15

PUBLIC ORDER OFFENCES

15.1 Public Order and Demonstration
15.2 Public Order Offences
Further Reading

15.1 PUBLIC ORDER AND DEMONSTRATION

In a flourishing democracy, what can conveniently be called public 'demonstration' can play an important (de)legitimizing role in politics. It is a mistake to equate the vitality of democracy solely with the working of formal or organized processes such as voting, taking part in scheduled public meetings, participating in focus groups or engaging in social media debates, vital though these are. A very public outpouring of (say) rage on the streets, perhaps expressed by large crowds coming together for that purpose, may have a profound influence on people's thinking, and on government policy, well beyond that exercised by more measured, rationalistic political processes or town hall meetings. Even if it does not and never would have such influence, though, it is still important to give people the opportunity to gather publicly in order to 'demonstrate'. Demonstration is an aspect of people's political autonomy—understood in a broad sense: one of the valuable ways in which people can construct and express their 'public' lives, frequently in common with others. In the modern world, personal autonomy—the flourishing of one's personal, family, and professional life—has come to seem of primary importance to many people, who accordingly tend to underestimate the importance of, or even disparage, the exercise of political autonomy. However, such an attitude should not be permitted to creep into official policy towards demonstration. Robust defence of the right to demonstrate is one of the hallmarks of healthy, anti-authoritarian democratic practice.

In that regard, though, the term 'demonstration' is more helpful as a focus in this context than 'protest', because it is wider in scope.[1] It covers both instances of the law's own division between public 'processions' and public 'assemblies'.[2] A 'demonstration'

[1] https://www.libertyhumanrights.org.uk/right/right-to-protest/ (last accessed 10/08/2021).

[2] Public Order Act 1986, Part II, Jennifer Brown and David Mead, *Police Powers: Protest* (HC Briefing Paper 5021, 2021).

can, of course, be held in public by one person acting alone. In such cases, someone's right to freedom of expression under Art. 10 of the ECHR will play a central role in determining the scope of what they may say and do. By contrast, to give a very different example, following the death of HRH Diana, Princess of Wales, more than 1 million people gathered in central London to line the route of her journey from Kensington Palace to Westminster Abbey.[3] Such action is a public 'demonstration'—in the form of a collective outpouring of grief—under the broad meaning of that term employed here, even though this vast gathering was not a political one in the ordinary sense. In such instances, central to determining the limits of what may be said and done will be not solely Article 10 but also the right to freedom of assembly and association under Art. 11 of the ECHR (set out below). In that regard, a wish to *protest* is merely one reason why people may seek to gather together to demonstrate in public, although there will often be an 'edge' to the imposition of restrictions specifically on protest gatherings, or to the decision to prosecute individuals in the light of incidents arising at a protest. That is because such official decision-making may be perceived as designed (or might in fact be designed) to stifle or deter political opposition to (government) policy. The importance of the right to protest—and more broadly, to demonstrate—is, in that respect, well captured by Helen Fenwick:

> [Freedom of assembly] enables people, especially minorities, to participate in the political process. Participation rights are not exhausted by membership of political parties . . . the exercise of the right enables protestors to express their personalities by their physical presence.[4]

Article 11 ('Freedom of Assembly and Association') of the European Convention on Human Rights says:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others . . .
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

Although 2 above gives what looks like wide scope to the authorities to restrict freedom of association and assembly, it is important to note that restrictions—even relatively small ones—must be 'necessary' (and proportionate) in a democratic society, as well as prescribed by law. It is not enough that it would be convenient or useful to have the restrictions.[5] As already indicated, Art. 11 is also supported, in general terms, by the protection in Art. 10 given to freedom of expression, including the right 'to receive and impart information and ideas without interference by public authority and regardless of frontiers'.

[3] http://www.bbc.co.uk/news/special/politics97/diana/scene.html (last accessed 10/08/2021).

[4] Helen Fenwick, *Civil Liberties and Human Rights*, 4th edn (2007), 665, citing an unpublished paper by Eric Barendt.

[5] *Redmond-Bate* v *DPP* (1999) 163 JP 789.

The main concern in this chapter is with what is called 'subsequent restraint' on demonstrations, when criminal offences are charged following incidents that occurred during the demonstration. While that is, of course, the normal pattern of usage for the criminal law, there is an extra dimension to it in civil liberty cases that is also present when, for example, someone is prosecuted for hate (or other kinds of illegal) speech. This is that prosecution, whether or not ending in conviction, may give more publicity to the actions of those prosecuted than the reporting on the actions themselves and, in some cases, may make 'martyrs' of those prosecuted, partly defeating the point of prosecution in the first place. One way for those in authority to avoid such consequences is to employ what is called 'prior restraint': in this context, involving the banning or severe restriction of the demonstration before it takes place. If a demonstration never takes place at all, or takes place only under severe restrictions, then its public impact is likely to be low to non-existent. This makes an aggressive policy of prior restraint in some ways much more controversial than a policy of subsequent restraint, in political protest cases.[6] Prior restraint is enforced through the use of two-step prohibitions, which we considered in Chapter 2.4. People can be made subject to specifically tailored restrictions or conditions, and it is then breach of the restriction or condition that becomes the offence.

In that regard, the Public Order 1986 Act ('the 1986 Act') provides the police with three powers:

- It requires individuals to notify the police when they are planning a protest march (but not a static protest meeting[7]).
- It allows the police to request that a protest march be prohibited if they have a serious public order concern. The police have more limited powers to request certain types of static protests are prohibited.
- It allows the police to impose conditions on any protests they suspect will cause serious damage to property, serious disruption or will incite unlawful behaviour.

It is an offence to organize a protest march without notifying the police six days in advance, or to change the route it will take (or the date and time) without notification, although it is not an offence simply to form part of such a march.[8] The Home Office signed 12 banning orders of protest marches between 2005 and 2012, ten of which were associated with far-right political groups (The English Defence League and the National Front), and two with anti-capitalist and anti-globalization groups.[9] So far as the imposition of conditions is concerned, senior police officers can issue a direction imposing any condition on the protest march that is 'necessary to prevent disorder,

[6] See the excellent discussion in Helen Fenwick, n 4, 660–61.

[7] The police can only request a static protest is banned if they have a serious public order concern and they think it is likely to be held on private land without the permission of the land's owner: Public Order Act 1986, s 14A.

[8] Section 11(7) and s 11(10), Public Order Act 1986.

[9] Jennifer Brown and David Mead, n 2 above, 6.

damage, disruption or intimidation'.[10] A senior officer must reasonably believe that the protest may result in serious public disorder, serious damage to property, or serious disruption to the life of the community. They may also issue directions if the purpose of the protest is to intimidate others and compel them 'not to do an act they have a right to do, or to do an act they have a right not to do'.[11] A failure to comply with a direction can lead to a fine or imprisonment. For example, the Metropolitan Police imposed a number of conditions on the 'Extinction Rebellion' (XR) protests that took place across central London in April 2019. The protests were non-violent but caused disruption to transport networks. The Metropolitan Police issued conditions requiring the protestors to restrict their activity to Marble Arch in central London, saying that the orders were necessary to 'prevent ongoing serious disruptions to communities.' More than a thousand people were arrested for breach of the conditions, which in itself, of course, brought a great deal of publicity to XR (something prior restraints are commonly intended to avoid). Judicial scrutiny of the use of prior restraint measures under the 1986 Act needs to be at a very high level of intensity, in the light of Art. 11, if overblown or politicized perceptions of the 'risk' likely to be posed by demonstrations are not to undermine people's freedom of assembly.

Helen Fenwick usefully divides the manifestations of demonstration into different, overlapping categories:

(a) Peaceful persuasion (eg handing out leaflets; chanting inoffensive slogans);

(b) Offensive or insulting persuasion (eg displaying racist banners or obscene photos);

(c) Intimidation (eg fist-shaking or abuse of those trying to go to a place of work);

(d) Passive or symbolic obstruction or interference (eg lying in front of a bulldozer);

(e) Active obstruction or interference (eg climbing a condemned tree; chaining oneself to a building; surrounding another demonstrator to prevent their arrest);

(f) Violence and the use of force (eg attacking counter-demonstrators or the police).[12]

It seems obvious that activities falling within (a) should be permitted in an unrestricted way. Conduct falling within (b) and (c) is also a form of political 'communication' and is thus protected in principle by laws granting freedom of expression. However, such conduct is vulnerable to claims that it may pose an imminent threat of disorder, a justification for prohibiting it that may be derived from Arts 10 and 11.[13] Even so, obnoxious though such conduct may well be, in the absence of an *imminent* threat of that kind, a liberal democracy may do well to tolerate it. In part, that is because

[10] Public Order Act 1986, s 12(1).
[11] Public Order Act 1986, s 12 and s 14.
[12] Helen Fenwick, n 4, 666 (Fenwick has seven categories).
[13] Eric Barendt, *Freedom of Speech* (1987), 10.

the alternatives are unattractive, involving a controversial extension of discretionary police powers. For example, should police officers be empowered (i) to decide whether a T-shirt people are all wearing at a demonstration is 'racist' and then (ii) to order the wearers to remove their shirts or cover them up, even though no one else is taking much notice? The Crown Prosecution Service has given the following guidance on when there is unlikely to be a public interest in prosecution, although it does not capture all the mitigating elements that might count against prosecution:

- The public protest was essentially peaceful, save where significant disruption is caused;
- The suspect had no more than a minor role;
- The suspect has no previous relevant history of offending at public protests or in general;
- The act committed was minor;
- The act committed was instinctive and in the heat of the moment.
- Prosecutors should consider the incident as a whole to assess the context in which the offence was committed.[14]

(D), (e), and (f) do not employ 'communication' in the ordinary sense, as a means to an end, because they are forms of so-called direct action. (D) in particular, though, involves a form of expression, and is thus in general worthy of a high degree of tolerance. As Fenwick argues, (d) involves 'message-bearing expression', and has a useful function in fuelling debate influencing the democratic process in a non-violent way.[15] For that reason, tolerance might take the form of permitting the protest to continue unhindered for a period of time, while maintaining a dialogue with protestors over when and how it should end or take some other form. In practice, that may also be the right approach in case (e) in some instances, such as where someone has chained themselves to a building but is not obstructing its use. As the Supreme Court put it in *DPP v Ziegler*,[16] 'deliberate obstructive conduct which has a more than de minimis impact on others, still requires careful evaluation in determining proportionality'. In that case, the Supreme Court held that there could be a defence of 'lawful excuse' to the offence of obstruction of the highway (contrary to s 137 of the Highways Act 1980), when arms trade protestors secured themselves on a road leading to a building in which an arms fair was taking place, in such a way as to make their removal by the police difficult. The Supreme Court held that the limited, targeted, and peaceful nature of the protestors' action was capable of amounting to a lawful excuse for the obstruction, in the circumstances, given their rights under Arts 10 and 11. If activity is protected by Arts 10 and 11, then (other things being equal) there will be a 'lawful excuse' for the activity, for the

[14] https://www.cps.gov.uk/legal-guidance/offences-during-protests-demonstrations-or-campaigns (last accessed 13/08/2021).

[15] Helen Fenwick, n 4, 666.

[16] [2021] UKSC 23, para 64.

purposes of the obstruction offence. Ultimately, in deciding whether there is a lawful excuse, the issue for the courts will be whether a fair balance has been struck between the rights of the individual and the general interest of the community, including the rights of others. As the Supreme Court indicated, that is very much a 'fact-specific' enquiry. In that regard, in *Ziegler*, a key factual finding was that the obstruction of the highway was liable to affect only those seeking to attend the arms fair (and not the public at large), and the obstruction—as the prosecution conceded—lasted only 90–100 minutes.

The issues raised by (d) and (e) are not simple ones. For example, we generally assume that what motivates people to engage in politically motivated obstruction or interference is a strong sense of justice and conscience (as in *Ziegler*), or outrage at a proposed change to their local neighbourhood that affects their lives. That is, in part, what justifies a tolerant attitude, if anything does. However, our approach might be different if we discovered that those involved were being paid to participate, or were there simply to further some undeclared private or political interest tangential to the protest issue. That brings us to category (f). Clearly, violent disorder, or widescale disruption of essential services, is intolerable in almost any circumstances. Nonetheless, we should be careful to bear in mind the wide scope of the criminal law when making sweeping claims such as, 'violence and property damage must never be tolerated in the name of protest!' For example, as we have seen, writing an inoffensive slogan on the pavement with chalk is criminal damage, even though the rain would wash it away.[17] Setting fire to a passport in some form of protest against nationality laws is arson, even if it is 'your' passport, because passports in fact belong to the government. You are only a passport 'holder'.

There is more to the picture. Our sympathies may be influenced by the perceived (lack of) democratic input into the issue that is the focus of demonstration. For example, if local people vote overwhelmingly to have a statue of someone erected in the town square, obstruction and hinderance by a minority seems clearly anti-democratic and hence unjustified. By contrast, if the national Department of Transport decides to build a by-pass through an area of outstanding natural beauty, even though this was not mentioned in any political manifesto, a good deal more political legitimacy may seem to attend the actions of demonstrators who obstruct or hinder the project. To give a different kind of example, suppose that people with disabilities chain themselves to government buildings to protest at the widespread neglect of their wants and needs in planning and building decisions. Their action may deserve a high level of tolerance, in the virtue of the fact that they have historically been neglected by political parties across the spectrum: so, how, other than through hard-hitting demonstration, can they raise their profile on the political agenda? Further, the correct approach to demonstrations will often depend not so much on clarity about, or curtailment of the reach of, the

[17] See Chapter 10.7.

criminal law, but on the way that law enforcement discretion is exercised by police and others involved in law enforcement. There will sometimes be tensions and conflicts between, on the one hand, the vigorous exercise of rights of assembly and expression, and on the other hand, the need for public order and the protection of personal and property interests. One cannot simply legislate one's way through those tensions and conflicts.[18] Their proper management will inevitably come to depend on how the police (and also prosecutors and judges) approach sensitive cases. Has police policy on prior restraint been consulted on with local authorities and residents as well as with would-be demonstrators? In relation to an individual demonstration, have the police made it clear when and how they will step in to curtail certain kinds of activity? Is there a way for people to have input into periodic reviews of police action, in these respects?

15.2 PUBLIC ORDER OFFENCES

What makes an offence a 'public order' offence? A central concern in the 1986 Act is the use or threat of violence (against the person, or against property), whether engaged in by D, or engaged in by someone else but provoked or stirred up by D. More controversially, at least in some cases, the criminalization of (non-violent) disruption, or threats of disruption, to other people's lawful activities may also fall within the scope of behaviour regarded as public order offending, as when it amounts to the offence of public nuisance or of obstruction of the highway. A key point, though, in relation to the offences under the 1986 Act, is the counter-intuitive absence of any requirement that the offending behaviour take place in public. The main offences in the 1986 Act may all be committed in private spaces. That raises a theoretical question over what make such offences 'public order' offences. Respecting the more serious offences under the 1986 Act, the answer to that lies in the requirement that D's conduct must have been such as would cause a person of reasonable firmness present at the scene to fear for their personal safety.[19] What this requirement points to is that serious 'public order' offending under the 1986 Act is offending that involves the threat of *indiscriminate* violence, whether that threat is posed in public or in private. D commits a serious public order offence when, even if he or she is in a private space, his or her conduct would lead a reasonably robust person there at the time to fear for their own safety, even if they were not the immediate object of D's attention. That requirement could in theory be satisfied even if D and one other person were alone in a room together. An example would be where D is in his gun room at home with X, and unlocks and loads a gun saying that he is going out to teach some people a lesson the world will not quickly forget. In such

[18] For CPS guidance on, 'Offences during Protests, Demonstrations and Campaigns', see https://www.cps.gov.uk/legal-guidance/offences-during-protests-demonstrations-or-campaigns.

[19] In relation to the less serious but more controversial offence in s 5 (considered below), the equivalent requirement is that D's conduct be 'within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby'.

a case, D would be guilty of, among other things, affray contrary to s 3 of the 1986 Act. There is a clear threat of indiscriminate violence, even though (*ex hypothesi*) X is not themselves at risk. Contrariwise, as we will see, if D unlocked and loaded a gun, but issued the shooting threat only to V, then affray would not be committed: there is now no threat of 'indiscriminate' violence.[20] 'Public' nuisance, referred to above, is similarly concerned with indiscriminate as opposed to individually targeted disruption. As Denning LJ explained this requirement:

> a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.[21]

It is important to note that the public order offences discussed below can be racially or religiously aggravated offences.[22] However, an offence under the 1986 Act must obviously be committed before it can be 'aggravated'. In *Campaign Against Anti-Semitism v DPP*,[23] the Campaign challenged the decision of the DPP to take over and terminate a prosecution the Campaign had instigated privately against an individual for an offence contrary to s 5 of the 1986 Act (see text at n 45 below). The prosecution was against an individual claimed to have shouted anti-Semitic remarks, alleging Jewish involvement in causing the fire, during a parade following the Grenfell Tower disaster. The challenge to the DPP's decision to terminate the prosecution failed. The court found that the DPP could legitimately have concluded that, appalling though the individual's words were, in the particular circumstances they posed no threat to public order. That being so, no offence under the 1986 Act was committed, even if—had one been committed—D's words would have involved religious aggravation. Separately, Part III of the 1986 Act creates offences of stirring up hatred, on the grounds of race, religion, or sexual orientation, punishable by up to seven years' imprisonment. In race hate cases (for example, s 18[24]), the question is whether conduct that is threatening, abusive, or insulting was intended, or likely, to stir up racial hatred. By contrast, in cases of hate stirred up in relation to religion or sexual orientation (s 29), the conduct that leads to this must have been threatening (it is not enough that it was insulting or abusive), and must have been *intended* to stir up hatred. So, the offence in the latter cases is considerably narrower in scope, both as regard the conduct and the fault element. The reason for this difference is a legitimate concern about undue restriction of free speech by the criminal law, in cases involving religion. At an earlier time, the state made it a criminal offence to criticize the Christian faith, punishing those who did so severely in many cases.[25]

[20] See the discussion of *Leeson* v *DPP* [2010] EWHC 994 (Admin) below. In this example, D may be guilty of threatening to kill V, contrary to the Offences Against the Person Act 1861, s 16.

[21] *A-G* v *PYA Quarries Ltd* [1957] 2 QB 169 at 191.

[22] Discussed in ch 9.3(d).

[23] [2019] EWHC 9 (Admin).

[24] The 1986 Act creates a number of race hate offences, not further considered here: see Smith, Hogan, and Ormerod, *Criminal Law*, 16th edn (2021), ch 31.10.3.

[25] See the discussion in ch 2.

A determination not to allow a return to such practices—whichever religion is criticized—has contributed to wariness about the scope of offences concerned with stirring up religious hatred. Accordingly, s 29J of the 1986 Act contains the following provision:

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

An analogous provision also applies to cases where it is alleged that hatred was stirred up in relation to sexual orientation. Presumably, then, what shapes the law is the same worry: that, if the offence concerned with sexual orientation was as wide as the offence concerned with race hate, it would raise the same threats to free speech as are present in cases of stirring up religious hatred. That may be doubted. Whereas mainstream religions are backed by powerful and wealthy institutions willing and able to support legal actions (including prosecutions) against their critics[26]—hence the need to take special legal steps to protect the critics—the same can hardly be said of those with particular sexual orientations. While s 29J is a valuable provision with respect to a wide range of controversial speech, the restriction of the scope of the s 29 offence concerned with sexual orientation to 'threatening' behaviour seems over-cautious. At the very least, *abusive* behaviour with regard to sexual orientation ought also to be caught by the offence. The Law Commission has considered this issue, along with proposals to broaden the range of protected characteristics that hate crime would cover.[27]

Riot: Anyone found guilty of 'riot' may be sentenced to imprisonment for up to ten years, fined an unlimited amount, or both together. The seriousness of the offence can be gauged by the fact that not only is the offence triable only on indictment, but the consent of the Director of Public Prosecutions must be obtained in respect of any charge. The offence is set out in s 1 of the 1986 Act:

(1) Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot.

(2) It is immaterial whether or not the 12 or more use or threaten unlawful violence simultaneously.

[26] For further discussion, in a Canadian context, see Dennis R Hoover and Kevin R den Dulk, 'Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada' (2004) 25 International Political Science Review 9; Steven Kettell, 'Britain's "Christian Right": Seeking Solace in a Narrative of Discrimination' (2017), https://blogs.lse.ac.uk/politicsandpolicy/britains-christian-right-seeking-solace-in-a-narrative-of-discrimination/.

[27] Law Commission, *Hate Crime Laws*: *Final Report* (Law Com 402, 2021).

(3) The common purpose may be inferred from conduct.

(4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(5) Riot may be committed in private as well as in public places.

In one sense, the offence is a species of aggravated offence against the person or criminal damage. Someone (Z) who engages in 'unlawful violence' is, in addition to being guilty of the relevant offence of violence, guilty of riot, if the violence was intended to further a common purpose shared by Z and 11 or more other people, and the other conditions set out in s 1 are also satisfied. This means that the prosecution can charge Z, in the alternative, with (say) assault occasioning actual bodily harm or criminal damage, in case the jury is not satisfied that all the elements required for proof of riot are present.

Obviously, the choice of 12 people as the magic number is to some extent arbitrary: conduct engaged in by a cricket or football team would not be capable of amounting to riot, in circumstances where, if a rugby team engaged in the same conduct, it would be so capable. However, specifying a minimum of 12 people does ensue that a serious charge such as 'riot' is not employed unless it would be a genuinely representative label for the conduct in question: not every scuffle or bar fight involving a group of people acting in concert amounts to a 'riot'. The use of 'common purpose,' rather than 'agreement', makes the law flexible enough to deal with spontaneous outbreaks of violence, where people may join in at the time, rather than being confined to pre-planned activity. In terms of proof, CCTV as well as mobile phone recording evidence may show a large group of people acting violently with what is clearly a common purpose, even if there was no prior agreement to act in that way. In that regard, it is important to note that while the 12 (or more) must use or threaten violence for the common purpose, the common purpose itself need not be a violent one. So, for example, a large group of people may gather outside a Government Minister's office demanding to speak to him or her (a lawful purpose), but then seek to break down the door when the Minister refuses to come out to speak to them. The latter conduct may amount to riot, but only if it is—taking the actions of all together—such as 'would cause a person of reasonable firmness present at the scene to fear for his personal safety'. Note, in that regard, that what matters is whether a person of reasonable firmness at the scene 'would' fear for his or her personal safety. It is not necessary that anyone actually does fear for their safety. So, in this example, even if there is in fact no one in the building, riot may still have been committed if the jury is sure that a person of reasonable firmness would have feared for their safety, had they been at the scene.[28]

The Crown Prosecution Service has indicated that riot is likely to be charged only in exceptional cases:

> Charges under section 1 should only be used for the most serious cases usually linked to planned or spontaneous serious outbreaks of sustained violence.

[28] *Jefferson et al* (1994) 99 Cr App R 13.

Conduct which falls within the scope of this offence might have the one or more of the following characteristics:

- the normal forces of law and order have broken down;
- due to the intensity of the attacks on police and other civilian authorities normal access by emergency services is impeded by mob activity;
- due to the scale and ferocity of the disorder, severe disruption and fear is caused to members of the public;
- the violence carries with it the potential for a significant impact upon a significant number of non-participants for a significant length of time;
- organised or spontaneous large scale acts of violence on people and/or property.[29]

Violent disorder: This offence, created by s 2 of the 1986 Act (and punishable by up to five years' imprisonment), is committed as follows:

(1) Where three or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using or threatening unlawful violence is guilty of violent disorder.

(2) It is immaterial whether or not the three or more use or threaten unlawful violence simultaneously.

Again, this is a kind of aggravated offence against the person or property, committed when the relevant conduct is engaged in by three or more people, who must intend to use or threaten violence or be aware that their conduct might be violent or threaten violence. The inclusion of threats of violence means that the offence is committed at the moment when, for example, D1, D2, and D3 corner V, and simultaneously produce knives from their coat pockets. There is no need, for s 2 purposes, for D1, D2, and D3 to go on to use the knives in any attack. However, the courts have taken this point about the inclusion of the threat of violence a long way. In *O'Harro*,[30] D was on the sidelines as his group attacked the shutters of a shop. The Court of Appeal approved the judge's direction to the jury that D's presence with his hood up while others in his group used violence constituted 'implicit menace amounting to a threat'. One worry about such a decision is that it lends legal support to reported police bias towards suspecting people wearing hoodies.[31]

Clearly, what makes this offence—triable either way—less serious than riot is the fact that fewer people need be involved for the offence to be committed. The absence

[29] https://www.cps.gov.uk/legal-guidance/public-order-offences-incorporating-charging-standard (last accessed 13/08/2021).

[30] [2012] EWCA Crim 2724.

[31] Ciro Civile and Sukhvinder S Obhi, 'Students Wearing Police Uniforms Exhibit Biased Attention toward Individuals Wearing Hoodies'(2017) 8 Frontiers in Psychology 62.

of the need to prove a 'common purpose,' in pursuit of which violence was used or threatened, may in some cases also make the offence less serious. The offence is capable of encompassing, for example, a 'road rage' incident in which a loss of temper leads the driver and passengers of one car to engage in shouting and scuffling with the driver and passengers of another car. Now consider a case in which two people attack a third party, who fights back. Can it be said that three or more people 'present together' used unlawful violence (that would cause a person of reasonable firmness at the scene to fear for their safety), and hence that the attackers are guilty of the offence? No, because if one of the three is acting in self-defence, he or she is not using 'unlawful' violence in resisting the attack.[32] It should be kept in mind that so long as the jury is satisfied that the conditions set out in s 2 have been satisfied, someone can be convicted of violent disorder even if the prosecution has failed to identify or charge any other participants:[33] 'a jury may be perfectly satisfied that there were at least 3 people participating without being able to say to the criminal standard who most of them were.'[34]

What is the justification for having aggravated—and quite complex—offences of riot or of violent disorder, when it would be perfectly possible in most cases simply to ensure that individuals found guilty of offences against the person, or against property, received longer sentences in virtue of having acted together with others, in an intimidating way? The answer to that may lie in the sense that, when a riot or violent disorder is in progress, the normal system of law and order has—albeit temporarily—broken down in a way that is not true when one individual commits an offence or even when two or more conspire together to do so.[35] If that seems over-dramatic as a justification, then there is also the concern that when a group or crowd together throws off the constraints of law, individuals in the group may be emboldened to engage in criminal acts they would never have contemplated when on their own. The CPS has indicated that it will rarely be the case that a charge of violent disorder should proceed by way of summary trial. In its view:

> Examples of the type of conduct which may be appropriate for a section 2 offence include:
>
> - fighting between three or more people involving the use of weapons, between rival groups in a place to which members of the public have access (for example a town centre or a crowded bar) causing severe disruption and/or fear to members of the public;
> - an outbreak of violence which carries with it the potential for significant impact on a moderate scale on non-participants;
> - serious disorder at a public event where missiles are thrown and other violence is used against and directed towards the police and other civil authorities.[36]

[32] *Mechen* [2004] EWCA Crim 388.
[33] *Lemon* [2002] EWCA Crim 1661.
[34] *Mbagwu* [2007] EWCA Crim 1068.
[35] Smith, Hogan and Ormerod, *Criminal Law*, 16th edn (2021), ch 31.3.1.2.
[36] https://www.cps.gov.uk/legal-guidance/public-order-offences-incorporating-charging-standard (last accessed 13/08/2021).

Affray: This former common law offence, punishable by up to three years' imprisonment, was put on a statutory footing by section 3 of the 1986 Act:

(1) A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

(2) Where 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of subsection (1).

(3) For the purposes of this section a threat cannot be made by the use of words alone.

The offence is in some respects more restricted in scope than those so far discussed, in that it is confined to the use or threat of violence to the person—damage or threats to property are not covered.[37] However, the offence is also wider than riot or violent disorder, in that it may be committed by one person acting alone. It has, for example, been used to charge individuals who have become violent when on board an aircraft.[38]

In spite of the fact that the offence may be committed by a single individual using or threatening violence towards another, the offence is still a 'public order' offence. This is demonstrated by the key role played by the need to show (as in the case of riot or violent disorder) that D's conduct would have caused a person or reasonable firmness at the scene to fear for their personal safety. Whether or not the person against whom violence is used or threatened fears for their own safety is quite irrelevant (other, perhaps, than as evidence of what the person of reasonable firmness might have feared). In *Leeson* v *DPP*,[39] D was in a locked room with V at their joint home, no one else being present. While holding a knife, D calmly said to V that she (D) was going to kill V, but made no move to do so. V easily disarmed D, but reported the matter to the police. Initially, D was convicted of affray but her conviction was quashed on appeal. The key point was not that V was never put in fear for his own safety; nor was it that there was no one else present (of reasonable firmness) who feared for their safety. The key point was that the calm manner in which D conveyed what was a threat directed solely at V meant that, had there been a hypothetical person present of reasonable firmness, they would not have feared for their *own* safety (as opposed, perhaps, to V's safety). This was, then, a case in which an offence against the person, and not a public order offence, was the appropriate charge.

Fear or provocation of violence. Section 4 of the 1986 Act creates a summary offence (punishable with up to six months' imprisonment) where D:

(a) uses towards another person threatening, abusive or insulting words or behaviour, or

[37] D must intend to threaten or use violence, or be aware that their conduct may be violent or threaten violence.

[38] See e.g. https://www.theguardian.com/uk/2000/jul/22/2 (last accessed 13/08/2021).

[39] [2010] EWHC 994 (Admin).

(b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive, or insulting, with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

Like the offences already discussed, this offence may be committed in public or in private, although s 4 is narrower in that it does not apply in a case where both D and V are in a dwelling.[40] However, an important theoretical difference with s 4 is that, unlike the public order offences discussed so far, there is no requirement for the use or threat of 'indiscriminate' violence. Like offences against the person or property discussed elsewhere in this work, s 4 presupposes an individual victim targeted or put at risk by the defendant's conduct. It is when we reach s 4 that we begin to appreciate how conflicts can arise between the reach of criminal offences, and the scope of rights to engage in acts of demonstration. It is not that s 4 necessarily lacks justification, on orthodox harm-prevention grounds, although it is a contentious provision in terms of its breadth. It is that it gives very considerable scope for controversial judgement calls and decision-making by officials, especially in cases where the police are considering prior restraint measures. For example, prior restraint measures could be justified, in relation to s 4 offending, on the somewhat flimsy grounds that (say) a proposed demonstration will involve 'insulting' words or behaviour, as a result of which another person is 'likely' to believe that immediate unlawful violence will be used.

Even in cases of subsequent restraint—involving prosecution—s 4 has significant potential to bear down harshly on a significant range of conduct that many would regard as, at worst, challenging or unconventional (and sometimes not even that). For example, in *Masterson* v *Holden*,[41] two gay men were cuddling in the street in the presence of four other young people. Extraordinarily, this behaviour was ruled capable of being 'insulting.' It is hard to see how the case could now withstand challenge as a violation of Art. 8 of the ECHR (right to a private life). In that regard, for the purposes of s 4, the conduct does not have to be intended to be threatening, abusive, or insulting, so long as D was aware that his or he conduct might be threatening, abusive, or insulting.[42] This creates an unacceptably broad offence, particularly in the case of supposedly 'insulting' behaviour, where rights to engage in controversial free speech are most likely to be at issue. For example, in *Lewis v DPP*,[43] anti-abortion protestors held up placards outside an abortion clinic, one of which showed an aborted 21-week foetus lying in a large quantity of blood. The Divisional Court held that this could constitute abusive and insulting behaviour. The Court rejected the argument that 'the photograph on the placard was an accurate representation of the result of an abortion, and that what is

[40] Section 4(2). [41] [1986] 1 WLR 1017. [42] Section 6(3).
[43] (1995) unreported, DC, cited in Smith, Hogan, and Ormerod, n 24, p. 12.

truthful cannot be abusive or insulting'. The problem with the Court's view is that it fails to give consideration to whether a stricter test must be satisfied by the prosecution in cases where images or words are both designed to communicate a political message, and also claimed—albeit, perhaps, wrongly—to be depictions of the truth, and purportedly displayed in the public interest. Whatever one's view on abortion, it is not right to treat such demonstrations as the equivalent of indecent exposure. As Smith, Hogan, and Ormerod rightly argue, there is thus a case for saying that *Lewis* v *DPP* would not survive an Art. 10 challenge, on the grounds that the Court's ruling was disproportionate, as a means of protecting the rights of those encountering the demonstration.[44] In the USA, the Supreme Court has held unconstitutional, as a violation of the right of free speech, the establishment of 'buffer zones' for anti-abortion protestors, when such zones—in the case in question, 35ft away from an abortion clinic—permit protest but make communication directly with people going in and out of clinics very difficult.[45]

Causing harassment, alarm or distress. Under s 5 of the 1986 Act, it is a summary offence, punishable by a fine, if a person:

(a) uses threatening or abusive words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening or abusive, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.[46]

It is a defence for D to prove under s 5(3)(c) that his or her conduct was reasonable, a defence that is not available under sections 1–4. Section 5 is more obviously controversial, in terms of its justification under the harm principle, for three principal reasons. First, it does not require that there be a victim, or someone at whom conduct was directed. All that matters is that the conduct described in (a) took place, or that the conduct described in (b) was 'within the hearing or sight' of someone likely to be caused harassment, alarm, or distress by it. So far as (b) is concerned, it arguably confuses the relevant wrong—actually harassing, alarming, or distressing—with the grounds on which the police might legitimately seek prior restraints aimed at preventing or minimizing the risk of one of the wrong being done—when conduct is likely to lead to that consequence. When one bears in mind that the 'person' within whose sight or hearing the conduct must take place can include a police officer keeping an eye on those engaged in the conduct, the paradoxical situation arises that the officer will be responsible both for the offence having occurred and for the prevention of further offending, arrest of the offenders, and so on.

Second, there is the extension of the conduct element in (a) to include 'disorderly' behaviour. Is such behaviour (potentially) really harmful, as such? Is it sufficiently clear

[44] Smith, Hogan, and Ormerod, n 24, p. 12.

[45] McCullen v *Coakley* 573 US (2014).

[46] D must intend his or her conduct to be threatening or abusive, etc, or be aware that it may have that character. D may also seek to show that he or she had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm, or distress.

what it involves, so that people know to avoid engaging in it? Third, there is the extension of the circumstance element of the offence in (b) so that the prohibition covers some exercises of freedom of expression, when the expression is within the hearing or sight of someone, 'likely' to be caused harassment, alarm, or distress by it. Looked at in terms of the US First Amendment, such a prohibition would have to survive the strictest scrutiny by the courts, because it is concerned with content or viewpoint of speech, and not just the manner and form of the expression.[47] In other words, under s 5, the problem need not be solely that I am, say, shouting *loudly* in a way likely—whatever the content of my speech—to cause harassment, alarm, or distress (although even then there may not always be much of a case for criminalization). Section 5 also covers cases in which it is the substance of what I say—however calmly—that causes the harassment, alarm, or distress. For example, in *Abdul v DPP*,[48] the Royal Anglian Regiment was returning from a tour of duty in Afghanistan and Iraq, and a homecoming parade was held. D was part of a protest group which shouted slogans and waved banners close to where the soldiers were passing, including, 'British soldiers: murderers', 'Rapists all of you', and 'Baby killers'. D's conviction for of an offence contrary to s 5 was upheld as a proportionate interference with his rights under Arts 10 and 11, on the grounds that, among other things, what was being said was defamatory, inflammatory, and highly likely to cause distress. That may be so, but defamation is a matter for private law remedies, and the mere fact that speech is inflammatory (and hence potentially distressing) seems a weak ground on which to justify criminal prosecution of the speaker, especially when the speech is political in nature.[49] In some instances, the courts have plumbed the depths of absurdity: wearing a T-shirt with the logo 'FCUK' has been held to fall within the scope of section 5,[50] as has a window display of a 4ft-high carved penis.[51] The approach of the courts is also in general inconsistent. For example, in *Percy* v *DPP*,[52] D was a protestor against American military policy. D wrote 'Stop Star Wars' over the stripes of the American flag and crossed over the stars. Then she put the flag on the road outside the American military base and walked over it. Some American service personnel gave evidence that they were distressed by her conduct. D was convicted under s 5 and appealed. The Administrative Court quashed the conviction, holding that the defence of reasonableness could not fail, in a case such as this, simply because D could have made her protest in some other way.[53] To restrict such conduct, in the circumstances, is hardly 'necessary' in a democratic society (as Arts 10 and 11 require, if freedoms are to be restricted).

[47] McCullen v *Coakley* 573 US (2014). [48] [2011] EWHC 247 (Admin).

[49] See *Otegi Mondragon* v *Spain* (Application no. 2034/07) 15th March 2011. For criticism, see A Khan, 'A "Right Not to be Offended" under Article 10(2) ECHR? Concerns in the Construction of "Rights of Others"' [2012] EHRLR 191.

[50] *Woodman* v *French Connection Ltd* [2007] ETMR 8.

[51] See Smith, Hogan, and Ormerod, n 24, ch 31, p 14, n 107. [52] [2001] EWHC Admin 1125.

[53] In *Texas* v *Johnson* (1989) 491 US 397, the Supreme Court by a majority held that a conviction for desecrating a venerable object, namely the United States flag, was in breach of the accused's right under the First Amendment to the Constitution to legitimate free speech.

Public nuisance. The focus for this chapter so far has mainly been offences concerned with conduct that involves or may lead to indiscriminate violence, harassment, and abuse, or to negative emotions in those present, such as fear, hate, alarm, or distress. However, another controversial aspect of public order law is that it also uses criminal offences to target the causing of disruption in public places and inconvenience to the public. We came across such an example when discussing the case of *Ziegler*, that concerned an alleged obstruction of the highway.[54] A prominent example of this kind of offence is the offence of 'public nuisance,' an offence triable either way:

> A person is guilty of a public nuisance (also known as a common nuisance) who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.[55]

A full discussion of this offence cannot be undertaken here.[56] Historically, the offence was focused on obstruction of the highway, or with the generation of noxious fumes, noise, and smells from industrial activities and trades. More unusual modern instances have concerned keeping wild animals (including a leopard) in a garden,[57] and switching off the floodlights at a football match to try to ensure it was abandoned.[58] The offence is a classic example of a common law crime so vague in its terms that there is a risk of judicial policy-making leading to over-extension. Even though the House of Lords has taken the view that the offence does not involve a breach of Article 7 (banning retrospective criminalization),[59] it must obviously be understood and interpreted in the light of rights under Arts 10 and 11. The offence has not hitherto played a very prominent role in subsequent restraint in public order cases. However, a dramatic escalation in its importance came in the form of police action aimed at prior restraint. In 2019, police raided a warehouse searching for equipment they believed would be used by the environmental group Extinction Rebellion to assist the group in mounting blockades in London streets. A number of people were arrested for conspiracy to commit a public nuisance.[60] It is hard to see how such a vague offence as public nuisance—even more so, a conspiracy to commit that offence—can justifiably be used as a basis for prior restraint other than in wholly exceptional circumstances, without that involving a breach of Arts 10 or 11. Even so, the government has included a reformed version of the offence in its latest proposals for extensions to public order law: an ominous development.[61]

[54] See text at n 16.

[55] *Goldstein and Rimmington* [2005] UKHL 63; Smith, Hogan, and Ormerod, n 24.

[56] Law Commission, *Simplification of the Criminal Law: Public Nuisance and Outraging Public Decency* (Law Commission Report 258, 2015).

[57] *Wheeler* (1971) The Times, 17 December.

[58] *Ong* [2001] 1 Cr App R (S) 404.

[59] *Goldstein and Rimmington* [2005] UKHL 63.

[60] See e.g. https://eachother.org.uk/extinction-rebellion-pre-emptive-police-arrests-set-dangerous-precedent/ (last accessed 21/08/2021).

[61] Police, Crime Sentencing and Courts Bill 2021, https://publications.parliament.uk/pa/cm5802/cmpublic/PoliceCrimeSentencing/memo/PCSCB19.htm.

Further Reading

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