.* at [29].

203. *See generally* Justice of the Peace Act, 1361 34 Edw. 3, c. 1 (exhibiting the ancient manifestation of the principle that a Justice of the Peace is assigned power by law over keeping the peace by appropriate action).

with protest. The case law will demonstrate that it is used in a wide variety of circumstances and is every bit as protean as the disorderly conduct provision under § 5 of the 1986 Act yet deployment of this provision by police does not attract criminal liability.

The scope and powers of this common law provision has been visited and revived numerous times by the judiciary of England and Wales²⁰⁴ and over the years codification has occurred to such an extent that breach of the peace has been found to be sufficiently clear to be accepted as being prescribed by law for the purposes of the ECHR.²⁰⁵ It should also be noted that the concept of police action to deal with breaches of the peace have been used within the Australian legal system as well as the English.²⁰⁶

XIV. *LAPORTE*: BREACH OF THE PEACE AND PROTEST

In *Laporte*, the House of Lords concluded that the essence of breach of the peace was to be found in violence or threatened violence.²⁰⁷ An arrest to prevent a breach of the peace is not, of itself, an arrest for a criminal offence,²⁰⁸ merely a preventative measure designed to remove the individual using or threatening violence. The most widely accepted definition of what constitutes a breach of the peace, and the one that is still in current usage, was elucidated by Watkins L.J. in *Howell*:

there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.²⁰⁹

Thornton, extrapolating generic principles from the judgment of Carswell L.J. in *Laporte*, has identified three distinct categories of events where the power to use breach of the peace would be appropriate.²¹⁰ The first occasion would be where an individual is committing or about to commit a breach of the peace.²¹¹ The next

204. See, e.g., *R (Laporte)*, [2006] UKHL 55 at [29] (stating the broad duty of every constable and citizen to prevent any breach by “arrest or other action short of arrest”); see also *R v. Howell (Errol)*, [1982] Q.B. 416, 426 (Eng.) (formulating a comprehensive definition of the term “breach of the peace”); see also *Percy v. DPP*, [1995] 1 W.L.R. 1382, 1390 (D.C.) (discussing the extent of justices’ power under the Justice of the Peace Act of 1361).

205. See *Steel v. United Kingdom*, [1999] 28 Eur. Ct. H.R. 603 [25-29] (recognizing that the keeping the peace is a principle proscribed by law).

206. See, e.g., *Forbutt v. Blake*, [1981] 51 FLR 465, 469 (an Australian court discussing the contours and definition of breach of peace).

207. THORNTON, *supra* note 24, at 255.

208. Smith, *supra* note 199, at 253.

209. *R. v. Howell*, [1982] Q.B. 416 at 427 (Eng.).

210. THORNTON, *supra* note 24, at 256.

211. See generally *Moss v. McLachlan*, [1985] 149 JP 167 (finding that striking miners who are being stopped from travelling to confront working

set of circumstances would be where individuals are engaged in lawful activities but are likely to provoke others to commit a breach of the peace.²¹²

The third of Carswell L.J.'s categories is when a counterdemonstration is arranged, where a "confluence of demonstrations, is likely to lead to a breach of the peace."²¹³ This situation occurs when a lawful protest and a lawful counter protest would likely lead to a breach of the peace. In addition to these three distinct occasions, *Howell* clarified that action may be taken to prevent a breach, when a breach is occurring.²¹⁴ Additionally, action may be taken when a breach has occurred and there is likely to be a renewal.²¹⁵ The power to continually detain an individual is limited to those occasions where the officer has an objectively reasonable ground for believing that doing so is necessary to prevent a breach of the peace.²¹⁶

In *Lavin*, Lord Diplock identified a wide range of actions available to police and citizens to deal with a breach or potential breach of the peace.²¹⁷ Such actions might include removing an inflammatory emblem or icon that a person was wearing,²¹⁸ or detaining a queue jumper whose activities could provoke a violent response from others waiting in the queue.²¹⁹ These activities are the exact type of low-level public order disturbance that may escalate into a violent response. Without appropriate lawful authority, these actions may constitute common assault and battery, which would violate § 39 of the Criminal Justice Act 1988.²²⁰ Authorization of a preemptory power to prevent escalation

miners is a situation where one is committing or about to commit a breach of the peace).

212. *Humphries v. Connor*, [1864] 17 I.C.L.R. 1 (Ir.) (finding that wearing sectarian emblems whilst on a lawful parade through a Catholic area of Belfast was liable to provoke a violent response).

213. *Thornton*, *supra* note 24, at 256.

214. *R. v. Howell*, [1982] Q.B. 416 at 427 (Eng.).

215. *See Albert v. Lavin*, [1982] A.C. 546 (H.L.) 553 (finding that "[i]t is a question of fact and degree when a restraint has continued for so long that there must be either a release or an arrest").

216. *Chief Constable of Cleveland Police v. McGrogan*, [2002] EWCA (Civ) 86, [17], [2002] All E.R. 144 (Eng.).

217. *See generally Lavin*, [1982] AC 546 (discussing the many options police have when dealing with a breach of the peace).

218. *Connor*, (1864) 17 ICLR 1.

219. *See generally Lavin*, [1982] AC 546 (finding that Lavin had "reasonable grounds for believing that a breach of the peace" was imminent when Albert, appellant, attempted to "jump the queue" at a bus stop).

220. *See ORMEROD*, *supra* note 26, at 581-89 (discussing this topic in greater detail). The *actus reus* for common law assault and battery, although statutorily prohibited, is actually found in *DPP v. Little* and occurs when D causes V to apprehend or fear that force is about to be used to cause some degree of personal contact and possible injury. *DPP v. Little*, [1991] 1 Q.B. 645 (Eng.). The actual infliction of the force is the battery. *Id.*

into a violent response, though short of an actual arrest, seems to be a core requirement of any low-level public order framework. The flexibility of common law makes this an attractive tool for police when dealing with actual or apprehended public disorder.²²¹

Any evaluation of the English judicial approach to defending freedom of expression and popular protest would be classified as indeterminate. At first sight, the case of *Laporte* provides “a rare case for celebration for civil libertarians.”²²² Indeed, this should be doubly so because all parties in *Laporte* accepted that that sufficient legislation allowed authorities to ban the demonstration at Fairford. Yet, the police tried to work within the existing public order framework to facilitate the protest. This optimism should be set against the concerns raised in *Abdul*. In *R v. Jones*²²³, Lord Hoffmann stated that it is the “mark” of a civilized community to accommodate protest and civil disobedience.²²⁴ Yet, that seems somewhat dissonant when balanced against cases such as *Haw*, *Blum*, *Tucker*, and *Abdul*.²²⁵

In seeking to establish a conceptual post 9/11 framework regarding the regulation of protest and low-level public order, it is tempting to view the government’s legislative attempts as a means to politicize the policing of protests. It is not novel to accuse a government of using the police to enforce an unpopular political agenda, and in England, this has been a constant criticism aimed at the police’s interpretation of the Public Order Act.²²⁶ The concern is that the legislature’s means is an insidious challenge to political protests. The principal concern, highlighted throughout this discussion, is the utilization of seemingly innocuous, low-level public legislation to suppress legitimate protest.

XV. CONCLUSION: SYSTEMIC INCOMPATIBILITY OR ATTITUDINAL SHIFT

In advocating more robust defense of freedom of expression, the research focuses on the protection afforded by the First Amendment in the U.S.; *Phelps* has indicated how the U.S. constitution provides an effective shield from the worst excesses of

221. Richard Card, *Public Order Law* 21 (2000).

222. Fenwick, *supra* note 5, at 743.

223. *R v. Jones*, [2006] UKHL 16, [2006] 1 AC 136 [89].

224. *Id.* (appeal taken from Eng.) (Lord Hoffmann).

225. *See generally id.* (discussing key aspects of low-level public order law that was deployed against protestors). In that case, the law was Criminal Trespass contrary to Criminal Justice and Public Order Act 1994, § 68, and the protestors were arguing that the U.K. and U.S.A. were guilty of the crime of aggression, arguing that their protests were justified under Criminal Law Act 1977, § 3. *See THORNTON, supra* note 24, at 326 (giving further details).

226. *See* ROBERT REINER, *THE POLITICS OF THE POLICE* (Oxford Univ. Press 3rd ed., 2000).

overly vague legislation.²²⁷ Unfortunately, however desirable it might be to transplant First Amendment jurisprudence into the English legal system, there are fundamental differences in the approaches taken by the two jurisdictions. In *Phelps*, there was no criminal prosecution. Instead the court was asked to decide whether to award damages to the party. Therefore, the whole thrust of the inquiry was different from a criminal investigation. It is possible to speculate that a prosecution in an English court, with similar facts to the case of *Phelps*, would likely result in conviction on that grounds that the activity of a funeral disruption strays beyond legitimate protest.²²⁸

Yet, despite the powerful protection afforded to speech within the U.S. Constitution, it is settled law that the First Amendment does not grant a protestors the right to protest anywhere they desire and at any time. The government is entitled to place certain restrictions regarding the time, place, and manner of any such protest.²²⁹ The American solution is to utilize disorderly conduct provisions where appropriate, whilst the ‘victims’ of extreme protest seek redress through the civil courts.²³⁰

Intriguingly, one of the key findings of this Article is that it is the enduring appeal of the preventative powers predating the War on Terror that provides opportunities for a non-criminal approach to managing low-level disorder. Simester and Sullivan have articulated the principle that if some other form of state intervention that falls short of criminalization may be effective to regulate disorderly conduct “then that alternative should be preferred.”²³¹

Within England and Wales, the common law breach of the peace powers²³² have been demonstrated to provide police with a range of options,²³³ up to and including arrest. The scope of these powers may have been both restricted²³⁴ and expanded²³⁵ in equal

227. *Phelps*, 131 S. Ct. 1207, 1211.

228. See *Abdul*, [2011] EWHC 247 (affirming convictions of five appellants for public order offences because the protest at a parade celebrating the return of soldiers from war was a legitimate protest).

229. Dunn, *supra* note 2, at 355.

230. See generally *Phelps*, 131 S. Ct. 1207 (exemplifying the procedural process in the United States for claims involving extreme protests).

231. ANDREW SIMESTER, G. R. SULLIVAN, J. R. SPENCER & G. J. VIRGO, *SIMESTER AND SULLIVAN’S CRIMINAL LAW: THEORY AND DOCTRINE* 652 (4th ed., 2010).

232. *Howell*, [1981] Q.B. 416, [1981] 3 W.L.R. 501 (Eng.).

233. See generally THORNTON, *supra* note 24, at 254-76 (discussing the scope of activity).

234. See generally R (Laporte), [2006] UKHL 55, [2007] 2 A.C. 105 (H.L.) (explaining Lord Bingham’s stance that the court should carefully scrutinize any prior restraint on freedom of expression).

235. See generally *Austin*, [2009] UKHL 5, [2009] 1 A.C. 564 (H.L.) (showing the expansion of the peace powers through police regulated protests).

measure. Nonetheless, this common law provision has been accepted²³⁶ as satisfying the certainty requirements of Article 7 of the ECHR and still remains “at the heart of English public order law.”²³⁷ It is contended that the flexibility of breach of the peace, with the ability to focus on conduct that threatens violence against people or property or causes people to be fearful that such violence would occur,²³⁸ would achieve the same practical ends as those often sought by employing § 5 but without the attendant stigma of criminality attached. This means that a non-criminal alternative for disorder management is readily available, with the advantage of significant case law support including approval by the European Court of Human Rights.²³⁹

It has been a constant theme throughout this Article that provisions to deal with low-level disorder, within England and Wales, tend to give very broad powers to the police that in turn can be used to suppress what may be legitimate protest.²⁴⁰ The findings of this discussion have helped to illustrate that the regulatory paradigm that predominates in the U.S. (with attendant civil and criminal sanctions) has much to offer the management of low-level disorder, especially within the context of protest. There is no need for the continued existence of § 5 of the 1986 Act, or §§ 132-137 of the 2005 Act to regulate low-level disorder within England and Wales. The lowest level activity, which threatens to lead to violence, can be dealt with by the application of the equally versatile, but noncriminal, common law power to deal with a breach of the peace. It appears, for the moment, that the differences in cultural approaches to protest between the two jurisdictions are pronounced. The attitude of the English courts is one of tolerance for protest only so far as it does not infringe the statutory framework; the U.S. jurisdiction tolerates the statutory framework only as far as it does not infringe the protest.

236. See *Steel v. U.K.*, [1998] 28 Eur. Ct. H.R. 603, [25-29] (discussing the acceptance of the common law breach of peace standard).

237. Smith, *supra* note 199, at 253.

238. See *generally Lavin*, [1982] A.C. 546 (discussing the flexibility of the breach of the peace standard).

239. See MEAD, *supra* note 15, at 57-118 (providing a chapter of discussion on Strasbourg judgments and admissibility decisions pertaining to protests).

240. Robbins, *supra* note 84, at 23.