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Optimal Pathways for Low-Level Public Order Law: Cross-Jurisdictional Perspectives and Comparative Standardizations

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Table of Contents

<i>Table of Contents</i>	<i>i</i>
<i>Acknowledgements</i>	<i>vii</i>
<i>Table of England and Wales Cases</i>	<i>viii</i>
<i>Table of United States of America Cases</i>	<i>xi</i>
<i>Table of Australian Cases</i>	<i>xiii</i>
<i>Table of German Cases</i>	<i>xiv</i>
<i>Table of Cases of The European Court of Human Rights</i>	<i>xv</i>
<i>Table of Statutes</i>	<i>xvi</i>
<i>Abstract</i>	<i>xviii</i>

Chapter One:

Introduction

Purpose of the Thesis	1
Background to the Research	1
Introduction to the Research Hypothesis	3
Research Hypothesis: Challenging the Criminal Hegemony	4
Introducing the Research Questions	7
1. How is the Management of Low Level Disorder Achieved Across the Jurisdictions?	8
2. What is the Scope of the Prohibited Behaviour?	9
3. Does Low-Level Public Order Law Offend Against Certainty?	10
4. Is the Criminal Law the only way to Deal with Low-Level Public Order?	11
Originality of the Research	12
Methodological Parameters: Defining “Low-Level” and “Public Order”	13
Purposive and Functional Approaches to Low-Level Public Order	15
Assessing the reach of Low-Level Public Order Law	16
Introducing the Comparative Methodology	18
Methodological Reasoning and the American Jurisdiction	19
The English Jurisdiction: Something Old, Something New...	21
Australia: A Developing Rights Profile	23
Defining the Parameters of the Study: Choosing a Civil and Codified Comparator	25
The German Legal System	26
Research Methods: Towards a “Black Letter”, Doctrinal Approach	27
Summary	28

Chapter Two:

Establishing the Contours of Low Level Public Order Law

Introduction to Chapter Two	30
Characteristics of the Public Order Offences	31
Introducing Multiple Frameworks	33
Development of the current English framework	33
Section 5 of The Public Order Act 1986	36
Fixed Penalty Notices and Section 5	39
Section 4A of the Public Order Act: Added Intent	42
Section 4: Threatening behaviour and a focus on immediate violence	44
Australia: Evolution not Revolution in Public Order	46
The United States of America: Developing a state-based framework	49
Model Penal Code & State Based Regulation	51
Germany: A Tumultuous History	57
OWiG: The Law of Administrative Offences	59
Beleidigung & low-level public order	63
Addressing the First Research Question	65
Understanding the Origins of the Existing Frameworks	65
Providing definition to the notion of “Low-Level Public Order”	66
Conclusion	68

Chapter Three:

The Behavioural Scope of Low-Level Public Order

Introduction to Chapter Three	69
The Terminology of Prohibited Behaviour	71
Threatening, Abusive or Insulting?	74
Harassment, Alarm or Distress	78
Public Disturbance: The American Dimension	79
Expanding the scope of the Conduct: Internet & Stalking Issues	80
The Location of the Offence: Public or Private Disorder	85
Location requirements within the other jurisdictions	88
Cross Jurisdictional (and not only American) Graffiti	88
Racially Aggravated Public Order	90

Dealing with a legacy: US Approaches to Hate Crimes	91
Hate Crimes and The Augmented Section 5	92
Hate Crimes in the German Jurisdiction	94
Establishing the Scope of Prohibited Conduct: The Second Research Question	95
Section 5 and the low-level paradigm shift	96
Consensus on Offence: Racial Aggravation and Low-Level Disorder	97
Conclusion	98

Chapter Four: Certainty, Culpability and Defences

Introduction to Chapter Four	100
An Uncertain Defence: Compounding the Problems with Section 5	101
Desiring Certainty in Public Order Law	102
English Approach to Certainty: A Dishonest Perspective	104
Social Defence: Forsaking Certainty for Pragmatism	105
American Certainty: The Void for Vagueness Doctrine	107
Rechtssicherheit: Legal Certainty within the German Law	110
Section 5: A Cross Jurisdictional Analysis	111
Conclusion: An untested certainty issue	113
The Mental Element for Low Level Disorder	114
Intention, the Model Penal Code & American Low-Level Public Order	118
OWiG & The Tripartite German Approach to culpability	120
General Defences & Intoxication	121
Justifying Disorderly Conduct: “Reasonable” Disorder	124
Reverse Onus Provisions and s.5(3) of the 1986 Act	127
Australian Defences: Limiting the scope of offence	128
Negating the Actus Reus – Defending the Offence in Australia	130
Defences to Disorderly Conduct in the USA	133
The German Perspective on defending Disorderly Conduct	135
Section 5(3)(c): Reasonableness Compounding Uncertainty	137
The Third Research Question: Uncertainty and Vagueness	139
Conclusion	141

Chapter Five: Public Order and Guaranteed Freedom of Speech

Introduction to Chapter Five	149
Scope of Free Speech Analysis	149
Implied Rights v Uncertain Statutes: Lessons from Australia	153
Coleman v Power: A Reluctant Paradigm Shift?	155
The English Position in respect of Public Order & Protest	159
The Judicial Balancing of Protest and Public Order	161
The Hostile Audience	162
Hammond: Relating Low-Level Disorder and Protest	163
Policing, Public Order and Protests in England	169
USA: Tolerating Legislation and Protecting Speech	171
Balancing in Action: The Case of Marcavage	175
Obnoxious Speech & Symbols through a Germanic Prism	176
Introducing the Versammlungsgesetz: A Bespoke Protest Law	178
Criminal Offences within the VslgG	179
Curbing the scope of s.5: Suggestions for Reform	181
Section 5 and Sexual Orientation	182
Cross Jurisdictional Perspectives on Low-Level Disorder and Protest	183
Conclusion	184

Chapter Six: Regulating Protest: Managing Disorder Proactively

Introduction to Chapter Six	187
Organized Protest: Differing Models of Low-Level Disorder	188
Dissent, Disorder and Regulation	190
Regulating US Protest: Preventative rather than Punitive	192
Acceptable limitations and low-level solutions	195
Australian Permit Based Regulation	197
Modern Permission Systems & Informal Arrangements: Australia	199
Authorization and Specific Immunities	200
Regulation in England: Part 2 of the Public Order Act 1986	202
Public Processions: An entrenched framework?	205
Regulating Processions: Conditions and Prohibitions	209

The Regulation of Procession: Low Level Preventative Offences	212
Defining and Regulating Assemblies	214
Versammlungsfreiheit, Brokdorf and German regulation	217
Versammlungsgesetz: The Lawful Restriction of Public Protest	220
Exemptions, Conditions and Spontaneous Protest within VslgG	222
Removing Section 5 from the sphere of Protest	225
Protecting Protestors: Adapting the German Assembly Act	226
Conclusion	228

Chapter Seven:

Public Order, Political Protest and The War on Terror

Introduction to Chapter Seven	229
Countering Low-Level disorder: Broadening the Focus	230
Addressing the underlying hypothesis: Reform in Context	230
Terrorist threat and low-level disorder in the USA	232
Germany and Australia: A Controlled Response	233
Proscription and Encouragement Offences: Narrowing the focus	235
The English Parliament, Protest and The War on Terror	238
Protest within the UK and The War on Terror	242
Funeral Protests in the USA: “Post 9/11” Paradigm Shift	246
Free Speech Zones: Content Neutral Controversy	251
Breach of the Peace: A “Sui Generis” Public Order Phenomenon	254
Laporte: Action short of arrest revisited	258
Low-Level Lessons from The War on Terror	260
England and USA: Systemic Incompatibility	261
Breach of the Peace: A Non-Criminal alternative	262
Conclusion	263

Chapter Eight:

Conclusions

Introduction	265
The Undiscovered Country: The Fault Lines of Section 5	266
The English Patient: German lessons for Non Criminal Regulation	267
Uncertain & Vague: Section 5 through a Comparative Prism	268

Section 5 and the Protest Paradigm: HRA Compliance and Ad hoc decisions	269
The US Response: Robust Judicial Guardianship	270
Uncertainty, Section 5 and Convention Rights	271
Low-Level Public Order and the need for a victim	274
Public Order Management: Alternatives to Criminalization	276
American Constitutionalism: The Immovable Object	276
Towards a German Model: Regulation not Criminalization	277
Reforming Low-Level Public Order in England and Wales	278
Repeal of the base offence under s.5 and reform of s.4A	279
Filling the Void: The ECHR Compliance of Breach of the Peace	281
Protest and Public Order: Towards Management rather than Criminalization	281
Use or Threat of Violence at a Notified Protest	282
Redefining Protest	283
Concluding Remarks	284
Bibliography	286

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Abstract

This thesis explores the boundaries of low-level public order law, drawing on optimal pathways and standardizations across the four legal systems of England and Wales, Australia, The United States of America and Germany. The aim is to identify the origins of the public order frameworks, explore limits of proscribed behaviour and to determine whether low-level public order laws satisfy the requirement of certainty within the respective jurisdictions. The requisite mental elements are investigated alongside the range of defences available to those accused of such an offence.

In order to fully investigate the unique synergies between protest and low-level public order, the study uses a comparative approach to examine the interaction between the low level provisions and constitutionally guaranteed rights to free expression; including an examination of the conceptual analysis of the wider frameworks within which protest and low-level public order operate. As the source of much contemporary protest, the impact of the War on Terror upon the nexus between public order and protest will also be examined in respect all of the jurisdictions.

It is argued that the law relating to low-level public order in all jurisdictions is, to some extent, based around “catch all” provisions that criminalize a broad range of behaviour and also allow the police and the courts a wide range of discretion when dealing with such offences. The various solutions in respect of structure, operation and judicial interpretation of the offences will be examined. This will highlight standardizations and also fundamental disparities between the four jurisdictions.

Such a comparative investigation is unique. The study draws upon multiple standardizations to model the lower end of criminality across the four diverse legal systems, providing dynamic areas of contrast through an examination of both civil law and common law solutions to the treatment of low-level disorder. The efficacy of both codified and ad hoc arrangements to regulate disorder while guaranteeing the right to protest are also assessed. The thesis contributes to the understanding of the scope and contours of low-level public order law as well as extrapolating optimal solutions from the findings of this study.

Chapter One:

Introduction

Purpose of the Thesis

The purpose of this thesis is to conduct an analysis of the boundaries of low-level public order law as it operates within the legal systems of England and Wales, America, Australia and Germany. This analysis will be used to address deficiencies within the English legal system, specifically as they apply to s.5 of the Public Order Act 1986. An examination will be undertaken into the scope of behaviour prohibited by low-level legislation, the required mental element and the certainty of such offences within the criminal law of each jurisdiction. This analysis will be accompanied by, and is intimately connected to, an inquiry into the way in which law relating to public disorder interacts with pre-existing rights to free speech and peaceful protest. Examining the approaches of America, Australia and Germany as well as the English legal system enables the study to draw upon multiple standardizations to efficiently model this aspect of the lower end of criminality. The inquiry will then project appropriately optimized solutions for reform to the Public Order Act.

Background to the Research

The principal difficulty facing both legislators and the judiciary in relation to dealing with disturbances to public order of a non-serious nature can be summed up by the famous concurring opinion of Justice Potter Stewart in *Jacobellis v Ohio*¹ when he said “*I know it when I see it*”². Although Justice Stewart was speaking in relation to hard-core pornography, the concern is exactly the same

¹ 378 US 184 (1964)

² “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, perhaps I could never succeed in intelligibly doing so. But I know it when I see it.”

with minor disorder. Low-level misconduct is inherently subjective and lacks any clearly defined parameters. Academic writing on criminal doctrine has acknowledged the ambiguity inherent within offences that punish behaviour on the margins of criminality simply because it causes offence:

*“With conduct that is supposedly offensive one must...ask: why does the actor deserve censure? If the essence of the offence is merely that conduct displeases many people, then it is not clear the wrongdoing has occurred at all. “I don’t like it” should never suffice as a basis for criminalization regardless of the numbers who say it.”*³

The ethnographic insights of the author have directly informed the formulation of the research hypothesis and provide the primary motivation for undertaking this study. Having been employed as a former police officer and then working as a trainee solicitor within the English jurisdiction, this practitioner experience has highlighted the breadth of the statutory provisions designed to combat the lowest level of public disorder and the amount of discretion afforded to police and prosecutors in determining whether conduct should be ascribed the stigma of criminality⁴.

Within England and Wales such behaviour is primarily, though by no means exclusively⁵, dealt with under the offence provided for by s.5 of the Public Order Act 1986⁶. This creates an offence where upon *inter alia* a person uses words or behaviour which is threatening, abusive or insulting, or disorderly conduct, within the sight or hearing of someone who is likely to be caused harassment, alarm or distress. There is no requirement that any “victim” actually is harassed, alarmed or distressed⁷ and as such the author witnessed at first hand, not only the broad scope of the conduct that could fall within this offence, but that relatively minor

³ Andrew Simester, Robert Sullivan, John Spencer and Graham Virgo, *Criminal Law: Theory and Doctrine* (4th Edn, Hart 2010) 646

⁴ A specific example of the scope afforded to individual police officers can be illustrated by the following anecdote. The author, employed at the time as a probationary police officer, was told by a colleague to arrest under s 5 of the Public Order Act 1986 anyone who swears “*because its not very nice*”.

⁵ For details of the other low-level public order offences see pp 42-46; for details on the use of the common law power afforded to every citizen to deal with a Breach of the Peace see Chapter Seven.

⁶ Chapter Two will fully explore the offences at the lower end of Part 1 of the Public Order Act 1986.

⁷ See, for example, *Southard v DPP* [2006] EWHC 3449

conduct could be ascribed the stigma of criminality simply because either the police, prosecutor or magistrate decided “I don’t like it”. Professor Smith, writing shortly after the promulgation of the 1986 Act issued the following portent in respect of s.5:

*“Because of the potential breadth of the language in which the section is drafted, it affords scope for injudicious policing; considerable common sense and restraint on the part of the police will be called for in the application of this section.”*⁸

The heuristic observations of the author reinforce this statement and lead to the supposition that the ambit of s.5 of the Public Order Act 1986 is both vague and uncertain. When this is added to this both injudicious and arbitrary interpretation of the terms of s.5, one is faced with a provision that can be used to counter almost any conduct that an individual police officer or witness finds distasteful. The decision to prosecute becomes therefore something of a *consensus ad idem* between prosecutor and witness based on their mutual dislike of the conduct⁹.

It is also contended that the English courts are equally as complicit in that they have not acted as a sufficiently robust vanguard against this injudicious policing. Accordingly there is a need, which is as yet unfulfilled, to fully explore the operation of low-level public order law, not only from a constitutional perspective, but also from the standpoint of criminal law theory and doctrine. Such a study is needed to inform developments within the jurisdiction of England and Wales, and requires the benefit of comparative perspective to establish the optimal, legal pathway to manage low-level disorder and propose reforms that address the perceived weaknesses of the current state of the law in a manner that is constitutionally compliant.

Introduction to the Research Hypothesis

The hypothesis around which this inquiry is based, although comparative in nature, hinges around the aforementioned dissatisfaction with the lowest level

⁸ ATH Smith, *Offences against Public Order* (Sweet & Maxwell, 1987) 117

⁹ *DPP v Orum* [1989] 1 WLR 88 held that there was nothing within the terms of s 5 of the 1986 Act which excluded a police officer from being harassed, alarmed or distressed.

English provision regulating public order, specifically s.5 of the Public Order Act 1986. The effect of the vagueness and uncertainty in the drafting of that statute means that the various state actors involved in the enforcement, investigation and prosecution of the offence are afforded a sizable amount of discretion in determining whether the actions of the alleged offender amount to being criminal¹⁰. Accordingly this discretion allows for the punishment of conduct on an arbitrary basis, with liability assigned because an individual disapproves of the conduct rather than any inherent criminality¹¹.

By postulating that the current arrangements for dealing with low-level public order in England and Wales are unsatisfactory, the thesis seeks to use a comparative prism to establish the optimal pathways for managing the kind of behaviour that inhabits the outer margins of criminality¹². The inquiry will critique the operation of the low-level public order legal solutions employed within the jurisdictions of United States, Australia and Germany to establish to what extent there is a uniform, immutable method of dealing with low-level public disorder.

Research Hypothesis: Challenging the Criminal Hegemony

It has been stated that criminal offences “*should be created only when absolutely necessary*”¹³. Underpinning the operation of s.5 of the 1986 Act are the observations made by the Law Commission in respect of its review of the state of public order. Specifically, an assumption that the terms of the offence, requiring behaviour to be threatening, abusive or insulting are “*...appropriate for defining the limits within which public protest may take place without incurring serious criminal penalties*”¹⁴.

The thesis will seek to examine the conduct that is currently dealt with by s.5 of the 1986 Act and contrast that with prohibited conduct from the other jurisdictions. This will indicate a consensus as to the extent that each jurisdiction is prepared to adjudge conduct as being criminal. There has been much discussion within

¹⁰ See for example the *Abdul v DPP* [2011] EWHC 247

¹¹ Simester (n 4) 7 states that indirectly, the criminal law imposes the legislature’s view and, on occasion, even a judge’s view of an acceptable life. It is contended that the breadth in scope of

¹² Smith (n 8) 117

¹³ *Per* Lord Williams of Mostyn, HL Deb, vol 602, col WA 58; 18 June 1999

¹⁴ Law Commission Report No 123/1983 *Offences relating to Public Order*, 46

criminal jurisprudence about the scope and reach of the criminal law¹⁵. Professors Simester and Sullivan have identified the existence of two, broad criteria that need to be met if the creation of an offence is to be justified¹⁶:

“There must, first, be a prima facie positive case for State regulation, in that the activity at issue must be sufficiently serious to warrant intervention. In general...this requires that the conduct leads to significant levels of harm or offence being suffered by others.”¹⁷

It will be the purpose of the first part of the thesis¹⁸ to provide both detail and critique at the range of activity covered by the various disorderly conduct provisions and establish the scope of activity sanctioned as low-level public order law across the jurisdictions. This first criterion, whether there is significant harm or offence to others, will be established by a collation and analysis of the level of misconduct that is criminalized across the jurisdictions.

The second criteria, articulated by Simester and Sullivan, for justifying the existence of a criminal offence is described as a *negative constraint*¹⁹:

“It must be shown that the criminal law offers the best method of regulation, being preferably to alternative methods of legal control that are available to the state; and the practicalities must be considered of drawing up an offence in terms that are effective, enforceable, and meet rule of law and other concerns.”²⁰

¹⁵ Classical liberal philosophy has long discussed the notion that conduct should only be criminalized if it results in harm to another. This “Harm Principle” was first articulated in John Stuart Mill, *On Liberty* (1859). This principle was developed to include occasions where serious offence to others arose from the conduct in Joel Feinberg, *The Moral Limits of Criminal Law* (1984-87); vol 1, *Harm to Others* (1984); vol 2, *Offense to Others* (1985); vol 3, *Harm to Self* (1986); vol 4, *Harmless Wrongdoing* (1988). It is not the purpose of this thesis to analyze these theories. For contemporary exposition of the competing issues see, Simester (n4), Chapter Sixteen, *The Moral Limits of Criminalization*, pp 637-660; William Wilson, *Criminal Law* (4th Edn, Longman, 2011) Chapter Two, *Decision to criminalize*, pp 32-48; Andrew Ashworth *Principles of Criminal Law* (6th Edn, OUP, 2009), Chapter Two, *Criminalization*, pp 22-43

¹⁶ Simester (n 4) in Chapter Sixteen provides details of the methodology behind these twin criteria drawing on liberal philosophy from John Stuart Mill and Joel Feinberg. Both Ashworth (n 13) and Wilson (n 13) broadly accept the Simester & Sullivan model so this will be the approach adopted within this thesis.

¹⁷ Simester (n 4) 637

¹⁸ Chapters Two and Three specifically deal with this.

¹⁹ Simester (n 4) 637

²⁰ *ibid* 638

This constraint gives rise to two key issues that need to be addressed in respect of the criminalization of low-level public order. The first contention is that s.5 of the 1986 Act, in its current form, offends against the key constitutional principle of certainty²¹. This occurs on two planes. Firstly, the construction of the offence provides the executive (in the form of the police and state prosecutors) with too much discretion in relation to deciding whether the conduct of the accused is criminal. The accused then has to wait for the decision by the finders of fact at trial as to whether, in fact the conduct was threatening, abusive or insulting *and* whether, in fact the conduct was witnessed by someone likely to be harassed, alarmed or distressed. This means that an accused conceivably may not know whether his conduct is criminal until the deliberation of the magistrates or jury.

The second key element, and fundamental to the research hypothesis is that, within the English legal system, the criminal law is the principal measure used to counter low-level behaviour by virtue of s.5²². This predilection with criminalizing low-level activity is reflected in the academic literature on this subject. Such writing tends to focus on the balancing of public order law and the conflicting rights enumerated within the European Convention on Human Rights (ECHR) rather than any substantive examination of the criminal doctrine surrounding s.5²³. The inquiry, by utilizing a comparative methodology, will be able to examine the efficacy of the more regulatory approaches to dealing with protest, whereby disorder is managed rather than criminalized. It is submitted that protest and disorder “management” rather than criminalization may be the optimal, constitutionally compliant pathway to overcoming the problems inherent with s.5.

²¹ 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. Perhaps the most celebrated, contemporary articulation of this can be found in Joseph Raz, “The Rule of Law and It’s virtue” (1977) 93 LQR 195

²² It is acknowledged that the highly controversial Anti Social Behaviour Order (ASBO) regime introduced under s1 Crime and Disorder Act 1998 provides for both civil applications in the magistrates court for orders, however Thornton et al states that the majority of ASBOs are made as a post-conviction measure. See Peter Thornton, *The Law of Public Order and Protest* (OUP 2010) 393

²³ See, for example Andrew Geddis, “Free speech martyrs or unreasonable threats to social peace? - “Insulting” expression and section 5 of the Public Order Act 1986” [2004] PL 853; Sophie Turenne, “The compatibility of criminal liability with freedom of expression” [2007] Crim LR 866. See also Thornton (n 22)

Introducing the Research Questions

This chapter provides an introduction to some of the fundamental themes and methodological issues that will be employed throughout the forthcoming investigation. As this inquiry is focusing on low-level public order law, both of these terms will be introduced and defined. Consideration will then be given to the problems that exist within such a context. The comparative approach will then be introduced together with the rationale behind both the choice of the comparator systems and the operation of key constitutional frameworks.

The affiliated hypotheses outlined above form the basis of the research and point directly to the areas of inquiry. The solutions to dealing with low-level disorder, specifically s.5, are not fit for purpose. They criminalize behaviour not in a targeted and specific manner; instead they endow the police and prosecutors with over-broad, interpretative powers to ascribing criminality to actions of which they personally disapprove. The objective of this research therefore will be to identify the scope of the conduct that is criminalized by low-level public order and juxtapose this with a critique of the approaches of other jurisdictions to establish the optimal pathways of prohibited activity.

The thesis will also examine whether solutions from other jurisdictions will imbue low-level public order law with more certainty and clearer defined terms, to eliminate the arbitrary imposition of a criminal sanction on conduct which has not been expressly criminalized. Alternatively, it may be that a more administrative approach is adopted. Such an approach would see s.5 either repealed or radically redrafted to curtail the proscribed conduct. The lowest level behaviour would be managed by measures that can be used to regulate but not criminalize the conduct of the individuals concerned. An examination of the different jurisdictions will establish what form such measures would take and how successfully they would manage low-level disorder. Such an approach would, if possible, overcome the constitutional and criminal doctrinal difficulties that currently bedevil s.5 and have been outlined above. The following research questions will be employed to test the veracity of the hypothesis and explore possible solutions for reform.

1. How is the Management of Low Level Disorder Achieved Across the Jurisdictions?

The first research question that needs to be addressed is the inherent assumption that all of the jurisdictions actually employ bespoke provisions for dealing with low-level public order. This thesis will seek to establish whether the jurisdictions under consideration employ the criminal law to deal with low-level public order. If it is established that such legislation does exist, it will then be necessary to construct a topographical map of this legal environment, encompassing the separate components of each offence within the different legal systems.

Such offences will need to be contextualized, therefore it will be necessary to introduce the social and historical framework underpinning the law relating to public order. Providing this background will allow for an exploration of the underlying reasons for the structure and form of the respective frameworks. The one exception to this would be the terrorist attacks of September 11th 2001 and the subsequent War on Terror, due to the relative immediacy and broader impact upon the respective legal systems, this phenomenon will be analyzed separately. The identification of the origins of the respective frameworks will then permit a full analysis of the contours of the various low-level public order provisions within England, Australia, America and finally Germany.

Such an analysis will allow for a comprehensive critique and evaluation of the various facets of low-level provisions. If it is established that criminal legislation does not exist, it will be necessary to identify and evaluate the legal mechanisms that are employed to regulate low-level disorder. At the outset, it can be confirmed that England and Wales has such a structure, and this is evident from the traditional studies of public order law. These works, however, concern themselves solely with matters concerning the English legal system²⁴, with only the occasional, parenthetical reference to provisions from other jurisdictions²⁵.

²⁴ Any reference made throughout the thesis to the “English” legal system refers to the legal system of England and Wales. The truncated use of the term is for the sake of brevity and not intended to convey the meaning that some rules only apply to England and not Wales. They most definitely do not.

²⁵ See, for example; Richard Card, *Public Order Law* (Jordans 2000); For an approach which seeks to combine analysis of protest and public order but solely within the English jurisdiction see Thornton (n 22).

The contrast across the four jurisdictions will be illustrative of the fundamental standardizations: as well as studying issues of low-level public order within England and Wales, the diverse legal systems and traditions within America, Australia and Germany will provide a juxtaposition of both civil law and common law approaches to dealing with low-level disorder²⁶. The four jurisdictions will provide insight into the operation of both codified and ad hoc arrangements to regulate disorder and protest and, as has already been alluded to, there is a comparison of the effectiveness of written as opposed to unwritten constitutional guarantees of freedom to protest when set against low-level public order legislation.

2. What is the Scope of the Prohibited Behaviour?

In order to understand the range of behaviour that is prohibited by the disorderly conduct provisions across the jurisdictions, it will be necessary to analyze and critique the scope of the individual offences²⁷. This discussion will need to consider the nature of the prohibited conduct as well as the role of potential “victims” of the conduct. One of the key elements of the “*Feinberg offence principle*”, highlighted above by Simester and Sullivan is that:

*“Conduct is offensive when it affronts other people’s sensibilities... Causing any such reaction, in Feinberg’s view, constitutes prima facie grounds for invoking the criminal law.”*²⁸

The restrictions and peculiarities caused by the location of the offence will also need to be assessed. Consideration will also be given to issues of harassment and the role of the Internet. The special status of racial insults and racially aggravated public order will be studied alongside the provision of racially motivated disorderly conduct. By examining these provisions across all four of the jurisdictions it will be possible to establish the mechanisms in place and to critically evaluate their operation within the broader low-level paradigm.

²⁶ For an explanation and analysis of the different legal systems see Chapter Two

²⁷ See Chapters Three and Four

²⁸ Simester (n 4) 645

3. Does Low-Level Public Order Law Offend Against Certainty?

In order to test the hypothesis that s.5 is an egregious piece of legislation that potentially offends against the requirements of certainty, it is necessary to conduct an analysis into the certainty of the terms used within low-level public order legislation and how those terms comply with the criminal doctrine of certainty within each jurisdiction. Although a separate area of inquiry, inherently linked to this will be an examination of the mental culpability required by the different jurisdictions in order to prosecute for the offence, thereby drawing out standardizations across the diverse legal systems.

An essential element of this question will be an evaluative comparison of the defences to low-level public order. The relationship between the “*reasonable excuse*” defence²⁹ within England and Wales and the prosecution of protesters under s.5 of the 1986 Act will also need exploring and critiquing as this highlights one of the fundamental problems with s.5, namely that the defence is another area of uncertainty and while the accused may feel their conduct was reasonable, this will be determined at trial along with the other elements of the offence. Within the other jurisdictions, the concept of reasonableness as being a key element of the *actus reus* will be explored and critiqued. The contrast between the two different incorporations of the notion of “reasonableness” will form a key part of this inquiry.

Although reasonableness is part of the bespoke defence afforded to s.5, it is postulated that reasonableness of activity should actually be determinative of conviction. This is particularly relevant when considering the way in which protest is managed within the four jurisdictions. This inquiry will conduct a comprehensive analysis of the problems posed by the vehement protestor who, in trying to deliver a persuasive, and sometimes shocking message, transgresses low-level public order legislation. The analysis will encompass the use of legislation to manage public order difficulties that are created by the individual dissenter and that of the ‘hostile audience’. The interaction of disorderly conduct provisions with guaranteed rights to protest embedded within the jurisdictions will inform the fundamental aim of seeking optimal solutions from the different systems

²⁹ Public Order Act 1986 s 5(3)(c)

4. Is the Criminal Law the only way to Deal with Low-Level Public Order?

With the relationship between low-level public order and protest being introduced, the final research question seeks to examine the alternatives to the deployment of the criminal law to deal with low-level conduct. It is significant that, even though the previous research questions may be able to establish a positive case for the criminalization of some low-level public disorder, it will also be necessary to draw on the solutions provided by the four jurisdictions to establish whether or not the criminal law is entirely suitable for dealing with low level public order in the form of s.5 of the 1986 Act. Simester and Sullivan have stated that, as a general principle, if some other form of State intervention falling short of criminalization is effective to regulate disorderly conduct “then that alternative should be preferred.”³⁰

It is intended that a conceptual analysis of the legal infrastructure in which large-scale protest is regulated throughout the jurisdictions should be undertaken. The nature of these regulatory frameworks will provide a “closed system” inside which the various low-level public order provisions can be deployed. This investigation will establish the key comparative standardizations in respect of the regulation of protests and how low-level public order operates within the confines of a regulated protest³¹. Drawing the themes of large-scale protest and societal drivers together will also require an examination of the impact of the events of 9/11 and the resultant War on Terror³². This will determine whether there is any causal link between the events of 9/11 and any changes to either the framework for protest or low-level public order offences themselves. By establishing the management of low-level public order law within the regulatory framework, any proposed reform of the low-level public order framework within England and Wales can be examined not only for compatibility with criminal law theory and doctrine, but also alongside non-criminal, administrative models of public order management.

³⁰ Simester (n 4) 652

³¹ The regulation of protest and the prevention of disorderly conduct are all dealt with under the umbrella of the Public Order Act 1986

³² For a full explanation of the term “War on Terror” see p 229 at fn 3

Originality of the Research

The identification of these issues arising from the current form of low-level public order law within England and Wales, specifically, that which is located around s.5 of the 1986 Act, inherently requires an examination of alternative solutions, both within the criminal sphere and also those which, as outlined above, are more regulatory in nature. There has been much written about the way in which s.5 operates in respect of the various provisions of the ECHR³³ yet there has been no comprehensive, comparative study of the operation of low-level provisions within other jurisdictions.

Therefore where academics have engaged in studies specifically related to low-level public order law, the focus tends to be on the provisions as they interfere with the rights of protestors and demonstrators³⁴. Such discussions largely overlook the criminal doctrine attached to the low-level offences. That is not to deny that there is a clash between positively guaranteed rights and public order law. Indeed, having established the conceptual edifice relating to low-level provision, the inquiry will examine the legislation, in the four jurisdictions, designed to deal with low-level disorder that occurs within the context of a protest considered alongside the regular provisions of low-level public order.

This analysis will determine the efficacy and appropriateness of prosecuting the extremist who propagates offensive (but honestly held) beliefs with the same legislative provisions used to prevent public urination or swearing. This cross-jurisdictional investigation into the structure, function and operation of low-level public order law provides a unique perspective on the problems associated with s.5 of the 1986 Act coupled with the proposals for reform that arise from this study.

³³ David Mead, *The New Law of Peaceful Protest* (Hart 2010); Turenne (n 23) 866

³⁴ See Mead (above n 33); For an American perspective see; Thomas M Place, "Offensive Speech and the Pennsylvania Disorderly Conduct Statute" (2003) 12 Temp Pol & Civ Rts L Rev 47; For the Australian jurisdiction see; Katherine Gelber, "Political speech practice in Australia: a study in local government powers" [2005] AJHR 7; Tamara Walsh, "The impact of *Coleman v Power* on the Policing, Defence and Sentencing of Public Nuisance cases in Queensland" [2006] MULR 6. For a theoretical German perspective see Tatjana Hörnle, "Offensive Behavior and German Penal Law" (2002) 5 Buff Crim L Rev 255

Methodological Parameters: Defining “Low-Level” and “Public Order”

This chapter provides an introduction to some of the fundamental themes and methodological issues that will be employed throughout the forthcoming investigation. As this inquiry is focusing on low-level public order law, both of these terms will be introduced and defined. Consideration will then be given to the problems that exist within such a context. The comparative approach will then be introduced together with the rationale behind both the choice of the comparator systems and the operation of key constitutional frameworks.

The law relating to public order is a branch of the criminal law. The boundaries of public order law are amorphous and the definition of public order is, itself, somewhat nebulous. It is stated by the Crown Prosecution Service of England and Wales that:

*“The criminal law in respect of public order offences is intended to penalize the use of violence and/or intimidation by individuals or groups. The principal public order offences are contained in Part 1 of the Public Order Act 1986... The purpose of public order law is to ensure that individual rights to freedom of speech and freedom of assembly are balanced against the rights of others to go about their daily lives unhindered.”*³⁵

In remarkable symmetry, the US Model Penal Code (MPC) Article 250 covers riot, disorderly conduct and related offences. Prior to the drafting of the MPC³⁶ there was little consideration given to the lower level offences due to the relatively minor penalties. Nonetheless in the explanatory notes to §250 of the MPC, disorderly conduct and related offences are described as *“a critically important area of the criminal justice system.”*³⁷ The explanatory notes go on to state that one of the key purposes of the provision is to safeguard civil liberties by careful definition of

³⁵ Crown Prosecution Service, “Public Order Offences including the Charging Standard” (Updated 1 November 2010) available at http://www.cps.gov.uk/legal/p_to_r/public_order_offences/#Section_5 accessed 19 September 2011

³⁶ The Model Penal Code was drafted in the late 1950s and promulgated in 1962. For further details see Paul Robinson, Markus D Dubber, “The American Model Penal Code: A Brief Overview”, 10 *New Criminal Law Review* (2007) 319, 319

³⁷ Model Penal Code Pt II, Art. 250, Refs and Annos Explanatory note for Sections 250.1 – 250.12

offences so that they do not cover, for example, arguing with a policeman, peaceful picketing or disseminating religious or political views³⁸.

The preamble to §250 offences within the MPC provides an explicit statement as to what is considered to be the role of low-level public order:

*“To systematize the chaotic provisions of prior law penalizing a wide variety of petty misbehavior under such vague headings as “disorderly conduct” or vagrancy
To limit the discretion of the minor judiciary to impose substantial imprisonment for petty infractions*

...

To minimize the overlap of disorderly conduct offenses and offenses dealt with by more specific provisions of the Model Code so that policies embodied in other offenses will not be disregarded by prosecuting the same behavior as disorderly conduct.”³⁹

Although this does not directly define what the term “public order law” means, it is implicit that petty offences and misbehaviour is the key mischief that low-level provisions are designed to counter. The MPC is explicit that it prohibits conduct that is “disorderly”, or causes a “public nuisance”, and does not seek to criminalize behaviour that is lawful but prompts others to respond in a disorderly manner. Crucially, when drafting the MPC, it was recognized that disorderly conduct was dealt with on an individual state level and at the time of promulgation there was a broad range of innumerable local ordinances that dealt with disorderly conduct style offences and some alignment was necessary⁴⁰.

Australian academic analysis dealing with low-level public order has tended to focus on identifying the offences which police use to deal with both disorder and protests. Douglas encapsulates the Australian perspective on defining public order when he states:

“It is clear that there are offences which have consistently loomed large in the police repertoire of charges. One group of offences relates to interference with

³⁸ *ibid* para 3

³⁹ *ibid* para 1

⁴⁰ For details of the extent of this alignment see Chapter Two

*police activities... A second group of offences deals with 'disorderly' conduct. These include engaging in offensive, riotous or disorderly behaviour, and using insulting or indecent language."*⁴¹

It is also identified that several provisions of the German Criminal Code deal with conduct that is apparently "intolerable and offensive"⁴². Chapter Seven of the German Criminal Code deals with public order, although the provisions contained within cannot be described as being low level. The study will, therefore, need to examine the wider German legal system to establish which mechanisms are used to deal with the lowest level disorder and minor delinquency and examine the enhancements that a truly codified system can offer, when set alongside common law jurisdictions.

Purposive and Functional Approaches to Low-Level Public Order

While the definition of the term "public order" is elusive, there does at least appear to be consensus in respect of the broad statements of behaviour that low-level public order law seeks to prohibit. As there are countless offences to deal with such behaviour, not all public order offences will be examined. This chapter will consider only those provisions whose essential mischief or mischiefs is the protection of public order⁴³.

In examining the nature of public order law, the underlying purpose of the low-level provisions requires consideration. If the wider criminal law is employed to protect members of society from "harm", Smith states:

*"The interests protected by public order law are diffuse and indeterminate. Public order law ranges in its extent from the preservation of mere peace and tranquility as between rowing neighbour or preventing unreasonable street exhibitionism – nuisances on the outer margins of criminality... to serious outbreaks of disorder amounting to riot (whereby) the constitutional stability of the country seems threatened."*⁴⁴

⁴¹ Roger Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement* (Federation Press 2004) 74

⁴² Hörnle (n 34) 255

⁴³ Card (n 25) 1

⁴⁴ Smith (n 8) 1

It is precisely these “*nuisances on the outer margins of criminality*” that provide cause for concern. Thornton, writing in respect of s.5 of the Public Order Act 1986, crystalizes the commonly held perception in respect of low-level legislation:

*“The offence under s.5 is more widely drawn and extends the criminal law into areas of annoyance, disturbance and inconvenience. In particular it covers behaviour which falls short of violence... Today s.5 is commonly used as a dragnet offence to catch all types of low-level anti social behaviour.”*⁴⁵

Writing at the inception of the 1986 Act, Smith argued that a need existed for such behaviour to be criminalized, and that the central purpose of s.5 was to protect people from being threatened, abused or insulted whereby the victims or witnesses of the behaviour are too weak, vulnerable or simply law abiding, to resort to violence in response. Smith goes on to state that the experiences of the victims in these cases are such that it is “*proper for the criminal law to take notice*”⁴⁶. This study will seek to establish if such an approach is uniform across the jurisdictions and whether the other legal systems have a similar entry point for criminality.

Assessing the reach of Low-Level Public Order Law

Whilst the comparative study seeks to provide an overview on the “important” case law⁴⁷ decided by the appellate courts, such a construct is in many ways misleading as to the nature of low-level public order law. In America, as with the other jurisdictions, because the punishment for committing such crimes was comparatively minor, the attention paid to such offences was accordingly little. Nonetheless, as is pointed out in the explanatory notes within the MPC:

*“Offences in this category affect a large number of defendants, involve a great proportion of public activity and powerfully influence the view of public justice held by millions of people.”*⁴⁸

⁴⁵ Thornton (n 22) 36

⁴⁶ Smith (n 8) 117

⁴⁷ Steven Ross Levitt, “The Life and Times of a Local Court Judge in Berlin” (2009) 10 German Law Journal 169, 169

⁴⁸ Model Penal Code Pt II, Art. 250, Refs and Annos. Explanatory note for Sections 250.1 – 250.12

Precisely because of the low-level nature of the offences, accurate figures as to the extent of prosecutions are not readily available for the majority of the jurisdictions⁴⁹. In 2006, Walsh conducted a study of low-level disorder cases in Brisbane and Townsville in Queensland, Australia. She stated:

*“The results of the July 2004 study suggested that the public nuisance offence was being overused by police, as well as being selectively enforced against certain marginalized groups. People were being charged with the public nuisance offence for engaging in trivial behaviour that included having a verbal argument in public (generally with a neighbour or family member), drinking alcohol in public and even vomiting in public.”*⁵⁰

Anecdotally, it has been recognized that disorderly conduct provisions are an important part of the criminal justice system in all jurisdictions⁵¹. Some statistics are available in respect of the primary legislative provision within the English legal system (under s.5 of the Public Order Act 1986). The most up to date figures⁵² released in response to a written parliamentary question addressed to the Secretary of State for Justice⁵³ reveals the following total number of convictions within England and Wales in respect of s.5 of the 1986 Act:

⁴⁹ “Crime statistics are provided for selected offences reported to, or becoming known to police and resulting in the submission of an offence/incident report in Police systems. The statistics exclude offences against public order, such as disorderly conduct.”
<<http://www.police.wa.gov.au/ABOUTUS/Statistics/CrimeStatisticalNotes/tabid/1212/Default.aspx>>
Although referring exclusively to crimes committed in Western Australia, the same is true of the other Australian States in relation to the collection of statistical data.

⁵⁰ Walsh (n 34) text to n 75

⁵¹ In respect of Germany, see the writings of Judge Rüdiger Warnstädt, a judge of the Moabit Local Court (*Amtsgerichte*), which provide some insight into low-level public order offences; Rüdiger Warnstädt, *Recht So, 80 Originale Strafurteile von Amtsgerichte Rüdiger Warnstädt aus dem Kriminialgericht Moabit (Das Neue Berlin Verlagsgesellschaft mbH 2003)*. Aspects of this book have been translated and discussed in; Steven Ross Levitt, “The Life and Times of a Local Court Judge in Berlin” (2009) 10 German Law Journal 169; see also chapter two, p 61 of this thesis.

⁵² <http://www.theyworkforyou.com/wrans/?id=2010-12-20b.30917.h>

⁵³ Taken from written statements and answers 20 December 2010, written question by Dominic Raab (Esher & Walton) Cons. Taken from <http://www.theyworkforyou.com/wrans/?id=2010-12-20b.30917.h>

*Total Convictions under s.5 of the Public Order Act 1986*⁵⁴

<u>Year</u>	<u>Convictions</u>
2000	17065
2001	16213
2002	16672
2003	18400
2004	19356
2005	19608
2006	21574
2007	23971
2008	22620
2009	21208
<u>Total Convictions (2000-2009)</u>	<u>196687</u>

These figures provide an indication of the widespread usage of s.5 of the 1986 Act by the police. It should also be noted that these figures only speak of *convictions*. There is no mention as regards the number of arrests, nor of the other disposals such as cautions, penalty notice for disorder and decisions to take no further police action. Such widespread usage is as true for each of the other jurisdictions as it is for the English legal system and further emphasizes the need for this study.

The inquiry will examine those provisions that Smith would refer to as “*nuisances on the outer margins of criminality*”. This means that legislative provisions governing low-level public order potentially extend the tendrils of the criminal law into behaviour that is arbitrarily determined to be undesirable by the police and the courts. When coupled with the large number of people affected by legislation that has the potential to be used in a capricious or arbitrary fashion, the need for a detailed study into this area becomes clear.

Introducing the Comparative Methodology

Detailed academic analysis of public order offences has a tendency to fall down the gap between the study of criminal and public law. In addition, the peculiarly

⁵⁴ The table shows the total number of *convictions* rather than the total number of proceedings. The figures available from the Home Office show that in a three year period at the start of the 21st century there were 75,759 proceedings *in the magistrates court* for offence under s.5 of the 1986 Act resulting in some 51,285 convictions. No details are available for the total number of proceedings from 2004.

constitutional context of issues, particularly attitudes in respect of freedom of expression, means the academic analysis of public order has remained rooted firmly within the native legal systems⁵⁵. There has been no detailed exploration of the operation of the provisions in comparison to other jurisdictions. The fact that this inquiry is focused upon the low-level aspect of public order law means that it is suited to a comparative study as Markensinis explains:

*“Looking at foreign law can bring a deeper understanding of problems... perhaps even unexpected ideas for solving them – but that will only happen when they (comparative lawyers) sharpen their focus by narrowing it.”*⁵⁶

Methodological Reasoning and the American Jurisdiction

Zweigert and Kötz have emphasized a paradox when trying to establish an effective and sustainable cross-jurisdictional analysis. They highlight a lack of systematic writing about appropriate methods of comparative study. The contradiction inherent in this is that it is extremely doubtful whether it is possible to draw up a universal methodological approach to comparative law:

*“A detailed method cannot be laid down in advance... when it comes to evaluation, to determining which of the solutions is the best, the only ultimate criterion is often the practical evidence and the immediate sense of appropriateness.”*⁵⁷

Such an assertion does not advocate an anarchical approach to the study. The need for a functional, systemic analysis rather than a mere list of similarities and differences is clear⁵⁸. What is also clear is that the choice of legal comparators is crucial. Zweigert and Kötz point to an immediate and obvious choice:

“Though England is unquestionably the parent system, the law of the United States while staying in the family has developed so distinctive a style that a

⁵⁵ See n 6

⁵⁶ Basil Markensinis, “Comparative Law – A subject in search of an audience.” (1990) 53 MLR 1 21

⁵⁷ Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (3 edn OUP 1998) 33

⁵⁸ Markensinis (n 56) 3

*comparatist would fall into error if he drew on English, to the exclusion of American, law.”*⁵⁹

The choice of America is logical for a number of reasons. First, although the US legal system follows the same common law tradition as its progenitor, it has an entirely different constitutional approach. This leads to central differences, more colourfully described as “rampant individualism”⁶⁰ in respect of the role of the judiciary and the protection of fundamental rights.

The US Constitution is supreme, as opposed to that of England and Wales, which – as part of the United Kingdom – recognizes the supremacy of Parliament⁶¹. Of particular relevance to this discussion is the First Amendment, which provides that:

*“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.”*⁶²

One of the key roles of the US courts is to act as an arbiter as to whether a law provides for an unconstitutional restriction on speech. The courts can strike down laws that do not comply. Freedom of association and assembly are not explicitly protected in the First Amendment, although the Supreme Court held, in *NAACP v. Alabama*⁶³, that freedom of association is a fundamental right protected within the scope of the First Amendment. In order to be constitutional, any low-level public order law will have to be First Amendment compliant.

⁵⁹ Zweigert & Kötz (n 57) 41

⁶⁰ Ian Cram, *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies* (Ashgate 2006) 13

⁶¹ For an exposition of the classic Diceyan theory of parliamentary supremacy as it operates within the modern British constitution see Anthony Bradley & Keith Ewing, *Constitutional and Administrative Law* (14th Edn Longman 2006) 51

⁶² Cornell University Law School, Legal Information Institute, “The Constitution of The United States of America” <http://topics.law.cornell.edu/constitution/overview> accessed on 19 September 2011

⁶³ 357 U.S. 449 (1958)

Despite the differences in constitutional make up, there are also key similarities. America and England are both “liberal democracies”⁶⁴ and, as such, they espouse respect for the democratic process and the rule of law⁶⁵. The conflict between low-level public order and guaranteed freedom of expression should produce opportunities for comparative standardizations in this area.

The English Jurisdiction: Something Old, Something New...

As the “parent” jurisdiction, and with the research hypothesis focusing upon the problems of s.5 of the 1986 Act, the legal system of England and Wales is fundamental within the study. Despite being the oldest common law system under consideration, the constitutional arrangements regarding protection for human rights within its domestic law are relatively new. The United Kingdom was a signatory to the ECHR. The “democratic imprimatur”⁶⁶ of this international treaty, giving further effect to the rights contained therein, was accomplished by virtue of the Human Rights Act 1998⁶⁷. There is much academic and case law discussion on the origins of the Convention and the background to the enactment of the 1998 Act⁶⁸. As with the above-mentioned discussion on the origin and concept of these rights, such themes lay outside of the scope of this study. Suffice to say that it has been identified that:

*“before the HRA came into force in England in October 2000, the UK’s common law constitution was based on the idea of residual liberty...people were free to do whatever they liked provided that they did not, at the same time, break the law.”*⁶⁹

This principle can be illustrated as follows: if an individual wanted to take part in a demonstration, such an activity would not exist as a right, and it would only be

⁶⁴ “According to classical liberal theory, to function effectively, liberal democracies required merely that the appropriate institutional mechanisms were in place (such as bicameral legislatures; checks and balances) and that constitutional doctrines were respected and enforced (separation of powers and rule of law).” quoted in Cram (n 60) 2

⁶⁵ Cram (n 60) 13

⁶⁶ *MacLaine Watson v Dept. Trade and Industry* [1990] 2 AC 418 (HL)

⁶⁷ Dominic McGoldrick, “The United Kingdom’s Human Rights Act 1998 In Theory and Practice” (2001) 50 ICLQ 901

⁶⁸ For detailed exposition of the origins, framework and operation of the Human Rights Act 1998 within England and Wales see: John Wadham et al, *Blackstone’s Guide to The Human Rights Act 1998* (5th edn OUP 2009). For a more critical discussion on the continued operation of the Human Rights Act see: Keith Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (OUP 2010)

⁶⁹ Mead (n 33) 26

lawful if there was no law preventing it⁷⁰. Certainly, if the protest was likely to cause an obstruction⁷¹, or lead to a breach of the peace⁷² then there was no requirement for the police to take account of any right to protest. Instead they would prevent the disorder – most likely by arresting the demonstrator - and the courts would be likely to rule that the protest was unlawful and uphold the legality of the police action.

The 1998 Act incorporates a number of legal mechanisms by which the rights enshrined within the ECHR can be given further effect within the English legal system, but there are two that have particular import for this study. The first, under s.3 of the 1998 Act, provides for a new rule of statutory interpretation. This approach eschews a strong constitutional review role for the courts⁷³ and instead places a duty upon the judiciary, whereby primary and secondary legislation is to be read in a way that is compatible with Convention rights⁷⁴. Where legislation cannot be read in a Convention-compliant fashion, it must still be upheld, although judges in the High Court and above can declare the legislation incompatible⁷⁵. The scope of the judiciary to “*recast statutes in a more Convention-compatible hue*”⁷⁶ is a significant one⁷⁷. A component element within this thesis will be establishing whether they have done so in relation to low-level public order law.

The second fundamental change brought about the 1998 Act provides that it is unlawful for any public bodies to act in a way that is incompatible with a Convention right⁷⁸. Mead states that the term is defined by reference to the functionality⁷⁹, and whilst there has been considerable debate as to the scope of the term “public body” within s.6, for the purposes of low-level public order law, it is clear that both the police and the Courts are classed as pure public bodies for the purpose of liability under this section. This duty has clear implications for both

⁷⁰ *ibid* 28

⁷¹ *Arrowsmith v Jenkins* [1963] 2 QB 561

⁷² *Duncan v Jones* [1936] 1 KB 218

⁷³ Mead (n 33) 41

⁷⁴ Human Rights Act 1998 s 3

⁷⁵ Human Rights Act 1998 s 4

⁷⁶ Mead (n 33) 44

⁷⁷ For further discussion on this see: G Marshall, “Two kinds of compatibility: more about section 3 of the Human Rights Act 1998” [1999] PL 377

⁷⁸ Human Rights Act 1998 s 6(1)

⁷⁹ Mead (n 33) 45

the policing and the adjudication of cases involving protest, disorder and the right to free expression and this will be explored further in Chapter Five.

The right to freedom of expression and association are qualified rights within Articles 10 and 11 of the ECHR. This means that they can be limited by the state in certain circumstances provided that limitation is necessary, in furtherance of a legitimate aim and in accordance with the law⁸⁰. The English legal system is unique amongst the four jurisdictions in that it does not have a constitutionally Supreme Court⁸¹ and while the appellate courts can make a declaration that legislation is incompatible with a Convention right, no English court can strike down an incompatible law⁸².

The English jurisdiction is fundamental to the research to be carried out. It is the central hypothesis of this thesis that the English solution to low-level public order, in respect of s.5 of the 1986 Act, is fundamentally flawed. The other jurisdictions are, in essence, being introduced in order to service the research questions in order to confirm or disprove that hypothesis. In projecting any possible models for reform, it will be necessary not only to consider the impact of the legislation but also the constitutional compatibility of any measures taking into account the distinct legal tradition of the legal system of England and Wales.

Australia: A Developing Rights Profile

Both England and America constitutionally guarantee freedom of expression in one form or another. Yet in England and Wales, this was not always the case⁸³ and another comparator, ideally with no explicit protection of free expression, would provide a counterpoint to the two positions outlined above. The Australian legal system is a liberal democracy with no established Bill of Rights and as such becomes the third of the triad of common law jurisdictions to be chosen as a comparator within this study. The incorporation of Australia, a legal system with

⁸⁰ ECHR Art 10(2) and Art 11(2)

⁸¹ The UK Supreme Court is only “supreme” in the sense that it is the Final Appellate Authority within the UK see Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell 2008)

⁸² It has argued been that, as a declaration under s 4 of the 1998 Act *always* leads to the government enacting remedial legislation, the *de facto* effect of the declaration of incompatibility *is as good as* a strike down power. Lord Hoffmann has stated that is merely a “technical distinction”; Lord Hoffmann, ‘Human Rights and the House of Lords’ (1999) 62 MLR 159 at 159-160

⁸³ For further description of the pre-Human Rights Act position see; Mead (n 33) 26-29

even closer familial links to the English legal system than America, may seem methodologically problematic in that there may not be sufficient difference in the legal systems. Certainly much of Australian law is derived from English precedent⁸⁴ and indeed the Australian Constitution received its *vires* from a British Act of Parliament⁸⁵.

The Australian jurisdiction, however, offers unique perspectives to the drawing of optimal pathways. It is a federal parliamentary democracy, with a written constitution⁸⁶. The Australian jurisdiction provides state based regulation of low-level laws, and as such resonates with America. As a signatory to the International Covenant on Civil and Political Rights, the State legislatures of Australia are not bound to take account of constitutionally integrated rights. The High Court is the final appellate court for the Commonwealth of Australia and has the power to shape the common law throughout the country as well as having the power of judicial review in respect of Acts of Parliament⁸⁷. This hybrid constitution has elements of the US system and the English, providing further opportunities for cross-jurisdictional standardizations and the exploration of optimal solutions.

The Australian legal system has no bespoke Bill of Rights within its constitutional framework. The absence of constitutionally guaranteed rights means that there is no explicit protection afforded to freedom of speech within the main instrument of government⁸⁸. Instead, the Australian High Court has implied a “*freedom of political communication*”⁸⁹ from the terms of the Constitution. It has been stated that this exists to protect only certain kinds of political speech⁹⁰. The essence of this key constitutional concept is that the courts regard the constitution as having established a system of representative and accountable government within the framework of a parliamentary democracy. In order to facilitate representative

⁸⁴ Douglas (n 41) 119-120

⁸⁵ Commonwealth of Australia Constitution Act 1900

⁸⁶ The Constitution of the Commonwealth of Australia was ratified via referendums held between the years 1898 and 1900 by citizens of the Australian States. The British Parliament then enacted this as a section of the Commonwealth of Australia Constitution Act 1900.

⁸⁷ Commonwealth of Australia Constitution s 76

⁸⁸ Adrienne Stone, “The Limits of Constitutional Text and Structure” (1999) 23 MULR 668

⁸⁹ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

⁹⁰ Adrienne Stone, “The Australian Free Speech Experiment and Scepticism about the UK Human Rights Act” in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (OUP 2001) 391

government, the courts have ruled⁹¹ that this implicitly means that the legislature should not pass any law that interferes with the operation of the democratic system⁹².

Defining the Parameters of the Study: Choosing a Civil and Codified Comparator

There is an additional and distinct comparison required, as these three jurisdictions all come from broadly the same, Anglo-Saxon legal tradition⁹³. A civil, codified legal system provides the final, overarching cross-jurisdictional perspective. There are a number of jurisdictions that could have fulfilled this role. Both India and Ireland have their roots in the English legal system but have adopted a codified approach to their criminal law. Whilst they would have partially fulfilled the needs of the study, they still have their roots in the common law tradition.

The French legal system and those countries, such as the Benelux countries (for example, the legal system of the Netherlands) that adopt derivations of the Napoleonic code also make attractive comparators for the common law approaches adopted in the other three jurisdictions. Tempting though it would be to try and incorporate numerous civil jurisdictions, this would only serve to dilute the quality of analysis. An essential part of the methodological requirements of the study are that the jurisdiction should be of a similar social and economic make up to the others.

The German jurisdiction provides clear legal and historical differences to generate clear optimal pathways in contrast to the other jurisdictions. Conversely, any areas of commonality that can be established will be given added resonance due to the conceptual differences between the German legal institutions and method and those from a common law tradition. In addition the historical upheaval caused by the rise of National Socialism within Germany leading up to and including the Second World War provides the opportunity to study a jurisdiction with a unique historical sensitivity to the exercise of arbitrary state power.

⁹¹ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106

⁹² For further details see p 153-155

⁹³ Zweigert & Kötz (n 57) 41

The German Legal System

More than the other jurisdictions under consideration, the German legal system can be said to represent a different philosophy of law. Whereas England, America and Australia differ in institutions and constitutional arrangements, the German legal system is underpinned by a positivistic, doctrine driven, approach which “to use a simplistic description is thus deductive in nature as opposed to the more inductive one of common law”⁹⁴. The hierarchy of norms within the German legal system provides a curious paradox to this apparent doctrinal supremacy. In spite of (or perhaps because of) the positivistic approach adopted by the legal system, the concept of natural justice⁹⁵:

*“Permeates the law as a guiding principle of interpretation...(and) has the force of influencing the application of even the highest ranking legal rules at constitutional level.”*⁹⁶

In more tangible terms, the German legal system is based on a written constitution. The Basic Law (*Grundgesetz*, GG) is the supreme law of the land⁹⁷ that specifies the operation of, and relationships between, the organs of the state and details the constitutional rights of the individual. The GG overrides any other form of law in Germany, with Article 5 I GG containing the right to free expression and Article 8 I GG providing for the right to peacefully assemble.

Fundamentally, German law requires adherence to the maxim *nullum crimen, nulla poena sine lege*⁹⁸. This concept of *Gesetzlichkeitsprinzip* requires all criminal liability to be based on a full act of parliament and also incorporates, *inter alia*, the principle of *Bestimmtheitsgebot* or that of legal certainty. In addition, the

⁹⁴ Michael Bohlander, *The German Criminal Code: A Modern English Translation* (Hart 2008) 2

⁹⁵ “This is based around the so called “Radbruch Formula” and states that formally valid positive normal law prevails over substantive concepts of justice, even if it is unjust and irrational. This primacy ends when there are breaches of justice of intolerable proportions, which are in turn defined as instances where the positive law explicitly and systematically neglects its goal of pursuing the aims of justice, and when the principle of equality is ignored on purpose.” Quoted in Bohlander (n 94) 3-4; Bohlander goes on to compare natural justice to the principles of equity within common law systems, acting as a safety valve as a corrective to the strict rules.

⁹⁶ Bohlander (n 94) 4

⁹⁷ It is acknowledged that international law also takes its place alongside the *Grundgesetz*, however the effect of things such as binding European law remains beyond the scope of this discussion.

⁹⁸ Literally meaning, “There can be no crime and no punishment without the law.”

notion of *Rechtsgüterschutzprinzip* or the protection of legal rights is designed to ensure that the criminal law is not in place to enforce one or more concepts of morality rather to protect individual or societal interests⁹⁹. These principles are internalized within the Criminal Code (*Strafgesetzbuch*, StGB).

Research Methods: Towards a “Black Letter”, Doctrinal Approach

It is acknowledged that there are difficulties inherent in comparative studies between common law and civil law jurisdictions and that, in essence this study, with an English legal dilemma as its basis, has not left behind the confines of one jurisdiction¹⁰⁰. It should also be noted that the procedure and trial of criminal offences, together with the range of decisions that can be made within the German legal system are different to the common law traditions. The role of the prosecution and defence and the judge at trial fulfil radically different functions to their adversarial counterparts. This discussion is not blind to such differences. But, in order to concentrate upon the central issues of inquiry (the standardizations and the quest for optimal pathways in relation to low-level public order) a simplified, more harmonious model will be suggested, although it is accepted that the fundamental approach to the criminal justice system is different within Germany.

In respect of the underlying methodology of the comparison, the approach that is to be adopted within this inquiry is often colloquially referred to as a “black letter law” perspective. In its simplest form, this utilizes the decisions of courts and the language of the legislation as the primary evidence for any enquiry into the operation of the low-level law. Whilst there will be historical discussion of the drivers upon the law, this inquiry will restrict itself to the low-level legislation as it manifests itself within the different legal systems. Theories regarding the origins of rights and their applicability to low-level public order will not be pursued. Such a discussion (explaining what the rights of protest and free expression *should* encompass) would divert attention from the central question of how the rights that *are* recognized are both protected and conflicted with low-level public order law.

⁹⁹ Nigel Foster & Satish Sule, *German Legal System and Law* (4th Edn OUP 2010) 340

¹⁰⁰ Zweigert & Kötz (n 57) 41

Summary

In order to answer the research questions posed herein, and ultimately to test the hypothesis that the solution to low-level public disorder, as found within s.5 of the Public Order Act 1986, the thesis will adopt the following approach. Chapter Two will seek to discuss the historical drivers behind public order legislations across the jurisdictions and also identify the low-level legislation across the four jurisdictions. Chapter Three will provide conceptual analysis of the various physical elements of the provisions within respective jurisdictions. This analysis will draw upon the offences highlighted and provide an analysis of the key elements of the offences to establish whether there is a positive case for criminalizing such conduct.

Chapter Four will perform a three-fold function within the broader thesis. In response to the issue of the broadness raised in the previous chapter, the certainty of the terms used within low-level public order legislation will be scrutinized around the requirements constitutionally enshrined in each of the jurisdictions. Chapter Five will seek to develop the arguments, in respect of both the breadth of the prohibited conduct and the extent to which the reasonableness of their conduct should absolve them from criminality, in the specific example of the defendant who is vehemently proclaiming a deeply held belief. The role of protest in any analysis of s.5 is crucial.

Having examined the *positive* case for criminalization, Chapter Six will focus upon the regulatory frameworks for governing protest within the different jurisdictions. Whether the criminal law is the most appropriate mechanism by which to deal with low-level public disorder is one of the key areas of inquiry for this thesis. The aim of Chapter Seven will be to analyze the changes to low-level public order across the jurisdictions following the terrorist attacks of September 11th 2001. The existence of a causative relationship between these attacks and any related transmogrification of either the framework regulating protest or low-level public order offences themselves may provide further insight into problems outlined in the hypothesis and indicate appropriate pathways for reform.

The concluding chapter of the thesis contains the proposals and recommendations detailing the way in which the law of England and Wales can be changed and adapted to more effectively manage the problems posed by low-level disorder. The ultimate purpose of the research conducted within this thesis is to identify standardizations and optimal solutions for change amongst the different jurisdictions. These findings will ensure that the flaws within s.5 can be addressed. This will provide the foundations of a coherent and certain legal framework for managing low-level disorder, whereby conduct is not criminalized on a capricious or arbitrary basis merely because an agent of the state finds it personally distasteful.

Chapter Two:

Establishing the Contours of Low Level Public Order Law

Introduction to Chapter Two

The hypothesis being tested within this thesis is that the English solution to low-level public order law, as embodied with s.5 of the 1986 is not fit for purpose and in need of reform. In order to confirm that hypothesis and make appropriate recommendations for reform, it is necessary to investigate the background to these provisions to understand why the framework has evolved into its current form. It is the purpose of this the first part of this chapter to outline some of the reasons behind why the enforcement mechanisms have developed in the way that they have. It will start by looking briefly at the unique historical, social and political factors at play within each jurisdiction. The study will then consider the idiosyncrasies of the individual legal systems. A key factor not being considered at this juncture, although undoubtedly significant, is the impact of the terrorist attacks that affected America and England in the early part of the 21st Century¹.

The chapter will address the first research question by exploring how low-level public order is managed throughout the four jurisdictions. This investigation will provide a locus around which the legislation can be examined² and provide definition to the notion of “low-level public order”. The comparative methodology employed³ requires exposition of the various frameworks, together with a description of the historical circumstances surrounding the legislation and the

¹ These attacks and the subsequent response as part of the War on Terror have seen an upsurge in mass protests, which in turn have impacted upon all aspects of public order law. Accordingly, the impact of the war on terror will be examined in greater detail in Chapter Seven of this thesis.

² The discussion as to the role of case law and the judiciary in the German criminal law is to be discussed later on in this chapter. For further information see Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 15

³ See p 18-28

broad constitutional context in which they operate⁴. This will then permit a full cross-jurisdictional evaluation of the solutions employed to deal with low-level public order. The conclusion being worked towards is that the English approach, of criminalizing low-level disorder by means s.5 of the 1986 Act, is not fit for purpose in the current form. An examination of the approaches of different jurisdictions will provide the first preliminary models for disorder management, around which the recommendations can be made.

Characteristics of the Public Order Offences

Unsurprisingly, as will be seen throughout this chapter, there is a degree of variance between the different jurisdictions. The approach to public order law by successive governments within England and Wales can be categorized as a hybrid mixture of statute⁵ and common law⁶ within a constantly evolving human rights landscape⁷. All of these different legal instruments operate as a discourse upon the various elements of the criminal justice system and those who enforce, prosecute and judge low-level public order offences.

As stated in the introduction, the statute that contains the principal criminal offences dealing with public order is the Public Order Act 1986. This Act deals with individual offences of varying degrees of seriousness⁸, the regulation of processions and assemblies⁹ and offences inciting racial hatred¹⁰. The England and Wales approach in respect of the lower level public order laws within the Public Order Act 1986 can be classified as being only partially codified¹¹, with important elements such as powers to deal with breach of the peace¹² being ignored by legislators and other statutory provisions regulating protests being

⁴ See p 19-27 for details on the constitutional peculiarities of each jurisdiction

⁵ Principally, as discussed in the previous chapter, Public Order Act 1986 but also Criminal Justice Public Order Act 1994 and Serious Organized Crime and Police Act 2005

⁶ The powers to deal with a breach of the peace will be examined in Chapter Seven; see also Peter Thornton et al, *The Law of Public Order and Protest* (OUP 2010) 254

⁷ The European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 as given further effect in UK law by virtue of the Human Rights Act 1998 being the principal driver for this phenomenon.

⁸ Part 1 of the Public Order Act 1986 ss 1-8

⁹ Part 2 of the Public Order Act 1986 ss 11-16

¹⁰ Part 3 of the Public Order Act 1986 ss 17-29N

¹¹ For full details see Richard Card, *Public Order Law* (Jordans 2000) chapters 2-4 and also Thornton, (n 6) chapters 1-5

¹² A common law offence and the terms of which were defined in *R v Howell* [1982] QB 416; [1981] 3 All ER 383; [1981] 3 WLR 501, CA. See p 258 for further details.

found in other statutes¹³. Despite having the appearance of coherence, the corollary of having these different provisions is an inherently fragmented approach to the problems faced by those charged with ensuring the preservation of public order.

The German legal system, whilst having a fully codified criminal law¹⁴, spreads a variety of public order offences between the more serious *Verbrechen* (felonies), lower level offences classified as *Vergehen* (misdemeanours) found within the *Strafgesetzbuch* (Criminal Code)¹⁵ as well as having a significant number of offence dealt with under the *Ordnungswidrigkeiten* (OWiG). The OWiG contains minor violations which do not count as criminal offences and which are punishable by a fine only¹⁶. Classification of offences as felonies and misdemeanours was removed from English criminal law and replaced by the slightly amorphous categorizations of summary and indictable offences. What is noticeable within the German criminal law is the existence of a body of law aimed specifically at regulating protest. The “Assembly Law” (*Versammlungsgesetz*) will be examined alongside the other legal mechanisms for protest in Chapter Six¹⁷.

The German position echoes the situation in the legal systems of the US and Australia, both of which also operate within a federal structure. Unlike the English approach to public order, in the other jurisdictions there has been no attempt at placing these low level offences into a single statute, either on a federal or state level. There have been moves towards codification of the criminal codes in Australia and the US¹⁸, but these have not been to the same extent as in Germany whereby the StGB can be said to be an inherent and conceptual part of the fabric of the legal system¹⁹.

The final part of this inquiry will go on to explore the current methods of legislating for prohibited behaviour, together with the approaches of different jurisdictions

¹³ ss 132-138 Organized Crime and Police Act 2005, see Chapter Seven for details.

¹⁴ See Bohlander (n 2) chapter 2

¹⁵ The offences against Public Order can be found in the Special Section of the StGB, Chapter Seven, §§123-145d

¹⁶ Bohlander (n 2) 14

¹⁷ See Chapter Six p 217 onwards

¹⁸ See below p 53 onwards for a discussion on the origins of the Model Penal Code and the variations that exist within the States.

¹⁹ Bohlander (n 2) 5

when the individual transgresses what at first sight appears to be a relatively low threshold. This will furnish the rudimentary information as regards commonality and divergence of approaches, enabling the construction of an evaluative commentary that incorporates and builds upon best practice throughout the different jurisdictions²⁰. An examination will be conducted of the role of the courts and the influence of the interpretative duty of the individual judges within the four jurisdictions, drawing on these basic provisions²¹. The lessons that can be drawn from the interpretive activity will be used to inform the evaluative commentary and this chapter will ultimately seek to furnish the “raw materials” in relation to the cross-jurisdictional analysis.

Introducing Multiple Frameworks

The historical, social and political drivers that have affected the way in which each jurisdiction deals with public order will now be identified. It is recognized that the comparative methodology²² does demand an understanding of the reasons why a particular solution has been adopted; an examination will now be made of the way in which the development of the legislation has been shaped by events. The 20th Century English experiences will be contrasted with those of the United States of America and Australia. These two common law jurisdictions, with radically different, federal constitutions, have not engaged in a holistic review process of the legislation governing public order. The same cannot be said of Germany, having endured traumatic transmutations to its constitutional order throughout the 20th Century. German approaches to dealing with low-level public order will be of great utility for the discussion, partly due to the civil, codified state of its legal system and partly due to the impact of historical events upon the modern German legal system. The next section will outline the reasons behind the different approaches and attempt to evaluate the current models in place within the four different jurisdictions.

Development of the current English framework

²⁰ Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (3rd Edn, OUP 1998) 18

²¹ Starting at p 36

²² Zweigert & Kötz (n 20) 34-43

The existing legislative provision currently operating within England and Wales²³ has roots in the disturbances that beset the whole of the United Kingdom in the late 1970s and early 1980s²⁴. As Thornton states:

*“The Public Order Act 1986, still the bedrock of the modern law came after the Southall riots of 1971 and the Brixton disorders of 1981, events fuelled by a blend of race and inner city discontent.”*²⁵

It was not only the disorders in London that shaped the law relating to public order. A diverse range of events occurred, almost contemporaneously, which can be broken down into three broad areas, although the following list is by no means hierarchical or mutually exclusive. The first of these societal drivers was the public order disturbances connected with industrial disputes and the rise of militant trade unionism²⁶. As stated above, there was violence connected with racial tensions that had begun to emerge, concentrated around the inner cities²⁷. A final, additional category is that of violence and disorder resulting from football matches²⁸. All of these drivers have generated explicit legislative responses, in the realms of employment law²⁹, equality law³⁰, and sports law³¹, which operate alongside the general low-level public order provisions. Due to the very specific arenas in which these activities take place, the details of these areas will not be

²³ The regime for dealing with low-level public order disturbances in Scotland and Northern Ireland is still based on the common law offence of Breach of the Peace.

²⁴ For an overview of the factors behind the social, industrial and political issues which beset the England and Wales in the 1970's and 1980's see; Peter Clarke, *Hope and Glory: Britain 1900-2000* (2nd Edn, Penguin 2004) 319-401; For a more detailed academic discussion of the political factors at play during this time, see Keith Middlemas, *Power, Competition and the State: The End of the Postwar Era - Britain Since 1974 Vol 3* (Palgrave Macmillan 1991)

²⁵ Thornton (n 6) 5

²⁶ ATH Smith, *Offences Against Public Order* (Sweet & Maxwell 1987) 116; for the political aspect see Middlemas (n 24) 311

²⁷ As a result of the inner city riots in the summer of 1981 focusing upon the south London suburb of Brixton a government enquiry was undertaken. See Report of an Inquiry by the Rt. Hon the Lord Scarman, *The Brixton Disorders 10-12 April 1981 Cmnd 8427* (1981)

²⁸ There have been numerous reports examining the issue of violence and disorder at sporting events the most significant contemporary of the Public Order Act 1986 was the Committee of Inquiry into Crowd Safety and Control at Sports Grounds: Final Report Cmnd 9710 (1986) by Rt Hon Lord Justice Popplewell.

²⁹ For information on the powers to deal with industrial disputes, see Simon Deakin & Gillian Morris, *Labour Law* (5th Edn, Hart 2009) at Chapter 11

³⁰ See for a detailed guide on the operation of equality legislation see Karon Monaghan, *Equality Law* (OUP 2007)

³¹ For a full discussion on this specialist area within the wider context of the role of the law regulating sport see Mark James, *Sports Law* (Palgrave Macmillan 2010) at Part 3, specifically Chapter 10, Crowd Disorder and Football Hooliganism

discussed further in this thesis. The focus of the study will remain upon the general, low-level provisions³².

It has been suggested that the Thatcher government of the 1980s, was seeking to position itself as “*the party of law and order*”³³. This may account for the need to be seen to be regulating and improving the operation of the criminal justice system. It is no coincidence that the changes to public order law were almost synchronous with the changes brought in by the Police and Criminal Evidence Act 1984 (PACE). Nonetheless, there is much academic³⁴ and judicial debate on the social and political background to these disturbances both individually and collectively³⁵. It was, ultimately, this discourse that highlighted the deficiencies of the previous arrangements for dealing with disorder within a changing society. These drivers coupled with the heightened media scrutiny, represented multifarious and serious threats to order within the United Kingdom and combined to provide a momentum for change³⁶.

Consequently, it was the combination of these events that led to the government commissioning a major review of public order law³⁷. This review was, by its own admission, principally concerned with the more serious offences within the sphere of major public disturbances³⁸. This assertion within the Law Commission Report No. 123 was not, of itself, surprising. Indeed, the most recent government inquiry into the state of public order, conducted in 2010, has focused on the policing of protest rather than the underlying legal framework. It was understandable that the government should inquire into the more serious threats to disorder. But this has

³² Due to the wide ranging impact of the terrorist attacks both on 9/11 and 7/7 these drivers will be considered separately in chapter seven

³³ Middlemas (n 25) 192

³⁴ For a broad ranging, socio-political discussion see Martin Kettle & Lucy Hodges, *Uprising: Police, the People and the Riots in Britain's cities* (Macmillan 1982)

³⁵ Lord Scarman conducted detailed inquiries for the government into two of the most significant of these disturbances. For a detailed analysis of what became known as the “Red Lion Square Riots” see *Report of an Inquiry by the Rt. Hon. Lord Justice Scarman, The Red Lion Square Disorders of 15 June 1974*, Cmnd. 5919 (1975).

³⁶ See Smith (n 27) at Chapter 1

³⁷ This process of review is outlined in Smith (n 27) 20-28, culminating in the Law Commission Report, *Offences Relating to Public Order*, (1983) Law Com. No. 123

³⁸ Law Commission Report (n 37) 2-3

the unwanted side effect of shifting focus away from the more mundane, commonplace offences³⁹.

The Law Commission report, whilst not a direct progenitor, certainly informed the final structure of Public Order Act 1986, an Act which one contemporary observer noted was “*a far more sweeping reform than had initially been intended*”⁴⁰. When considering the low-level offences, the White Paper for the Public Order Bill⁴¹ sounded an ominous warning when addressing the proposed crime of disorderly conduct, stating that:

*“The Government recognizes that there would be justifiable objections to a wide extension of the criminal law which might catch conduct not deserving of criminal sanctions.”*⁴²

Taking this portent into consideration, an examination will now be undertaken of the low-level public order offences that exist within Part 1 of the Public Order Act. Analysis will start with the lowest in the hierarchy of infractions in an attempt to map out the base contours of the offences.

Section 5 of The Public Order Act 1986

The public order legislation which is used primarily to deal with the lowest level public order offences within England and Wales, is to be found under s.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.*

³⁹ See “Policing Public Order: An overview and review of progress against the recommendations of Adapting to Protest and Nurturing the British Model of Policing” report of February 2011 available at: http://www.hmic.gov.uk/SiteCollectionDocuments/PPR/PPR_20110209.pdf

⁴⁰ Smith (n 27) 26

⁴¹ White Paper, Cmnd 9510 quoted in Thornton (n 6) 37

⁴² *ibid* para 3.26

*within sight or hearing of a person likely to be caused harassment alarm or distress.*⁴³

The *actus reus* of s.5 is that the conduct⁴⁴ of the accused must be within the sight or hearing of someone likely to be caused harassment, alarm or distress⁴⁵. There is no need for the conduct to be directed at any particular victim but (unlike other more serious offences under the 1986 Act⁴⁶) the person who is likely to be caused harassment, alarm or distress must actually witness the conduct, even if it is by CCTV⁴⁷ or on the Internet⁴⁸. The *mens rea*, found in s.6(4) of the 1986 Act, is that the accused must either intend his words or behaviour to be threatening, abusive or insulting or intend his conduct to be disorderly or be aware that it may be⁴⁹.

The range of conduct that is prohibited includes disorderly behaviour. In *Chambers & Edwards*⁵⁰, it was held that whether the conduct was disorderly was a question of fact to be determined by the court depending on the circumstances of the case. It is assumed, in reaching this decision, the word disorderly is to be given its natural meaning⁵¹. The *mens rea* of s.5 requires proof either that the defendant intended his conduct to be threatening, abusive or insulting or disorderly or that he was aware that it might be so⁵². Ormerod asserts that, at its lowest, this requires proof of an awareness of a possibility⁵³.

The legislation provides for a defence to prove that the conduct was reasonable⁵⁴. Since the coming into effect of the Human Rights Act 1998, a number of prosecutions under s.5, especially those involving protestors, have been disputed on the grounds that the words or conduct was part of a protest⁵⁵. The accused protestor(s) base the reasonableness of their conduct on the guaranteed rights to

⁴³ Public Order Act 1986 s 5(1)

⁴⁴ Either the words or behaviour or disorderly behaviour according to s 5(1)

⁴⁵ For further exploration of these concepts see p 81

⁴⁶ See, for example, the requirement under Public Order Act 1986 s 3(2)

⁴⁷ *Rogers v DPP* (1999), unreported 22 July DC as cited in David Ormerod, *Smith & Hogan Criminal Law* (12th Edn, OUP 2008) 1075

⁴⁸ *S v Crown Prosecution Service* [2008] EWHC 438 (Admin) 2008 WL 924

⁴⁹ For detailed exploration of the terms of s 6(3) of the 1986 Act, see Chapter Four, p 120 [1995] Crim LR 896

⁵⁰ Ormerod (n 47) 1074

⁵¹ Public Order Act 1986 s 6(3)

⁵² Ormerod (n 47) 1075

⁵³ Public Order Act 1986 s 5 (3)(c)

⁵⁴ See, for example *Hammond v DPP* [2004] EWHC 69, [2004] Crim LR 851

freedom of expression⁵⁶ and freedom of assembly⁵⁷. Ormerod states that there have been a number of cases in which the offence under s.5 has been challenged in the courts as being incompatible with Article 10 of the ECHR⁵⁸. It is submitted that this is not necessarily the case. The challenges in the courts have been targeted at the appropriateness of the individual conviction not at the underlying offence itself. The rights based challenge posed by the coming into force of the Human Rights Act 1998, the scope of the mental element, together with an exploration of disorderly behaviour and the terms threatening, abusive or insulting will be examined in greater detail in the next chapter⁵⁹.

Of great significance at the inception of the 1986 Act was the provision set down in s.5(4). This provided a bespoke power of arrest to police officers and was initially what gave s.5 of the 1986 Act real potency⁶⁰. The provision of the power of arrest⁶¹ for s.5 meant that the police should have been able to effectively deal with the mischief that the Act was designed to counter. This was of particular importance as the power of arrest could only be exercised following the issue of a warning to the person concerned in the disorderly conduct.

The test as to whether a warning has been given was laid down in *DPP v Groom*⁶², a case that is an exemplar of the type of behaviour s.5 was designed to counter. The defendant had made racial remarks to an individual and, upon being overheard by a police officer, was asked to desist and apologize. The defendant refused and was subsequently arrested. It was stated that the warning under s.5(4) did not require any prescribed words; all that was necessary was that it was clear any repetition or continuation of the conduct would amount to breaking the

⁵⁶ The right to freedom of expression can be found Article 10 of the ECHR

⁵⁷ Freedom of Association and Assembly found under Article 11 of the ECHR

⁵⁸ Ormerod (n 48) 1076

⁵⁹ See p 72

⁶⁰ s 5(4): A constable may arrest a person without warrant if -
(a) he engages in offensive conduct which a constable⁶⁰ warns him to stop, and
(b) he engages in further offensive conduct immediately or shortly after the warning.

⁶¹ Prior to the Serious Organised Crime and Police Act 2005 the power to arrest was contingent as to whether the offence was "arrestable" or "non-arrestable" Low-level offences generally did not have a power of arrest; see Ed Cape, "Arresting developments: increased police powers of arrest" [2006] Legal Action 24

⁶² [1991] Crim LR 713 DC

law. It was for the court to reach a common sense conclusion based on whether, in all of the relevant circumstances, a warning had been given⁶³.

Rights based criticisms of the provisions of the Act would point out that the provision also meant that where a police officer decides that a peaceful protest was within the ambit of this Act, the protestor could be arrested and their participation within that protest ended⁶⁴. The requirement for a warning⁶⁵ was repealed⁶⁶ as part of the changes to the police powers of arrest that rendered the need for a specific power of arrest redundant by virtue of the Serious Organized Crime and Police Act 2005⁶⁷. This was one of a number of provisions within the 2005 Act that would have ramifications upon the policing of low-level public order⁶⁸.

Fixed Penalty Notices and Section 5

The Law Commission report into public order offences published in 1983⁶⁹ was explicit as to the nature of conduct that s.5 of the 1986 Act was intended to counter. This report viewed behaviour such as groups of youths persistently shouting abuse or obscenities and low-level football hooliganism as the primary mischief that needed addressing⁷⁰. Under English criminal law, the offence would be classed as a minor one, as it is triable as a summary offence only⁷¹. Upon conviction the maximum penalty is a fine not exceeding level 3 on the current scale⁷². As a conviction will not result in imprisonment, this offence can be said to be at the bottom of the “public order” scale. By virtue of s.5(6) of the 1986 Act, this offence remains largely within the purview of the lower courts with only a small number of appeals percolating through to Divisional Courts.

⁶³ *ibid* [714]

⁶⁴ Andrew Geddis, “Free speech martyrs or unreasonable threats to social peace? - “Insulting” expression and section 5 of the Public Order Act 1986” [2004] PL 853; Card (n 11) 155-157

⁶⁵ Also the definitional provision under s5(5) of the 1986 Act

⁶⁶ Serious Organized Crime and Police Act Sch. 17(2), Para 1

⁶⁷ Serious Organized Crime and Police Act s110 provided for a new power of arrest based *not* on Arrestable and Non-Arrestable Offences but on a more broadly defined criteria of ‘necessity’ according to s24 (4) and 24 (5) Police and Criminal Evidence Act 1984

⁶⁸ See p 242 for discussion on the case of Brian Haw and ss132-138 Serious Organized Crime and Police Act

⁶⁹ Law Commission Report (n 37)

⁷⁰ *ibid* para 5

⁷¹ Public Order Act 1986 s 5(6)

⁷² At the time of writing a level 3 fine would equate to a fine of £1000

In addition to the instituting of criminal proceedings, police officers now have authority to deal with offences under s.5 of the 1986 Act by use of Fixed Penalty Notices. Introduced as an attempt to deal with (predominantly alcohol related) disorder, the recommendations outlined in a Home Office consultation paper⁷³ formed the core of Part 1 of the Criminal Justice and Police Act 2001. The operation and ambit of when a notice can be issued is to be found in Part 1 of the 2001 Act. It defines a penalty notice as:

*“A notice which offers the opportunity, by paying a penalty, to discharge any liability to be convicted of the offence to which the notice relates.”*⁷⁴

The corollary of this is that by paying the fine, the recipient is discharged of liability for conviction of the offence that is specified on the notice. Although a record is kept of the issue of notices, this is not the same as a criminal conviction and accepting a fixed penalty notice does not require an admission of guilt⁷⁵.

Eager to dispel lurid tabloid imagery of drunken youths being marched by police to cash points, the 2001 Act⁷⁶ allows the recipient of a notice to elect to have the case tried before a court⁷⁷. In relation to public order offences the issuing of fixed penalty notices has not been without problems. The issue raised in case of *R v Gore*⁷⁸ illustrates the difficulties of using immediate mechanisms of disposal for seemingly innocuous offences. In *Gore*, a fixed penalty notice was issued for disorderly conduct. It transpired that instead of the mild jostling that had occurred, one of the parties had sustained a broken arm. The appellants argued that further proceedings would be an abuse of process and that once an offence had been dealt with by means of any disposal, then the accused could not be prosecuted again.

⁷³ Reducing Public Disorder: the role of fixed penalty notices, (Home Office September 2000)

⁷⁴ Criminal Justice and Police Act 2001 s 2(4)

⁷⁵ *R v Hamer* [2010] EWCA Crim 2053

⁷⁶ Criminal Justice and Police Act 2001 s 4(2)

⁷⁷ Criminal Justice and Police Act 2001 s 6 provides that there should be notes for guidance issued to police officers to detail the operation of the fixed penalty scheme.

⁷⁸ *R v Gore; R v Maher* [2009] EWCA 1424; Times, July 17, 2009

The appeal in *Gore* was rejected, and although the facts highlight the potential danger of an incomplete investigation they also emphasize the efficacy of employing this method of disposal. Such administrative disposals expedite the management of low-level disorder, yet they do not preclude criminal sanctions in the event more serious offences come to light.

It is illustrative of the attitude of the legislature to lower level public order offences that the vast majority of fixed penalty offences are regulatory in nature⁷⁹ apart from s.5 of the 1986 Act. Despite the reassurances, however, that a record of notices will be maintained, a recent request to the CPS made under the Freedom of Information Act 2000⁸⁰ showed that they did not have details as to how many fixed penalty notices have been issued in respect of s.5. This is a disturbing development pointing to another potential area where police discretion and summary justice could potentially lead to an increased arbitrariness in respect of low-level public order.

It should be noted that whilst the issue of fixed penalty notices is a relatively new concept within English public order law, the OWiG, within the German jurisdiction, has long made use of Penalty Notices as a means of disposal for administrative offences. §65 allows for offences under the OWiG to be punishable by penalty notices. §66 OWiG contains the details as to what information should be carried on the notice and the legal force of the notice. §67 OWiG deals with the appeals procedure should an individual issued with a penalty notice wish to appeal the decision. Whilst the legal status of the respective penalty notices may differ, it is an important area of commonality that both jurisdictions share. What it also shows up is that the use of low-level public order disposals for disorderly conduct may well be suitable for the type of disorder originally envisaged by the framers of s.5 within the English legal system⁸¹, but may be less suited to those offenders who seek to deliberately cause offence as part of a protest.

⁷⁹ Criminal Justice and Police Act 2001 s 1 lists the offences that are “penalty offences”. The majority of these offences are strict liability in nature.

⁸⁰ See the following discussion;

http://www.whatdotheyknow.com/request/statistics_regarding_section_5_p?unfold=1#incoming-49670

⁸¹ Smith (n 27) 117

Section 4A of the Public Order Act: Added Intent

Occupying the next tier of low-level public order offences is that of causing ‘intentional harassment, alarm or distress’⁸². The genesis of this provision lay in the early 1990s. From the outset, it was clear that, although the ambit of s.5 of the 1986 Act was extremely broad, the range of activity covered was more substantial than the framers of the legislation had anticipated⁸³. Nevertheless, there was also a perception that the range of sentencing was not sufficiently broad enough to cope with those offences committed with malevolence, but lacking threat of immediate unlawful violence to shift the conduct from an offence under s.5 up to the more serious s.4⁸⁴.

This perception was reinforced by a considerable amount of political pressure, coupled with the findings of the Commission for Racial Equality in 1992 and the Home Affairs Select Committee in 1993-94⁸⁵, to create a clause strengthening the law as it related to racial harassment. As Smith asserted, “*that undertaking metamorphosed into the creation of a more serious general harassment offence*”⁸⁶. This was trumpeted as a provision that sought to penalize “*the harassment of women, children, the elderly or the disabled*”.⁸⁷ It is difficult to see how these claims can be supported, especially as there is no mention of any of these particular groups within s.4A. What the legislation does do, is to create an offence whereby a person who intends to (and through his conduct in fact does) cause harassment, alarm or distress can face a greater sanction than the non-imprisonable offence under s.5 could offer. The introduction of s.4A of the Public Order Act 1986 by virtue of s.154 of the Criminal Justice and Public Order Act 1994 provides that:

⁸² Public Order Act 1986 s 4A

⁸³ Andrew Ashworth, “Criminalising Disrespect” [1995] Crim LR 98 provides a discussion on Brown & Ellis, *Policing Low-level disorder: Police Use of Section 5 of the Public Order Act 1986* (Home Office Research Study No. 135, HMSO, 1994)

⁸⁴ Public Order Act 1986 s 5(6) states that a person guilty of an offence under this section will be liable, on summary conviction, to a fine not exceeding level 3, s 4(4) of the 1986 Act provides, on summary conviction, to imprisonment for a term not exceeding level 5 on the standard scale.

⁸⁵ Martin Wasik & Richard Taylor, *Blackstones Guide to the Criminal Justice and Public Order Act 1994* (OUP 1995) 98

⁸⁶ ATH Smith, “The Criminal Justice and Public Order Act 1994 – the public order elements.” [1995] Crim LR 19, 19

⁸⁷ *ibid* 19

*“A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, 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,
thereby causing that or another person harassment, alarm or distress.”*⁸⁸

Although this offence enjoys a titular connection to s.4 of the 1986 Act, in essence this provision is, as has been explained above, an aggravated version of s.5, with significant areas of overlap between the two offences. The analysis that will be conducted as regards the meaning of threatening, abusive, insulting or disorderly behaviour and the meanings behind harassment, alarm or distress are equally as applicable to s.4A as they are to s.5⁸⁹. There are, however, two additional elements contained within s.4A that allow for the augmented sentencing provisions as provided for by s.154 of the 1994 Act. Within the *actus reus*, the accused must actually cause a person harassment, alarm or distress⁹⁰ and possess the *mens rea* of intending that his conduct would be so⁹¹.

As with s.5 of the 1986 Act, this remains a summary offence. The maximum sentence for this basic offence under s.4A is a term of imprisonment not exceeding six months or a fine not exceeding level 5 or both⁹². The Magistrates Court Sentencing Guidelines also have a number of aggravating factors, such as a targeted, group attack or a weapon being brandished or threats being made against a vulnerable person, or mitigating factors, such as provocation and short duration of the incident. These factors are taken into account within a range of sentences available to the magistrates⁹³. The provision of imprisonment as part of the sentencing options for this offence gives it a status “above” many of the other provisions from other jurisdictions in the public order hierarchy.

⁸⁸ Public Order Act 1986 s 4A(1)

⁸⁹ See p 73 at fn 5

⁹⁰ Public Order Act 1986 s 4A(1)

⁹¹ Writing at the time of that these provisions came into force, Wasik & Taylor (n 86) 99 state that “Section 4A is clearly based on the wording of s.4 (fear or provocation of violence) and s.5 (harassment, alarm or distress). It is placed just above s.5 in the hierarchy of public order offences since, unlike the offence under s.5 the offence in s.4A requires proof both of an intent on the part of the defendant. ...And proof that the victim did suffer such consequence.”

⁹² Public Order Act 1986, s 4A(5)

⁹³ Thornton (n 6) 49

Section 4: Threatening behaviour and a focus on immediate violence

There is a final, substantive lower-level offence that operates within the corpus of low-level public order law. S.4 of the 1986 Act provides for the offence of using threatening behaviour thereby causing fear or provocation of violence. According to Thornton, the Law Commissioners, when reporting on the terms of the new Act, wanted an offence where the defendant used conduct which not only threatened a person directly, but where a person fears immediate unlawful violence would be used against him *or another*⁹⁴.

S.4 of the 1986 Act provides:

*“A person is guilty of an offence if he:
uses towards another person threatening, abusive or insulting words or behaviour,
or
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.”*⁹⁵

This offence is a summary offence only with a maximum sentence of 6 months imprisonment and/or a fine.⁹⁶ Therefore it is undoubtedly the case that s.4 is regarded as being part of the statutory regime to deal with low-level public order.

The range of behaviour covered by the *actus reus* includes the requirement for the defendant to use words which are threatening, abusive or insulting⁹⁷ and these words must either provoke immediate unlawful violence by the speaker or another, or that the person to whom the words are addressed⁹⁸ believes such

⁹⁴ *ibid* 28

⁹⁵ Public Order Act 1986, s 4(1)

⁹⁶ Public Order Act 1986, s 4(4)

⁹⁷ For comments on this as part of the prohibited behaviour see p 77 The comments apply equally for s.4, s.4A and s.5 of the 1986 Act

⁹⁸ *Lodge v DPP* [1990] 1 All ER 36, DC

violence will be used against him or another⁹⁹. There has been considerable academic criticism of the provisions of s.4. Ormerod indicates that the objective nature of the test employed to determine whether the behaviour is threatening, abusive or insulting creates an “*extremely harsh offence*”¹⁰⁰. Thornton has stated that in the years since the coming into force of the Public Order Act, s.4 of the 1986 Act has been interpreted “*very widely indeed*”¹⁰¹. As with the offence under s.5 (and unlike s.4A), the *mens rea* for the offence under s.4 of the 1986 Act is explicitly defined within s.6 of the 1986 Act. This element, and the scope of the prohibited behaviour will be critiqued in greater detail in throughout the thesis¹⁰². It was confirmed in *Atkin v DPP*¹⁰³, that s.4 of the 1986 Act will require a ‘victim’, meaning the words must be “used in the presence of and in the direction of another person directly”¹⁰⁴. *Swanston v DPP*¹⁰⁵ held that the threat to another must be a direct one, although in this case it was accepted that the evidence for this threat can come from another (in the case of Swanston this was from an off duty police officer who witnessed a fracas at a pub).

There are further restrictions on the scope of the defendant’s behaviour to be found within the *actus reus* of s.4. In *Rothwell & Barton*¹⁰⁶, it was affirmed that the violence used has to be unlawful. This means that an individual who acts in self-defence, the defence of another or preventing a crime, will not fall within the terms of s.4. The Act also specifies that only the use of words or behaviour tending to provoke *immediate* unlawful violence will attract liability. This is a crucial difference between s.4 and the other two low-level English provisions.

Following a significant criticism of the imprecise nature of the drafting of this requirement, the Divisional Court, in *Ex parte Siadatan*¹⁰⁷, focused upon the notion of immediacy. Siadatan brought a private prosecution against the publishers of Penguin Books stating that the book “*The Satanic Verses*” contained

⁹⁹ Card (n 11) 127

¹⁰⁰ Ormerod (n 47) 1071

¹⁰¹ Thornton, (n 6) 32

¹⁰² See p 73 for a discussion on the scope of prohibited behaviour and p 120 for a discussion of the mental elements.

¹⁰³ *Atkin v DPP* (1989) 89 Cr App R 199, DC

¹⁰⁴ *ibid* [200]

¹⁰⁵ *Swanston v DPP* (1997) 161 JP 203

¹⁰⁶ *R v Rothwell & Barton* [1993] Crim LR 626, CA

¹⁰⁷ *R v Horseferry Road Stipendiary, ex parte Siadatan* [1991] 1 QB 260 (DC)

words that were abusive and insulting and likely to provoke unlawful violence. The Divisional Court upheld the ruling of the magistrate not to issue a warrant for the arrest of the author, Salman Rushdie. It was held by Watkin LJ that immediate violence connoted a proximity requirement of both time and causation. This meant that violence must result from the words/behaviour within a relatively short time period and without any other intervening event¹⁰⁸.

The decision of the court in the case of *Ramos*¹⁰⁹ threatened to dilute this requirement, whereby the Divisional Court held that the victim becoming immediately fearful that something was likely to happen “*at any time*”¹¹⁰ satisfied the immediacy requirement. This decision appears to be regarded as an aberrant one, with Smith stating that it was not enough that the victim is immediately put in fear, he must be put in fear of immediate violence¹¹¹.

The offences under s.4, s.4A and s.5 form the basis of the statutory response to low-level public order issues within the English jurisdiction. The offence of threatening behaviour, despite being the more serious of the offences, is the one that offers the least cause for concern due to this requirement of the words or behaviour needing to lead to the fear of immediate unlawful violence. The scope and prohibited behaviour required for an offence for all three offences will be examined in greater detail in the next chapter. The focus of the study will now move to the development of the public order framework in Australia, another common law jurisdiction that shares much commonality with England and Wales.

Australia: Evolution not Revolution in Public Order

With the close social, political and economic links, Australia has, understandably, drawn heavily upon the English legal system for both their legal institutions and method¹¹². Unlike the other jurisdictions, the Australian development of public order law provides perhaps the most piecemeal examples of activity by legislators. This may well be due to the fact that Australian history has little by way

¹⁰⁸ *ibid* [269] (Watkin LJ)

¹⁰⁹ *DPP v Ramos* [2000] Crim LR 768

¹¹⁰ *ibid* 768

¹¹¹ *ibid* 769

¹¹² For a full explanation see Tony Blackshield & George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th Edn, Federation Press 2005)

of the seismic public disorder disturbances experienced by the other three jurisdictions¹¹³.

That does not mean that codification has not occurred in some form. As will be seen with the United States¹¹⁴, it would appear that whilst operating within a federal structure, the lower level public order offences operate on a regional canvas with each state having its own variation of a disorderly conduct offence. Notwithstanding the existence of independent criminal codes, all States and territories in Australia make it an offence for a person to engage in disorderly behaviour¹¹⁵ or to use offensive language in a public place¹¹⁶. Again, as with the other jurisdictions, although to varying degrees, the process of codification within the criminal law has seen common law offences (such as vagrancy legislation) providing a base model for the low-level public order offences to emerge.

Of the four States that incorporate disorderly behaviour within a summary offences statute, most have directly imported the terms of previous anti-vagrancy legislation¹¹⁷. It is the more modern attempts at codification within the criminal law that provides closest comparison to those in other jurisdictions. In New South Wales, s.4 of the Summary Offences Act 1988 provides the offence of offensive behaviour which states that a person must not conduct himself in an “*offensive manner in or near, or within view or hearing from a public place or a school*”. The 1988 Victorian Act also states that a person must not use offensive language in or near, or within hearing from, a public place or a school¹¹⁸.

¹¹³ The racial tension that emerged in 2005 in the Cronulla beach district of Sydney and various industrial disputes are relatively small in impact to both the society and the political landscape. For further information Kiran Grewal, “The ‘Young Muslim Man’ in Australian Public Discourse” *Transforming Cultures eJournal* Vol 2, No 1, Nov 2007 which can be accessed at <http://epress.lib.uts.edu.au/ojs/index.php/TfC/article/view/599/546>

¹¹⁴ See p 51

¹¹⁵ Disorderly can also include offensive and indeed riotous behaviour. See Roger Douglas, *Dealing with Demonstrations: The Law of Public Protest and its Enforcement* (Federation Press 2004) 78

¹¹⁶ *ibid* 78

¹¹⁷ South Australia (SA) s 7 Summary Offences Act 1953; Tasmania (Tas) ss. 12 & 13 Police Offences Act 1935; Victoria (Vic) s 17 Summary Offences Act 1966; Western Australia (WA) ss 74, 74A and 74B Criminal Code 1913 as amended by No. 70 of 2004 (s 7) and No. 59 of 2006 (s 18), Northern Territory s 47 Summary Offences Act, ACT Crimes Act 1900 but with move-on powers defined in s 4 Crime Prevention Powers Act 1998

¹¹⁸ Summary Offences Act 1988 (Vic), s4A

In the State of Queensland, it was the case of *Coleman v Power*¹¹⁹ that encouraged legislators towards a revision of the law¹²⁰. This case, and its constitutional impact, will be discussed in Chapter Five, where the rights of protesters, as they coincide with the current frameworks for dealing with low-level public disorder will be examined and evaluated. In response to the decision in *Coleman*, the disorderly conduct provision was redrafted by the Queensland legislators and now comes under Part 2 of the Summary Offences Act 2005¹²¹. Somewhat unusually, there is within the Act, an explicit statement of the object of the offences, stating that the Act “*has, as its object ensuring, as far as practicable, members of the public may lawfully use and pass through public places without interference from acts of nuisance committed by others*”¹²². The offence under s.6 of the 2005 Act is the lowest level public order offence and states, in its simplest terms, that a person must not commit a public nuisance offence. The 2005 Queensland Act provides that a person commits a public nuisance offence if a person behaves in a disorderly way¹²³, an offensive way¹²⁴, a threatening way¹²⁵ or a violent way¹²⁶ and the person’s behaviour interferes, or is likely to interfere with the peaceful passage through, or enjoyment of a public place by a member of the public.

As the ‘oldest’ of the ‘modern’ codified legislation, Part 1 of the Summary Offences Act 1966 (Vic), provides a number of specific offences against public order¹²⁷. The more general, disorderly conduct and offensive language provision can be found in Part 1, Division 2 of the 1966 Act. S.17 provides for the offence of using obscene, indecent, threatening language and behaviour in public¹²⁸. S.17A provides for the offence of disorderly conduct, the offence being simply that a person who behaves in a disorderly manner in a public place is guilty of an

¹¹⁹ [2004] HCA 39, (2004) 220 CLR 1

¹²⁰ Prior to *Coleman v Power* the offence was to be found under s. 7 Vagrants, Gaming and Other Offences Act 1931

¹²¹ Summary Offences Act 2005 (Qld) has 6 parts, each of the parts broken up into different divisions. Part 2, Division 1 specifies the offences about quality of community use of public places.

¹²² Summary Offences Act 2005 (Qld) Preamble to Pt 2, Div 1

¹²³ Summary Offences Act 2005 (Qld), s 6(2)(a)(i)

¹²⁴ Summary Offences Act 2005 (Qld), s 6(2)(a)(ii)

¹²⁵ Summary Offences Act 2005 (Qld), s 6(2)(a)(iii)

¹²⁶ Summary Offences Act 2005 (Qld), s 6(2)(a)(iv)

¹²⁷ s 4 of the 1966 Act provides *inter alia* for offences of burning rubbish in public, opening a drain without permission of the local authority and flies a kite or plays a game to the annoyance of any person will commit an offence.

¹²⁸ Summary Offences Act 1966 (Vic), s 17 (1)

offence and liable to a penalty not exceeding 10 penalty units¹²⁹, and as such is broadly comparable to the punishment available under the English provision of s.5 of the 1986 Act.

The United States of America: Developing a state-based framework

When looking at the historical evolution of the regulation of low-level public order within the United States, the principal drivers behind changes to the legislation are very different to those at play within the history of England and Wales. There is a history of civil disorder of a greater magnitude than anything seen within England and Australia (and indeed the upheaval encountered by Germany is scarcely comparable in nature). Social commentators and political scientists alike provide a myriad of explanations as to the root causes of the disturbances that occurred in the USA in Universities and inner cities within the 1960s and 1970s¹³⁰. President Lyndon B. Johnson established the National Advisory Commission on Civil Disorders¹³¹, in the aftermath of major, urban disorders that, in the summer of 1967¹³², led to at least 83 deaths. This Commission concluded that:

*“While the disorders were racial in character they were not inter-racial. The policeman in the ghetto is a symbol, not only of law, but also of the entire system of law enforcement and criminal justice. As such he becomes the tangible target for grievances against the shortcomings throughout that system.”*¹³³

There will be no attempt at engaging in an historical and sociological analysis of the underlying causes of civil unrest in England and America. The accounts of the riots in Brixton and Toxteth provide the closest analogy to the racial upheaval

¹²⁹ According to the Office of the Chief Parliamentary Counsel in Victoria, the value of a penalty unit is fixed by the Treasurer (s.5(3) of the Monetary Units Act 2004). As of 2010-11 a penalty unit is fixed at \$119.45 for further information see;

<http://www.ocpc.vic.gov.au/CA2572B3001B894B/pages/faqs-penalty-and-fee-units>

¹³⁰ See for example Michael W Flamm, *Law and Order: Street Crime, Civil Disorder, and the Crisis of Liberalism* (Columbia Studies in Contemporary American History, Columbia University Press, 2005) for a substantive discussion on all dimensions of civil disorder in the United States and how this links to the wider nexus of law and politics.

¹³¹ *Report of the National Advisory Commission on Civil Disorders* (Bantam Books, New York, 1968) pp 1 -29 accessed through <http://www.eisenhowerfoundation.org/docs/kerner.pdf>

¹³² Michael Banton, “Race and Public Order in An American City” (1972) 45 *Police J* 198, 198

¹³³ *ibid* 198

experienced by the United States¹³⁴. Yet in England these disturbances led to a wholesale change into the way policing¹³⁵ and public order would be regulated.

Unlike England and Wales, and despite leading to highly significant changes in other areas of American society, the social upheaval¹³⁶ did not lead to any significant revivification of the lower levels of public order legislation at any level. It will be shown later on in this chapter that most US low-level public order legislation is based around the Model Penal Code, which was first promulgated in 1962¹³⁷. Indeed, many of the low level violations, have their origins in or around the start of the 20th Century¹³⁸. As a parenthetical point, it should be noted that while disturbances in the UK have largely ceased to be around racial issues, the disturbances which occurred in Los Angeles following the assault upon Rodney King by two white police officers led to former US Secretary of State, Warren Christopher, producing another independent commission report examining a significant racial disturbance¹³⁹.

Perhaps the most plausible explanation for this apparent legislative inertia (and certainly most accessible for the criminal lawyer) lies within the constitutional make up of the United States, whereby the imposition of criminal liability is primarily the responsibility of the States¹⁴⁰. Low-level public order, by its very nature, will not be seen to threaten federal interests and as such remains within the purview of the state criminal codes. It is recognized that the diversity among

¹³⁴ *cf* Report of an Inquiry by the Rt. Hon the Lord Scarman, The Brixton Disorders 10-12 April 1981 Cmnd 8427 (1981) with *Report of the National Advisory Commission on Civil Disorders* (Bantam Books, New York, 1968)

¹³⁵ It is perhaps of interest to note that the Philips Royal Commission on Policing which led to the Police and Criminal Evidence Act 1984 governing all aspects of the investigative process ran almost concurrently with the reviews by Scarman (n 135) and the Law Commission report into Offences against Public Order (n 38)

¹³⁶ For a discussion on the theories underpinning the uprisings, especially the Black Panther Movement and protest of the American Indian Movement, see Jules Boykoff, "Limiting Dissent: The Mechanisms of State Repression in the USA" *Social Movement Studies* 6 (2007) 281

¹³⁷ Paul Robinson, Markkus D Dubber, "The American Model Penal Code: A Brief Overview", 10 *New Criminal Law Review* (2007) 319 319

¹³⁸ Flamm (n 131) for further details

¹³⁹ Warren Christopher, *Report of the Independent Commission on the Los Angeles Police Dept* (Independent Commission on LAPD, 1991)

¹⁴⁰ This is subject to the *Supremacy Clause* found in Article VI, para. 2 of the Constitution of the United States of America, which establishes the Constitution and Federal Law as being the supreme law of the land. It was affirmed in *Edgar v Mite Corp*, 457 US 624 (1982) the Supreme Court held that where a statute and federal law conflict, the state statute will be void to the extent that it conflicts with the federal law.

the various criminal codes¹⁴¹ means that it is difficult to state “the American rule on any point of criminal law”¹⁴².

Model Penal Code & State Based Regulation

The drafting of the Model Penal Code (MPC) by the American Law Institute in 1962 was an attempt to codify the criminal law which, it was felt at the time, had become “*chaotic and irrational*”¹⁴³. It has found some degree of favour, having been adopted by thirty-four States in its entirety, and virtually all States have incorporated elements of the MPC. The partial codification of the criminal law has a particular relevance when considering First Amendment issues and freedom of expression¹⁴⁴. This is particularly important when discussing the nature of the defences available for low-level public order offences and this point will be revisited later on in the thesis¹⁴⁵. The drafting of the MPC was crucial for the development of low-level provisions. As Samaha states:

*“Disorderly conduct crimes...are minor crimes that legislators, judges and scholars didn’t pay much attention to until the 1950’s when the MPC was drafted. Why the lack of attention? The punishment was minor, most of the defendants were poor and convictions were rarely appealed.”*¹⁴⁶

Public order law has numerous categories of offences and regulatory ordinances depending on the seriousness of the behaviour. Within the English legal system, the serious public order offences occupy Sections 1 to 3 of the Public Order Act and replaced a number of common law provisions relating to riot and affray¹⁴⁷. These provisions relate to group related behaviour that causes or threatens serious violence involving multiple participants¹⁴⁸. The offence of Affray does not

¹⁴¹ Each of the fifty States has their own criminal code, as does the District of Columbia. The fifty-second criminal code is the federal criminal code.

¹⁴² Robinson & Dubber (n 137) 319

¹⁴³ *ibid* 321

¹⁴⁴ See p171 onwards

¹⁴⁵ There is a vast amount written about first amendment and indeed constitutional interpretation.

For a full exposition on this area see the discussion in Chapter Four commencing at p106

¹⁴⁶ Joel Samaha, *Criminal Law* (8th Edn, Thomson, 2005) 426

¹⁴⁷ Public Order Act 1986 s 9(1) abolished these and a host of other common law offences replacing them with their statutory progeny which can be found in ss1-3 of the 1986 Act

¹⁴⁸ The offence of Riot as defined in s 1 Public Order Act 1986 states that there must be a minimum of 12 or more persons gathered together and threatening or using unlawful violence. Violent Disorder, contrary to s 2 of the 1986 Act, reduces this number to 3 or more persons.

have any requirement that the offending behaviour be group related although the behaviour must cause fear for personal safety¹⁴⁹. In respect of the situation within the United States, federal law has provisions for civil disorder¹⁵⁰ and riot¹⁵¹ both of which are felony offences designed to deal with large-scale public disorder. As such, they are significant enough to warrant a place within the United States Code (US Code)¹⁵². The term “civil disorder” is defined in Title 18 of the US Code §232 as any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual.

In respect of the public order legislation, the MPC (and by implication the majority of US States), tend to include affray within the realm of the lower-level offences categorizing them as a misdemeanour offence. In spite of this, the treatment of those accused of an offence under s.3 of the 1986 Act under English law and the trial and punishment for the offence of affray that permeates throughout many US States are remarkably similar. Affray, as has already been stated, does not fall within the ambit of this study¹⁵³.

¹⁴⁹ Public Order Act 1986 s 3 states that: ‘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.’ See also *R v Davison* [1992] Crim LR 31

¹⁵⁰ The specific offences relating to civil disorder can be found in 18 USC § 231 and relates to the use of firearms, explosives, incendiary device or other technique designed to cause injury or death in furtherance of a civil disorder which may in anyway obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function. Additionally, there is the offence for an individual who commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function.

¹⁵¹ According to 18 USC § 2102 Riot is defined as:

“A public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual”

¹⁵² Most low-level public order legislation is not mentioned within the U.S. Code. The U.S. Code contains general and permanent laws. Most public order law is contained within the individual criminal codes of the States.

¹⁵³ Public Order Act 1986 s 3(7) provides that Affray is triable either way. The CPS guidance is that where a charge of Affray is preferred then trial at the Crown Court is the most appropriate venue.

In trying to establish whether a person has committed an offence, the MPC engages a three-tier structure. This process starts by “*examining the contours of the prohibited action*”¹⁵⁴. Phase two of the structure then seeks to establish whether a justificatory defence exists. Finally, if having established the criminality of conduct and the unjustified nature of the conduct, the analysis then seeks to establish whether there exists an excusatory defence. This final stage of establishing criminality examines whether the suspect was sufficiently blameworthy¹⁵⁵. In many respects this three-stage model echoes the tripartite structure (*dreistufiger Verbrechenbau*) of the German Criminal Code (*Strafgesetzbuch*)¹⁵⁶.

It is unlikely that the MPC will ever operate wholly as “American criminal law”. The US Constitution specifically reserves authority for the imposition of criminal liability to individual States¹⁵⁷. The MPC does, however, form the base of many States criminal code. Thus, while it is not practical to detail every disorderly conduct provision that is in operation within the various States, the disorderly conduct provision within the MPC represents something of a progenitor offence. The relevant legislation relating to public order can be found in Article 250 of the MPC. This provision was introduced as it was felt that public order law had received little by way of systematic consideration by legal professionals and academics alike¹⁵⁸.

Article 250 of the MPC provides codification of the wide ranging, common law provisions which were prevalent at the time whilst safeguarding the civil liberties of the individual citizen and preventing an overlap with other provisions of the MPC¹⁵⁹. The low-level public order offence, within the USA, that most accurately equates on to s.5 of the 1986 Act is that of disorderly conduct. The offence is to be found within §250.2 of the MPC, which states:

All of this points to Affray being regarded as a ‘serious’ public order offence For further information see http://www.cps.gov.uk/legal/p_to_r/public_order_offences/#Affray

¹⁵⁴ Robinson & Dubber (n 137) 326

¹⁵⁵ Robinson & Dubber (n 137) 326

¹⁵⁶ See p 125, although detailed cross comparisons of the similarities between the two codified systems are well beyond the scope of this thesis.

¹⁵⁷ See n 140

¹⁵⁸ Model Penal Code Pt II, Art. 250, Refs and Annos. Explanatory note for Sections 250.1 – 250.12

¹⁵⁹ *ibid* para 2

*“A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof, he:
Engages in fighting or threatening, or in violent or tumultuous behaviour; or
Makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or
Creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.”*

§250.2(2) of the MPC goes on to state that an offence under this section is a petty misdemeanour if the actor’s purpose is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after a reasonable warning or request to desist, otherwise disorderly conduct is a violation¹⁶⁰.

There is a federal disorderly conduct provision detailed within the Code of Federal Regulations¹⁶¹ that prohibits disorderly conduct within the boundaries of a National Park¹⁶². Although it mirrors almost completely the provision laid down in §250.2 of the MPC, the provision does provide some instruction in respect of the location aspect of disorderly offences, specifically emphasizing the public nature of the prohibited activity¹⁶³. This in turn provides some insight into the scope of conduct that disorderly conduct provisions within the USA are seeking to combat.

It is instructive to note that whilst the provisions of s.5 of the 1986 Act in England no longer require police officers to issue a warning prior to arrest, in certain States it is still an active ingredient of the offence. It was held in *Com. v. Thompson*¹⁶⁴, in the State of Pennsylvania, that the provision of the warning by police officers is very much a key element of the offence, with the defendant carrying on with boisterous, verbal behaviour after police had attempted to defuse the situation. The scope of people who can issue the warning is not limited to police officers,

¹⁶⁰ A violation is a ‘minor, petty crime’ the definition of which varies from state to state. N.Y Penal Code §10.00(3) defines a violation as an offence for which the maximum sentence cannot exceed fifteen days imprisonment

¹⁶¹ 36 CFR §2.34

¹⁶² 36 CFR § 1.2(a)(1)

¹⁶³ *US v Coutchavlis*, 260 F 3d 1149 (9th Circuit 2001)

¹⁶⁴ Pa Super2007, 922 A2d 926

but it was found in *Com. v Mastrangelo*¹⁶⁵, to encompass others who are involved in the administration of law or other governmental functions. Ohio prohibits a number of behaviours; in addition to the fighting or turbulent behaviour, there is also a prohibition on unreasonable noise, “grossly abusive” language, insulting or taunting another to provoke a violent response and hindering movement on a public right of way¹⁶⁶.

These different provisions are classed as minor misdemeanours¹⁶⁷ but, as with the MPC, they increase in magnitude if the offender persists in his conduct after a reasonable warning¹⁶⁸. They also escalate if the offense is committed in the vicinity of a school or in a school safety zone¹⁶⁹ or in the presence of various emergency personnel engaged in their duties¹⁷⁰. The differentiation of the seriousness of the offence being contingent on the location is common throughout the US jurisdiction, but unusual in respect of the other jurisdictions¹⁷¹.

Samaha states that: “*the most common use of disorderly conduct statutes is against fighting in public*”¹⁷². The ways in which this mischief is tackled, despite the above-mentioned provision of §250.2 MPC, varies within the States. Although not all States have directly incorporated the disorderly conduct provisions from the MPC, it would appear that the elements of the offence remain largely the same, with some minor (yet still significant) differences. In the State of New York, the offence of disorderly conduct is a violation (with no bespoke aggravating factors to change the grading to a misdemeanour)¹⁷³. As well as having the behaviour requirements of §250.2, there is a provision criminalizing “*the disturbing of any lawful assembly or meeting of persons*” and the “*refusal to comply with a lawful*

¹⁶⁵ Pa 198, 414 A2d 54, 489 Pa 254 involved the defendant shouting abuse at a meter maid and persisted in doing so after being asked to desist, preventing her from carrying out her (lawful) duties

¹⁶⁶ Ohio Revised Code (§2917.11,2002)

¹⁶⁷ Misdemeanour offence varies from state to state but McKinney’s Consolidated Penal Code §10.00(4) defines a misdemeanour as an offence for which a sentence to a term of imprisonment in excess of 15 days may be imposed but for which a sentence to a term of imprisonment in excess of one year cannot be imposed. The guidance for punishment of minor misdemeanour is that it should not be dealt with by way of imprisonment where a fine or anger management order could deal with the infraction more effectively.

¹⁶⁸ Ohio Revised Code (§2917.11,2002) at para E3(a)

¹⁶⁹ Ohio Revised Code (§2917.11,2002) at para E3(b)

¹⁷⁰ Ohio Revised Code (§2917.11,2002) at para E3 (c & d)

¹⁷¹ See p 88-90 for further details as regards the location of the offence

¹⁷² Samaha (n 146) 427

¹⁷³ NY Penal Code §240.20

*order of the police to disperse*¹⁷⁴. The Municipality of Chicago has enumerated 12 different courses of conduct that will constitute disorderly conduct¹⁷⁵. On the other hand, the state of New Mexico has a smaller, but equally comprehensive provision that states disorderly conduct will consist of:

*“engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace; or maliciously disturbing, threatening or, in an insolent manner, intentionally touching any house occupied by any person.”*¹⁷⁶

These provisions for disorderly conduct all adopt different ways of detailing the prohibited behaviour. This should not disguise the fact that they each seek to heavily proscribe certain types of behaviour, including violence and threats to

¹⁷⁴ NY Penal Code §240.20 (1-7)

¹⁷⁵ Municipal Code of Chicago 8-4-010A person commits disorderly conduct when he knowingly: (a) Does any act in such unreasonable manner as to provoke, make or aid in making a breach of peace; or (b) Does or makes any unreasonable or offensive act, utterance, gesture or display which, under the circumstances, creates a clear and present danger of a breach of peace or imminent threat of violence; or (c) Refuses or fails to cease and desist any peaceful conduct or activity likely to produce a breach of peace where there is an imminent threat of violence, and where the police have made all reasonable efforts to protect the otherwise peaceful conduct and activity, and have requested that said conduct and activity be stopped and explained the request if there be time; or (d) Fails to obey a lawful order of dispersal by a person known by him to be a peace officer under circumstances where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm; or (e) Assembles with three or more persons for the purpose of using force or violence to disturb the public peace; or (f) Remains in the public way in a manner that blocks customer access to a commercial establishment, after being asked to clear the entrance by the person in charge of such establishment. (g) Appears in any public place manifestly under the influence of alcohol, narcotics or other drug, not therapeutically administered, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity; or (h) Carries in a threatening or menacing manner, without authority of law, any pistol, revolver, dagger, razor, dangerous knife, stiletto, knuckles, slingshot, an object containing noxious or deleterious liquid, gas or substance or other dangerous weapon, or conceals said weapon on or about the person or vehicle; or (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute; or (j) Pickets or demonstrates on a public way within 150 feet of any church, temple, synagogue or other place of worship while services are being conducted and one-half hour before services are to be conducted and one-half hour after services have been concluded, provided that this subsection does not prohibit the peaceful picketing of any church, temple, synagogue or other place of worship involved in a labor dispute. (k) Either: (1) knowingly approaches another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way within a radius of 50 feet from any entrance door to a hospital, medical clinic or healthcare facility, or (2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person entering or leaving any hospital, medical clinic or healthcare facility.

¹⁷⁶ New Mexico Code § 30-20-1

violence. In New Mexico, the more serious offence of affray¹⁷⁷ is the ‘next rung up’ on the public order ladder. In the Texas Penal Code, there are eleven different ways in which the offence can be committed¹⁷⁸, and the next public order offence listed is that of riot¹⁷⁹. The next chapter will conduct a detailed study of the requisite prohibited behaviour within low-level public order offences¹⁸⁰.

It is recognized, not least by those who review the provisions of the MPC¹⁸¹ that the constitutional position has changed significantly since the drafting and promulgation of the MPC in the early 1960s¹⁸². Judicial scrutiny of statutes for First Amendment compliance has increased together with an intolerance of vague penal legislation. This, in many ways, mirrors the judicial activism of the higher courts in England and Wales¹⁸³. From the troika of common law jurisdictions, the focus will now shift on to the approach adopted by the codified criminal law that operates in Germany. The first point to be examined will involve a very brief historical discussion detailing the legal background. An exposition of the nature of the criminal code itself and then the specific provisions relating to the maintenance of public order will follow this socio-historical analysis.

Germany: A Tumultuous History

In contrast to the Australian and US experiences, the German legal system has encountered significant and indeed turbulent historical disruption to the established constitutional order. The historical development of 20th Century Germany, and the trauma caused by the abuse of the Weimar Constitution by Adolf Hitler and the Nazi party has been well catalogued. The atrocities committed against indigenous Germans and the dehumanizing effect of the laws passed in the period 1933-45 provides for a unique sensitivity to issues of free speech and

¹⁷⁷ The offence of Public Affray can be found under §30-20-2 of the New Mexico Code.

¹⁷⁸ Texas Penal Code § 42.01 (a) (1) – (11)

¹⁷⁹ Riot contrary to Texas Penal Code §42.02

¹⁸⁰ See p 74 onwards

¹⁸¹ Robinson & Dubber (n 137) 9

¹⁸² Model Penal Code Pt II, Art 250, Refs and Annos. Explanatory note for Sections 250.1 – 250.12

¹⁸³ For an empirical based study on the rise of Judicial Activism within the USA and specifically the Supreme Court see Frank B Cross & Stefanie Lindquist *Measuring Judicial Activism* (OUP 2009). See also Brice Dickson, “Judicial Activism in the House of Lords 1995-2007” in Brice Dickson, *Judicial Activism in Common Law Supreme Courts* (OUP 2007)

the repugnance against arbitrary exercise of authority by the executive¹⁸⁴. Despite this, the characteristics and sources of German law are not the unique product of the post World War Two regeneration. The current German legal system owes much to developments prior to the 20th Century and has been shaped by the, “comprehensive and rapid assimilation of Roman principles of law” from the Middle Ages¹⁸⁵. Flavours of revolutionary France and the codification introduced throughout the 19th Century also permeate. Parenthetically, it is intriguing to note that the reunification of Germany in 1990, despite occurring at a time of international upheaval, saw relatively little disturbance to the constitutional and legal composition of the German state¹⁸⁶.

Whilst there may be no doubt that the turbulent recent history of Germany shaped the general legal landscape, it is the current legal and constitutional make up which shapes the criminal law and, ultimately, the way in which low-level public order is dealt with. The supreme source of German law is The Basic Law (Grundgesetz herein after referred to as GG). According to Art 20 (3) GG all of the principal organs of government are subject to the provisions of the Basic Law, including the legislature¹⁸⁷. In this respect, the constitution can be said to be supreme and operates in much the same way as the US constitution.

It is, perhaps, unsurprising that, as with the Federal Code of the USA, the German Criminal Code, (Strafgesetzbuch, StGB) does not contain much by way of low-level public order legislation. Those crimes within the StGB that deal with public order are to be found from §123 - §145 and deal with a wide range of criminality, ranging from burglary¹⁸⁸, forming terrorist organizations¹⁸⁹ through to the violation of a professional qualification¹⁹⁰ and misleading the authorities about the

¹⁸⁴ For the (admittedly Anglophile in perspective) historical overview there are a myriad of texts available. See for example AJP Taylor, *The Origins of the Second World War* (Penguin Books 1964), Ruth Henig, *Versailles and After 1919-1933*, (2nd Edn, Routledge 1995), for a German perspective see Hans Mommsen, *From Weimar to Auschwitz. Essays in German history (English translation)*, (Cambridge University Press 1991)

¹⁸⁵ Nigel Foster, & Satish Sule, *German Legal System and Laws* (4th Edn, OUP 2010) 3

¹⁸⁶ The German Democratic Republic (East Germany) and the Federal Republic of Germany (West Germany) decided upon reunification to keep *Grundgesetz*, with accession under Art 23 GG

¹⁸⁷ Art. 20 (3) GG states that the legislature shall be bound by the constitutional order, the executive and the judiciary shall be bound by law and justice.

¹⁸⁸ § 123 StGB

¹⁸⁹ § 129a StGB

¹⁹⁰ § 145c StGB

commission of an offence¹⁹¹. There is no bespoke disorderly conduct provision to be found within the StGB. What does exist are a number of individual offences that would come within the scope of either disorderly conduct provisions or would fall within the umbrella of those actions, which would cause harassment, alarm or distress as recognized in English law. These will be highlighted later on in this chapter when the behaviour prohibited by low-level public order legislation is examined¹⁹².

OWiG: The Law of Administrative Offences

It is to the next tier of minor offences that one must look when seeking the provisions governing low-level public order. German criminal doctrine has three tiers of offences, and the offences that regulate minor public order infractions are to be found largely within the realm of the Law on Administrative offences (Ordnungswidrigkeitengesetz, OWiG)¹⁹³. These OWiG provisions do not count as criminal offences and are punishable only by a fine. They are somewhat colloquially known as *kleines strafrecht* or ‘little criminal’ offences¹⁹⁴. The OWiG is recognized as being the lowest in the tier of criminality for which imprisonment is not an option, even at the harshest end of the scale¹⁹⁵. The OWiG lays down the scope¹⁹⁶ and procedure for the punishment of minor offences and the ways in which the courts can enforce the financial penalties that flow from a conviction.

In respect of the actual construction and interpretation of these offences it would appear that the closest analogy within the jurisdictions are those of local ordinances¹⁹⁷ in States of the USA or bylaws within England and Wales. The OWiG contains an internalized code that operates independently of the StGB¹⁹⁸, governing the fundamentals of punishment and issues relating to attempts,

¹⁹¹ § 145d StGB

¹⁹² See Chapter Three, p 71

¹⁹³ Bohlander (n 2) 27

¹⁹⁴ §7 OWiG holds that the fine must be a minimum of 5€ and must not exceed 1000€ unless the law specifies otherwise.

¹⁹⁵ Tatjana Hörnle, “Offensive Behavior and German Penal Law” (2002) 5 *Buff Crim L Rev* 255, 271

¹⁹⁶ §2 OWiG provides that the terms of the act shall cover both federal and state law.

¹⁹⁷ A law found in the municipal code of individual States in U.S.A., which usually result in a violation. For example the town of Manasquan, New Jersey has issued a disorderly conduct ordinance in respect of offences contained under New Jersey’ criminal code under N.J.S.A. 2C:33-2

¹⁹⁸ Bohlander (n 2) 27

participation, error and omission¹⁹⁹. Crucially, §10 OWiG states that only intentional acts are punishable unless issues of negligence are explicitly stated within the terms of the offence. What the OWiG does not do is to make specific provision for general principles of criminal liability²⁰⁰. Accordingly, when conducting an analysis of the individual component elements of criminality within the relevant offences, reference will be made to the general principles of criminality contained within the StGB where the OWiG is silent.

The substantive offences can be found under Part Three OWiG. The “*Verstöße gegen die öffentliche Ordnung*” (offences against public order) are detailed in the second section²⁰¹ and although they cover some offences that are recognizable from the other jurisdictions, the approach to low-level public order regulation within StGB and the OWiG framework represents something of a departure from the common law jurisdictions. Whilst there is no easy mapping of the provisions from the other jurisdictions, it can be stated with some confidence that the following offences have relevance in terms of the regulation of low-level behaviour.

As a prelude to considering the nature of the operation of the substantive public order offence, perhaps the most illuminating element of the OWiG and its application can be found in §47 OWiG where, inter alia, it states that the prosecution of the relevant offence is at the reasonable discretion of the prosecuting authority²⁰². This regulatory provision is designed to allow the filtering of those situations by the prosecuting agencies on such occasions as prosecution. A similar (although not identical) provision exists in relation to the power of arrest within England. Within the codes of practice provided to augment the PACE²⁰³ regime, there is clear direction to police officers that arrest (for any offence) is discretionary. §47 OWiG provides a clear statement to all those involved in the prosecutorial process of the discretionary nature of these offences.

¹⁹⁹ §8-16 OWiG

²⁰⁰ Bohlander (n 2) 27

²⁰¹ Specifically §116 – 123 OWiG

²⁰² §47(1) OWiG *Verfolgung von Ordnungswidrigkeiten*

²⁰³ Police and Criminal Evidence Act 1984, s 24 deals with the power of arrest and specifically s24(5) PACE which incorporates a necessity test in relation to the arrest

The bespoke disorderly conduct provision, *Belästigung der Allgemeinheit*, is to be found under §118 OWiG and states:

“An administrative offense shall be deemed to have been committed by anyone who engages in a grossly improper activity, which resulting in the endangerment of or disruption to the general public or interferes with public order.”

The term *“grob ungehörige handlung”* (grossly improper act) has no further clarification within the OWiG. According to the commentary on the OWiG, it would appear that the notion of a grossly improper act equates to:

*“An action that, from an objective viewpoint, ignores that minimum of norms (rules), without which even a society that is open to new developments cannot do.”*²⁰⁴

Göhler describes this provision as a *“Gummiparagraph”*, or “catch all” regulation and as such, this would seem to be in line with the view of the legislation in other jurisdictions²⁰⁵. This provision has gained some notoriety in respect of the so-called *“Nacktläufer”*²⁰⁶. Dr Peter Niehenke was convicted by the OLG in Karlsruhe²⁰⁷ of an offence under §118 and fined €1500 for running naked throughout the city of Freiburg. Another example, which indicates the potential breadth of the regulation, transpired when the proprietors of a particularly graphic laser-quest style facility were prosecuted under the terms of §118.

In addition to operating within the OWiG in the form of §118, there are a number of *Polizeiverordnung*²⁰⁸ (police ordinances) made by each *Bundeslaender*²⁰⁹ which, although primarily designed to prohibit environmentally harmful behaviour²¹⁰ (*gegen umweltschädliches Verhalten*)²¹¹ also encompass some low

²⁰⁴ Erich Göhler, Franz Gürtler & Helmut Seitz, *Gesetz über Ordnungswidrigkeiten – OWiG*, (15th Edn, Beck Legal Publishing, 2009), §118, 4

²⁰⁵ *ibid* 4

²⁰⁶ Literally means the “Naked Runner”

²⁰⁷ Ss 2 75/02 23 44 Js 12955/01 OWiG - AK 106/0

²⁰⁸ These are actually *Polizeiliche Umweltschutz-Verordnung* (Police Environmental Regulations passed under §10(1) Police Act 1992

²⁰⁹ These are the Federal States which exist within the Federal Republic of Germany

²¹⁰ Such as *inter alia* the offences offering *Schutz gegen Lärmbelästigung* (Protection against noise), regulation of *Abspritzen und Abwaschen von Fahrzeugen* (hosing and washing of vehicles), *Taubenfütterungsverbot* (ban on feeding pigeons)

level disorderly conduct provisions, inter alia, a prohibition on aggressive begging or the use of children in begging²¹², public urination²¹³, consuming alcohol where the effects are likely to harass third parties²¹⁴ and the dropping of litter²¹⁵. These ordinances are significant in so far as they place the regulation of public order squarely within the realm of minor infractions not worthy of criminalization. The other jurisdictions clearly have disorderly conduct at the lower end of criminality; in Germany it is not within the criminal sphere at all.

The OWiG does provide for a number of ancillary offences that would potentially occupy the same orbit as s.5 of the 1986 Act in England. The first of these, provided for by §116 OWiG, is that of *Öffentliche Aufforderung zu Ordnungswidrigkeiten*²¹⁶ which states that it is unlawful to make a public invitation or representation to commit any OWiG offence²¹⁷, through the use of writings, recordings, pictures or anything held in any form of data storage or in transmitted form. The punishment for this offence is by a fine, the maximum amount being determined with reference to the maximum fine available for the offence that the defendant was encouraging others to commit²¹⁸.

In relation to the Criminal Code, §111 StGB provides for the offence of public incitement to the commission of an unlawful act. §111(1) states that any person who incites such an act shall be held liable as an abettor (*anstiftung*). The need for §116 OWiG becomes apparent when §14(1) OWiG is taken into account. This provision displaces any division between principal and secondary offenders and as such there is a need for a bespoke administrative offence. Another provision, and one that is evocative of other low-level public order provisions in the other jurisdictions (apart perhaps from the English legal system), is that of *Unzulässiger Lärm*. This can be found in §117 OWiG and provides for the offence of illegal and avoidable noise. This offence is committed by anyone who generates noise without authorization to a level that is considered unacceptable or avoidable under

²¹¹ Cities of Heidenheim and Voehrenbach and the association of local associations in Lower Saxony (amongst others) have what appear to be “model” regulations

²¹² Polizeiverordnung der Stadt Heidenheim §18 (2)

²¹³ Polizeiverordnung der Stadt Heidenheim §18 (3)

²¹⁴ Polizeiverordnung der Stadt Heidenheim §18 (4)

²¹⁵ Polizeiverordnung der Stadt Heidenheim §18 (6)

²¹⁶ §116 OWiG

²¹⁷ §116(1) OWiG

²¹⁸ §116(2) OWiG

the circumstances, and which results in disruption to the general public or neighbourhood or damage to public health. The punishment is a fine unless the prohibited noise can be prosecuted under other legislation²¹⁹.

It has been noted that this provision requires the production of considerable noise and the central mischief behind such a violation is to address a lack of concern for the general public²²⁰. This provision of the OWiG echoes the provision found within §250.1(b) of the MPC that provides for the offence of disorderly conduct encompassing unreasonable noise. It is likely that within England this would possibly come within the remit of s.5 only if the noise was threatening, abusive or insulting and had the potential to cause harassment alarm or distress. The mere playing of loud music would more likely be dealt with by means of the bespoke Noise Act 1996²²¹ or potentially through a range of civil remedies such as Anti-Social Behaviour Orders²²².

The other offences within the second section of the third part of the OWiG relate to prostitution and the keeping of dangerous animals. The more serious public order offences are to be found within StGB. The offence of riot (*Landfriedensbruch*) provides for prosecution of both principal and secondary participants who either engage in acts of violence or threaten to persons to commit acts that are committed by a crowd of people who have joined forces in a manner that endangers public safety²²³.

Beleidigung & low-level public order

One final provision, which falls slightly outside the scope of this discussion, is the misdemeanour offence (*Vergehen*) found under §185 StGB of *Beleidigung* (Insult)²²⁴. This provision sits within the Chapter 14 offences of Libel and Slander:

²¹⁹ §117(2) OWiG

²²⁰ Hörnle (n 195) 272-273

²²¹ The Noise Act 1996 provides for a summary offence of failing to desist from making excessive noise after having being served with a warning notice. In addition to the level 3 fine, it is likely that persistent offenders will be subject to Anti Social Behaviour Orders as per the terms of s 1 Crime and Disorder Act 1998

²²² Thornton (n 6) 392

²²³ §125 StGB

²²⁴ Curiously, it is the writings of Judge Rüdiger Warnstädt, a judge of the Moabit Local Court (*Amtsgerichte*), which provide insight into the public order application of this offence see; Rüdiger Warnstädt, *Recht So, 80 Originale Strafurteile von Amtsgerichte Rüdiger Warnstädt aus dem*

“An insult shall be punishable with imprisonment of not more than one year or a fine and, if the insult is committed by means of an assault, with imprisonment of not more than two years or a fine.”²²⁵

This relatively low-level offence, would at first sight, appear to sit alongside the offence under s.5 of the 1986 Act. In an exemplar prosecution under §185 StGB, a defendant was involved in a parking dispute with traffic wardens²²⁶. When the police attended, one of the officers was referred to as a “Turk”. The court held that such a statement constituted a misdemeanour because it was meant as a “put down.” Similarly, when a police officer referred to a taxi driver of French/African heritage as being a “tramp”, this too was considered to be an insult that was designed to undermine the victim’s personal honour²²⁷.

§185 StGB, when set alongside the English provisions, would, in all likelihood, be classed as coming within the umbrella of low-level public order law. The attitude towards §185 StGB means that, within the German legal system, the offence is more analogous to a battery:

“No person would consider the offence of battery to be unusual. In a battery offense, the victim is hit and feels pain...pain can be caused physically and this is the battery. Pain can also be caused by emotional torment and this is the German crime of insult. Insult hurt the feelings or emotional well being of the victim just as much as a kick or hit would.”²²⁸

The Federal Constitutional Court has held that the “protective purpose” of §185 StGB is “personal honour”²²⁹ and given the unique historical events that occurred from 1932-45, it is understandable that such an offence has remained within the

Kriminalgericht Moabit (Das Neue Berlin Verlagsgesellschaft mbH 2003). Aspects of this book have been translated and discussed in; Steven Ross Levitt, “The Life and Times of a Local Court Judge in Berlin” (2009) 10 German Law Journal 169

²²⁵ §185 StGB

²²⁶ Levitt (n 224) 190

²²⁷ Levitt (n 224) 191

²²⁸ Levitt (n 224) 191

²²⁹ BVerfGE 54, 148 [153] as quoted in Levitt (n 224) above n 191

German Criminal Code²³⁰. Nonetheless §185 remains something of a paradox – an offence that has all the characteristics of a public order offence yet is something more akin to an offence against the person.

Addressing the First Research Question

The hypothesis being tested is that the English method of dealing with low-level public disorder is unsatisfactory and that s.5 of the 1986 Act criminalizes too broad a range of conduct. This broadness permits criminalization that is often based on an individual dislike of the conduct by the police or prosecutor. In order to test this hypothesis, the first research question sought to examine the current framework in order to effectively critique the current methods of managing low-level disorder. This chapter both explains the origins of the current framework and also provides a working definition of the contours of low-level public order by exploring the legislation within each of the four jurisdictions.

Understanding the Origins of the Existing Frameworks

Within England and Wales, the catalyst for change came about as a result of social and political upheaval within the 1970s and early part of the 1980s. Both the Public Order Act and PACE were consonant with the political leitmotiv of their time. Both attempted to codify areas of law that were made up of diverse common law and statutory provisions, and both have, despite the enactment of the Human Rights Act 1998, survived the scrutiny of the Courts. In respect of the Public Order Act, individual convictions and aspects of the legislation may have been re-examined and reinterpreted, but as will be seen throughout the following chapters, the basic structure for dealing with low-level public order remains largely unaltered from the promulgation of the 1986 Act.

Examining the historical drivers within the other jurisdictions illustrates the diverse nature of these frameworks. Although there were numerous historical drivers, arguably the biggest influence upon low-level public order law within the United States was the drafting of the Model Penal Code (MPC) in 1962. The MPC was

²³⁰ It should be noted, however, that the origin of the offence of §185 StGB does pre-date the Weimar Republic.

the first time that any meaningful attention had been paid to low-level public order offences in the context of the US legal system. The Australian jurisdiction had little by way of significant historical or legal drivers to reform the management of public order law and the situation was anomalous with regard to the other jurisdictions. In respect of German law, the rise of National Socialism from 1932-1945 resulted in the drafting of the German post-war constitution to ensure that all provisions were compliant with the terms of the Basic Law. It was also noted that the reunification of Germany did not significantly affect the operation of low-level disorderly conduct provisions.

Providing definition to the notion of “Low-Level Public Order”

The second part of the chapter, following consideration of these historical drivers, explored the contours of the lowest level public order offences within the four jurisdictions. The resultant conceptual edifice is crucial in respect of answering the first research question and provides definition to the somewhat amorphous term of “low-level public order law”

It was established that the English legal system has the three key provisions found under s.5, s.4A and s.4 of the Public Order Act 1986. The provisions under s.5 have been described as “*one of the mainstays of public order policing in England and Wales*”²³¹. Although the lowest on the public order scale, it is contended that it is also the most widely drawn of the three provisions. The conduct does not need to be directed at someone *nor does anyone need to be offended by the conduct*. This is a key distinction to draw between s.5 and the other offences within the 1986 Act. Conviction under both s.4A and s.4 requires proof that the threatening, abusive or insulting behaviour directly affected another person. The breadth of behaviour covered and the problems with the certainty of the proscribed behaviour will be covered in the next chapter²³².

Australian solutions to low-level public order remain relatively unmoved by historical or political events. There is no overarching federal “Public Order Act” and States, whilst having a wide variety of statutory provisions, all follow broadly

²³¹ David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart, 2010) 219

²³² Chapter Four and specifically p 102 onwards

similar models to each other. Indeed, Australian and English provisions for dealing with low-level public order are broadly similar to each other, and as shall be seen later on in the thesis, suffer from the same difficulties in terms of certainty and the amount of discretion afforded to police officers in the prosecution of this offence. What distinguishes the Australian legislation from proclivities in any of the other jurisdictions is that the focal point of the prohibited activity is much more on the prohibited activity being in a public place.

In respect of the US States, §250.2 MPC has provided the base for many States disorderly conduct provisions. Each state has its own variant of the disorderly conduct provision, although most States generally conform to the MPC exemplar. Of those different manifestations some, such as those found within the Municipality of Chicago, consist of an enumerated list of twelve different types of behaviour, described by the Illinois Appeal Court as “*one of the most charming grab bags of criminal prohibitions ever assembled*”²³³. Other States, such as New Mexico and Wisconsin define the offence in more general terms²³⁴.

The German solution to low-level public order is to treat it as an administrative matter, both by means of the low level, §118 offence within the OWiG, and the various city based *Polizeiverordnung*. The case of the *Nacktläufer* is illustrative of the type of low-level behaviour which §118 is designed to deal with. Other offences, such as excess noise²³⁵ are dealt with elsewhere in the OWiG and the emphasis is upon limiting the environmental (in the broad sense) impact of the behaviour rather than assigning criminal liability.

The operation of the misdemeanour offence under §185 StGB provides an example of an offence that is concentrated upon an individual victim rather than a catch all provision. At first sight, an offence designed to protect feelings seems to be wholly within the realm of low-level public order. Yet it is included within a group of offences that would be more at home next to the tort of libel and slander within English law. It is also viewed (by at least one member of the German

²³³ *Landry v Daley*, 1968 280 FSupp 968 (ND Ill) at 969

²³⁴ Wisconsin Criminal Code 2003, §947.01

²³⁵ §117 OWiG

judiciary) as being the verbal counterpart of the offence of battery, highlighting the more focused nature of its operation.

Conclusion

The creation of the foundational edifice across the four jurisdictions leads on to the establishment of a fundamental premise. Specifically, each of these jurisdictions has some form of legislation for dealing with low-level public disorder in one form or another. England and Australia have these provisions operating as summary offences, although still functioning within the regular criminal law. Germany operates in stark contrast to this and places the administration of low-level public order into the OWiG, an administrative code that is not criminal in nature. The US solution is, as is to be expected given the wide number of States, a variable one. Some States have disorderly conduct as a misdemeanour offence. In others, such as New York, the lowest grade of disorderly conduct is classed as a violation, another form of administrative offence. Accordingly, there appears to be no consensus across the jurisdictions as to where exactly these legislative provisions operate, other than broadly accepting they operate within the lowest environs of criminality.

One key area of commonality is the acknowledgement within all of the jurisdictions under consideration that these low-level provisions are *designed* to cover a broad variety of activity. Expressions such as “*catch all*”, “*glorious grab bag of criminal prohibitions*”, or “*gummiparagraph*” all serve to highlight that the scope of these provisions are open to wide interpretation by both the police and the courts. Therefore, having provided definition to the concept of “low-level public order” and explored what offences fall within such a conceptual term, next research question will look in detail at the type of behaviour that is covered by these provisions across the jurisdictions. Such an examination will establish whether this intentionally designed broadness is mirrored in the actual application of low-level offences. Such findings will provide a key cross-jurisdiction perspective on the central hypothesis that s.5 criminalizes too broad a range of behaviour and is in need of reform.

Chapter Three:

The Behavioural Scope of Low-Level Public Order

Introduction to Chapter Three

The previous chapter establishes that there exists an identifiable framework for dealing with low-level public order within the respective fora. It has also been identified that these provisions are broadly drafted “catch all” provisions. A key element of the research hypothesis, however, is that s.5 of the 1986 Act within England and Wales is *too* broad in the scope of conduct that receives the stigma of criminality. It is the purpose of this chapter to undertake a conceptual analysis of the *actus reus* precepts of the various disorderly conduct provisions. Such an analysis, within a comparative context, will draw out the optimal pathways of behaviour proscribed within the jurisdictions and will directly address the second of the enumerated research questions designed to determine the scope of the conduct which is prohibited¹.

It is indicative of the issues within the England and Wales that there is more case law and indeed more academic comment on the lower reaches of public order than in the other three jurisdictions. That there is more material available when the legislation is analyzed from a rights based perspective is revealing of the academic approaches adopted by scholars within the English legal system² and may, of itself, provide an illuminating contribution to the metanarrative³. In

¹ See p 9

² See p 21

³ For a German perspective see; Dr. Jur. Thesis, Schrier, C ‘Drogenszene, Bettelei und stadstreichertum im Deutschen Rechtsstaat aus Präventiver Sicht’ (Humboldt University, Berlin, 2003); Australian research has been conducted by Roger Douglas, *Dealing with Demonstrations: The Law of Public Protests and its Enforcement* (Federation Press 2004)

attempting to fathom the operation of s.5, a fundamental part of the inquiry is to examine the behaviour that the statutory provision is trying to prevent.

In relation to offences under s.5 the legislation adopts a two-tier approach: first that the conduct that is prohibited must be threatening, abusive or insulting⁴. Once it has been established that the conduct has met this threshold, the second stage of analysis is for the finders of fact at trial to then establish whether it is likely to cause harassment, alarm or distress. The Crown Prosecution Service charging standards in relation to the range of behaviour which s.5 is expected to encompass states that:

*“S.5 should be used in cases which amount to less serious incidents of anti-social behaviour. Where violence has been used, it is not normally appropriate to charge an offence under s.5.”*⁵

There is no requirement for a victim, and the CPS notes on charging state that it is not necessary to prove any feeling of insecurity, in an apprehensive sense, on the part of a member of the public⁶; the behaviour merely has to occur within the sight or hearing of someone. No apprehension of violence is necessary, merely that the conduct must be likely to cause harassment, alarm or distress⁷. Although not the principal focus of this chapter, the offence under s.4 of the 1986 Act shares many of the prohibited elements common to s.5. The terms threatening, abusive and insulting are elements common to all of the offences under s.4, s.4A and s.5, although most of the analysis is focused on the offence of disorderly conduct.

In addition to the extensive consideration given to the English system, the chapter will examine the approaches of the other jurisdictions. It has been suggested that the various state-based provisions of Australia bear similarity to those provisions under the s.5 of the 1986 Act. Given the low-level nature of the OWiG offence within the German legal system, there is something of a paucity of information, however, what evidence there is of low-level behaviour will be examined to

⁴ Public Order Act 1986, s 5(1)

⁵ Accessed online from the CPS website, also taken from Stones Justice Manual 27724.
http://www.cps.gov.uk/legal/p_to_r/public_order_offences/#Section_5

⁶ See *Chambers & Edwards v DPP* [1995] Crim LR 896

⁷ Peter Thornton et al, *The Law of Public Order and Protest* (OUP 2010) 38

assess how §118 OWiG comports within the general scheme of prohibited conduct. As far as it is relevant, the terms of §185 StGB will also be examined, especially with respect to the insulting nature of the prohibited conduct which, like that of s.5 of the 1986 Act, is not defined within the statute.

Many US States have chosen to adopt the *actus reus* and *mens rea* of the Model Penal Code⁸. §250.2 limits the conduct that qualifies as *actus reus* to three distinct types of behaviour. The principal mischief that the provision is designed to counter is that of fighting in public. It has been stated that fighting is the most common activity that the disorderly conduct provision is deployed to counter⁹. §250.2 also prohibits the creation of a “*hazardous or physically offensive condition*”. The *actus reus* as laid down within §250.2 also forbids making unreasonable noise or using abusive language. This conduct element brings disorderly conduct potentially into conflict with the First Amendment guarantee of free speech. This will be the subject of much analysis and critique within later chapters¹⁰.

The Terminology of Prohibited Behaviour

The first aspect of the lower level offences under the Public Order Act 1986 is that the accused must engage in conduct that is threatening, abusive or insulting. This is a uniform requirement across the jurisdictions as it is present in provisions from Australia and USA. There is also a German requirement that the activity should be “severely improper”¹¹ and is, “*that, which ignores that minimum of norms without which even a progressive society cannot function*”¹². S.5 of the Public Order Act 1986 goes on to require that this behaviour must be performed “*within the sight or hearing of someone who is likely to be caused harassment, alarm or distress*”. In *Holloway v DPP*¹³, the court held that while it was not necessary for the prosecution to call a witness who could say that he or she saw the prohibited

⁸ Joel Samaha, *Criminal Law* (8th edn Thomson, 2005) 428

⁹ *ibid* 427

¹⁰ See Chapter Five onwards

¹¹ “Grob ungehörige Handlung” as defined in Erich Göhler, Franz Gürtler & Helmut Seitz, *Gesetz über Ordnungswidrigkeiten – OWiG*, (15th Edn, Beck Legal Publishing, 2009, 4

¹² *ibid* 4

¹³ [2004] All ER (D) 278 (Oct); [2004] EWHC 2621

conduct, the conduct must occur within the sight or hearing of someone actually present at the scene.

The facts of *Holloway* are rather unusual but do serve to illustrate the scope of the conduct against which s.5 is now being deployed. The defendant was arrested in woods overlooking a comprehensive school playing field. He had, in his possession, a digital video camera and tripod. Upon examining the video camera, the police found images of the appellant, naked, with the schoolchildren in the background playing sport. The court decided that it was not sufficient for the prosecution to establish that someone might have come across the appellant and might have seen what he was doing. The offence required that some person must have actually seen the insulting or abusive words or behaviour. It is, though, incumbent upon the prosecution to provide sufficient evidence to enable the court to draw the inference, having regard to the criminal standard, that the conduct in which the accused was engaged was clearly audible or visible to people who were in the vicinity at the relevant time¹⁴. The case of *Masterson v Holder*¹⁵, involved two men kissing on Oxford Street in London at 2am. Glidewell LJ held that whenever there are persons present who might be insulted by the behaviour, then an offence will be committed notwithstanding that those committing the offence may not intend such insult, or indeed be aware that there is anyone else present¹⁶.

The decisions in *Holloway* and *Masterson* echo throughout the other jurisdictions. The requirement of a victim, or at least someone to be present, appear to be an established element of any offence of disorderly conduct whether explicit in the statutory provision or not. The provisions within various States of The US have been tested by litigation and a number of State ordinances differ in respect of what effect the behaviour of the individual might have¹⁷. In *People v Ellis*¹⁸, the defendant was shouting abuse at owners of a hardware store while tearing down

¹⁴ Ibid [32]

¹⁵ [1986] 1 WLR 1017; [1986] 3 All ER 39, [43] (Glidewell LJ)

¹⁶ Ibid [44] (Glidewell LJ) "Although it is unlikely that the same decision would be reached if the case was heard in the present, it was also stated in *Masterson per curiam* that overt heterosexual, as well as homosexual, conduct may be insulting behaviour if there is another person, such as a young woman, who feels it objectionable".

¹⁷ E M Larsson, "Disorderly Conduct: I. Nature and Elements of Offence", (2010) 27 CJS 103 Disorderly Conduct § 3, after fn 39

¹⁸ 141 Ill App 3d 632, 96 Ill Dec 247, 491 NE2d 61 (5th Dist 1986)

Christmas decorations. It was held that in order for the offence of disorderly conduct to be made out there must be some connection between the behaviour of the defendant and a risk to public order. In this case the conviction was upheld due to the reaction of the owner of the store. This requirement was subsequently reaffirmed in *People v Tingle*¹⁹, whereby the conviction for disorderly conduct was overturned. The defendant, part of a large group witnessing an armed robbery, shouted “5-O,” indicating that police were approaching. The appeal court judge, Wolfson J, held that there was no evidence provided by the police that the conduct of the defendant had done anything to threaten public order.

In respect of the various Australian authorities, this requirement of behaviour possessing some form of public element is equally well enumerated within the case law. The unreported case of *Spence v Loguch*²⁰ emphasizes that:

*“what matters is that the defendant’s behaviour had the potential to annoy and there must be evidence to support the conclusion that a relevant ‘reasonable person’ might have been expected to be present when the relevant behaviour occurred.”*²¹

The situation is similar when one considers the German offence of *Belästigung der Allgemeinheit*²². As well as activity that is “severely improper”, this activity needs to be capable of causing a nuisance to the general public. This is an objective test with reference to the minimum norms of behaviour²³. It covers low-level behaviour such as urinating in the street, minor scuffles, causing interference to the screening of a film and making inappropriate calls to the emergency services²⁴. Clearly, within §118 OWiG, there is a broad scope of behaviour, but in common with all of the other jurisdictions (except under s.5 in England), there is still the requirement that the behaviour has a public element.

¹⁹ 279 Ill App 3d 706, 216 Ill Dec 323, 665 NE2d 383 (1st Dist. 1996)

²⁰ Douglas (n 3) 88

²¹ *Spence v Loguch* (unreported NSWSC, Scully J. 12/11/1991) at 6, 10; in Douglas (n 3) 88

²² §118 OWiG

²³ Göhler (n 13) 4

²⁴ RGSt vol. 19, 256

Threatening, Abusive or Insulting?

The principle established in *Brutus v Cozens*²⁵ is the lead authority that the English courts now use to decide whether words are insulting. The defendant was an anti-apartheid protestor who stepped onto the court of a doubles tennis match at the Wimbledon tennis championship in 1971. He distributed leaflets to the crowd and sat on the court blowing a whistle. The prosecution stated that this behaviour was insulting to the spectators. At first instance, the justices found that this behaviour was not, in fact, insulting. The final appeal to the House of Lords determined that the question of whether words or behaviour are threatening, abusive or insulting was to be a question of fact and not a question of law²⁶. The words themselves are to be given their ordinary English meaning and also be judged according to the impact that the conduct would have on the reasonable man or woman²⁷. Similarly, it was held in *R (on the application of DPP) v Humphrey*²⁸, that abusive was to be ascribed the normal, dictionary meaning, unfettered by any additional statutory boundary. The range of activity held to have been threatening, abusive or insulting includes swearing,²⁹ engaging in the conduct of a "Peeping Tom"³⁰ and calling a police horse "gay"³¹.

The criterion of threatening, abusive or insulting behaviour was taken from the progenitor offence under s.5 of the Public Order Act 1936³². As such, many of the cases on interpreting these three terms pre-date the inception of the 1986 Act. It has also been noted that, "this is important because what might objectively have

²⁵ [1972] 2 All ER 1297, HL

²⁶ The outcome of the case was that their Lordships allowed the appeal. They stated behaviour that affronted others, or evidenced disrespect for their rights "so as to give rise to resentment or protest, was not necessarily insulting within s.5. (of the 1936 Act)" It was held that the word should be given its ordinary meaning, and whether behaviour had been "insulting" was a question of fact for the original magistrates to determine

²⁷ *ibid* [1303]

²⁸ *R (on the application of DPP) v Humphrey* [2005] EWHC 822 (Admin)

²⁹ *Southard v DPP* [2006] EWHC 3449 (Admin)

³⁰ *Vigon v DPP* (1998) 162 JP 115 DC

³¹ Daily Telegraph, 12 July 2005, "Arrest for 'gay' horse jibe is absurd says Tatchell" <http://www.telegraph.co.uk/news/uknews/4196447/Arrest-for-gay-horse-jibe-is-absurd-says-Tatchell.html> accessed on 1 June 2011

³² Public Order Act 1936 s 5 made it an offence for a person, in any public place or at any public meeting:

(a) to use threatening, abusive or insulting words or behaviour; or

(b) to distribute or display any writing, sign or visible representation which was threatening, abusive or insulting;

with intent to provoke a breach of the peace or whereby a breach of the peace was likely to be occasioned.

been threatening, abusive or insulting in 1939 may not be so in 2009”³³. The obverse is also true. What is clear is that under s.5, the test for insulting is whether an “ordinary person” would find the words insulting. It is irrelevant that a person is particularly predisposed to find the words insulting.³⁴ It has been noted that:

*“Whether or not the speaker knows that such persons will hear the words appears to be immaterial as far as this ingredient of the ss.5, 4 and 4A.”*³⁵

It was held in *Lewis v DPP*³⁶, that words and visible representations could also be abusive or insulting despite being truthful. The defendant was standing outside an abortion clinic with a placard showing an aborted foetus in a pool of blood with a caption stating “21 Weeks Abortion”. The Divisional Court held that given all of the circumstances, the behaviour was both insulting and abusive³⁷. This holistic approach to the defendant’s conduct is something common to the other jurisdictions. In the US case of *Howard v City of Roanoke*³⁸, it was held that the defendant’s entire course of conduct, irrespective of the contents of his utterances, at a city-council meeting was sufficiently insulting to support the conviction for disorderly conduct.

Within the context of §185 StGB, the term “*Beleidigung*” (insult) is much more closely regulated than under English law. Whilst it is not defined within §185, there are specific limits placed on both the meaning and application of the offence. There is a requirement that the expression has a defamatory context and that the insult is directed at someone, who is subsequently offended by the statement. Therefore, the meaning of insult is a mixture of an objective assessment of all of the circumstances and the subjective *intention* of the defendant. As is the case in the English case of *Lewis*, §192 StGB holds that the truth of the statement shall not necessarily be a barrier to the prosecution of the offence when a particularly

³³ Thornton (n 7) 31

³⁴ This echoes the position of the wider criminal law in that one must ‘take the victim as they find them’ See, for example *R v Blaue* [1975] 61 Cr App R 271

³⁵ Helen Fenwick & Gavin Phillipson, *Text, Cases and Materials on Public Law and Human Rights* (3rd Edn, Routledge 2011)

³⁶ *Lewis v DPP* (1995) Unreported case, DC; in Richard Card, *Public Order Law*, (Jordans 2000)

122

³⁷ Card (n 36) 122

³⁸ 51 Va App 36, 654 SE2d 322 (2007)

derogatory tone is used. It is unlikely, on the individual facts of the case of *Lewis*, that a prosecution would have succeeded under §185 and, indeed, would not have been permitted unless the insult had been directed at a particular individual and that individual had complained to the police³⁹.

In Australia, the notion of what behaviour may be considered offensive has been revisited on a number of occasions. Up until 2004 it was almost universally accepted by the Australian judiciary⁴⁰ that the fact of many people objecting to a particular opinion does not make it 'offensive' in the context of the statutory provisions⁴¹. It was held in *Gebert v Innoncenzi*⁴², that whether words are insulting is to be decided objectively rather than on any intent of the speaker. It follows, therefore, that in Australia, as with England, the context of the behaviour is every bit as important as the actual behaviour itself⁴³. This method of interpretation is not dissimilar to the *Brutus v Cozens* approach adopted by the English courts as seen above.

There is not a standardized approach in respect of the Australian and English notions of insulting behaviour. The Australian position is that words cannot constitute an insult unless they relate to a person or persons present when the words are delivered⁴⁴. In *Lendrum v Campbell*⁴⁵, when the leader of a New South Wales paramilitary organization insulted the Premier of New South Wales, Jack Lang, within a public debate, the court held that this was not an offence, given that Lang was not present when the words were uttered. This reasoning seems to imply that the Australian approach is designed to stop one party from insulting another party whereby a breach of the peace might occur. This small but significant difference means that the Australian legislation is very different in scope to s.5 of the 1986 Act, which makes no mention of breach of the peace.

The question of whether behaviour is threatening, abusive or insulting in Australia and England is largely determined with reference to an objective test. Accordingly,

³⁹ As per the requirements of §194 StGB

⁴⁰ *Worcester v Smith* [1951] VLR 316

⁴¹ Douglas (n 3) 79

⁴² [1946] SASR 172

⁴³ *Sully v Loguch* (Unreported, NSWSC, Scully J, 12 Nov 1991) at 3; in Douglas (n 3) 81

⁴⁴ Douglas (n 3) 85

⁴⁵ (1932) 32 SR (NSW) 499

the statutes provide only a skeletal outline of the type of behaviour that constitutes prohibited activity. By way of illustration, the decision in *People v Pearson*⁴⁶, determined in the state of New York, saw the defendants convicted of disorderly conduct for acting as lookouts for a pickpocket⁴⁷. It was held that where a statute provides a specified list of acts, the commission of one of those acts is an essential element of the offence. In a disorderly conduct statute, where there is a list of prohibited conduct, that list will be a closed one.

The New York Penal Code lists seven different proscribed activities by which the offence of disorderly conduct can be committed. This is not atypical of other States⁴⁸, and is in keeping with §250.2 of the MPC⁴⁹. It was held in *People v Perkins*⁵⁰, that even variations of these will not be sufficient to make out the offence if at least one of the elements listed within the statute is not present. This contrasts sharply with the situation in England, Australia and German whereby the prohibited conduct is given a much less comprehensive definition, allowing both police and prosecutors more flexibility.

When examining the scope of conduct, there is a further limit upon disorderly conduct within a US context. *W.L. v State*⁵¹ held that the conduct of the defendant had to include more than pure speech for it to be punishable, even if the speech is abusive or offensive. This outright protection afforded by the First Amendment is a key difference to the other jurisdictions. The undoubted influence of First Amendment jurisprudence upon disorderly conduct statutes is significant⁵² and will be further explored in chapters four and five of this thesis. It is sufficient at this point to note that the First Amendment places significant limitations upon the type of words and expression that can be proscribed within disorderly conduct provisions.

⁴⁶ 188 Misc 744 69 NYS2d 242 (Spec Sess 1947)

⁴⁷ The offence has now been downgraded from a misdemeanour in the state of New York and is now a violation contrary to §240.20 NY Penal Code. The decision of the Court in *People v Pearson* is still held to be good law.

⁴⁸ See, for example, Ohio Revised Code (§2917.11,2002)

⁴⁹ §250.2 (1) MPC actually has a matrix of six different types of proscribed courses of conduct

⁵⁰ 150 Misc 2d 543, 576 NYS.2d 750 (App Term 1990)

⁵¹ 769 So 2d 1132 (Fla Dist Ct App 3d Dist 2000)

⁵² See Chapter Five

Having broadly established the standard by which the requisite insulting behaviour is determined across the jurisdictions, this chapter will now examine the second stage of test the for the offence under s.5 of the 1986 Act, the requirement that the prohibited behaviour should cause harassment, alarm or distress. Once this requirement is deconstructed, the discussion will then seek to critically evaluate the extent to which the other jurisdictions impose similar regulation.

Harassment, Alarm or Distress

Offensive conduct is often mentioned within the legislation in the other three jurisdictions. Peculiar to the English Public Order Act 1986 is the requirement that the offensive conduct iteratively has the potential to cause harassment, alarm or distress. Consequently, it is necessary to examine the case law to fathom the appropriate interpretations placed upon these words by the courts. In *Chambers v DPP*⁵³, two defendants were convicted under s.5 of harassing a surveyor by disrupting the beam on his theodolite. The prosecution for conduct that, “*caused ‘inconvenience and annoyance’ illustrates the potential breadth of this term.*”⁵⁴ As with the term disorderly conduct mentioned above, whether a person is likely to be caused harassment, alarm or distress is, ultimately, to be determined by the finders of fact in a trial and will inevitably pivot on the individual circumstances of the case.

The decision in *Chambers* is illustrative of the manner in which public order law has developed within England and Wales. If one brings disorderly conduct into consideration, there are four, presumably distinct, categories of reaction that the threatening, insulting or abusive behaviour may engender within anyone in hearing or sight. One approach suggested⁵⁵ is that the terms should not be read disjunctively. In *R(R) v DPP*⁵⁶, the Divisional Court said of “distress”:

“It is part of a trio of words, harassment, alarm or distress. They are expressed as alternatives, but in combination they give a sense of the mischief which the section is aimed at preventing... The statute does not attempt to define the

⁵³ [1995] Crim LR 896 DC

⁵⁴ Card (n 36) 136

⁵⁵ Thornton (n 7) 40

⁵⁶ [2006] EWHC 1375

*degree (of distress) required. It does not have to be grave but nor should the requirement be trivialized.*⁵⁷

Public Disturbance: The American Dimension

No other legal system has this requirement for the conduct to either actually cause harassment, alarm or distress or be likely to do so⁵⁸. In the US, it was held in *Startzell v City of Philadelphia*⁵⁹, that the clear focus of the law relating to disorderly conduct is whether a person's words or acts cause or unjustifiably risk a public disturbance⁶⁰. In addition, the so-called 'fighting words' doctrine as first established in *Chaplinsky v New Hampshire*⁶¹ can be implied in the *actus reus* of disorderly conduct. As will be further discussed in chapter five⁶², the US Supreme Court held in *Chaplinsky* that insulting or fighting words were those, which by their very utterance inflict injury or tend to incite an immediate breach of the peace. The test laid down in *Chaplinsky*, and affirmed in *City of Garfield Heights v Yaro*⁶³, was an objective one as to whether the words used would reasonably incite the average person to retaliate⁶⁴.

As with the Australian provisions⁶⁵, in spite of establishing what would appear to be an objective test in relation to the scope of the prohibited conduct, it is also clear that the *circumstances* or context of the relevant act or conduct will also play a significant part in the court deciding that the behaviour is a threat to public order as was held in *City of Minneapolis v Lynch*⁶⁶ and also *City of Fort Scott v Arbuckle*⁶⁷.

From a German perspective, when considering the offence under §118 OWiG⁶⁸, the position is very similar to that outlined in respect of the US position. Göhler points out in his commentary to the OWiG that the prohibited action must interfere

⁵⁷ *ibid* [6]

⁵⁸ As per Public Order Act 1986 s 5(1)

⁵⁹ Pa CA 3 (Pa) 2008, 533 F 3d 183

⁶⁰ MPC §250.2, Westlaw topic no. 129 Explanatory note at para 6

⁶¹ 315 U.S.568 (1942)

⁶² See p 171-180

⁶³ 1999 WL 1084255 (Ohio App 8 Dist)

⁶⁴ *ibid* [4]

⁶⁵ *Gebert v Innoncenzi* [1946] SASR 172

⁶⁶ 392 NW 2d 700 (Minn Ct App 1986)

⁶⁷ 164 Kan 49, 187 P2d 348 (1947)

⁶⁸ See p 59-63

with the set of written and unwritten norms that are essential for an orderly functioning society⁶⁹. Yet again, those norms will be heavily dependent upon the context of the action and will, accordingly, vary as the individual facts of the case vary.

Expanding the scope of the Conduct: Internet & Stalking Issues

In relation to s.4A of the 1986 Act within England and Wales, the prohibited conduct must not only be *likely* to cause harassment, alarm or distress, but must *actually* cause a person to be so affected. The case of *S v DPP*⁷⁰, illustrates that there must be some form of causal nexus between the conduct of the accused and the effect it has upon the “victim”. The appellant, (S) was an animal rights activist, protesting at a laboratory during which time he took a digital photograph of a security guard. S then transferred this image to the protestor’s website, and added an offensive cartoon style message on the photograph with accompanying text which falsely implied that the security guard had previous convictions for violence offences. The security guard did not view the material until some five months later when he suffered harassment, alarm or distress. S was arrested, charged and subsequently convicted under s.4A of the 1986 Act. The Administrative Court found that, but for the actions of the appellant in this case, the security guard would not have suffered harassment, alarm or distress, and as such the intervening acts of the police officers, in showing the victim the offending picture, had not broken the chain of causation. By examining the issue of breaking the chain of causation, *S v DPP* crystallizes the issues in relation to the delay between the display of an image and the suffering of harassment, alarm or distress by the victim

Perhaps more critical for the wider research question, *S v DPP* demonstrates the chameleon-like ability of the Public Order Act 1986 to deal with situations that must have been outside the contemplation of the original framers of the legislation. The Internet and related technological developments have placed a singular pressure upon judicial interpretation of certain statutes. In the judgment

⁶⁹ Göher (n 13) 4

⁷⁰ [2008] EWHC 438 (Admin)

the Divisional Court endorsed the views of the District Judge who, at first instance, stated that,

*“Any person who posts material on the Internet puts that material within the public ambit, and this was the event which caused the eventual harassment, alarm or distress.”*⁷¹

Examining the issue of causation, *Chappell v DPP*⁷², pre-dated the enactment of s.4A of the 1986 Act and instead relied on a prosecution under s.5 of the 1986 Act. In *Chappell*, the female complainant had received a number of letters through the post, which the court found were threatening and abusive. At first instance, Chappell was convicted under s.5(1) of the 1986 Act which provides, *inter alia* that a person will commit an offence if he uses threatening, abusive or insulting words within the sight or hearing of a person likely to be caused harassment, alarm or distress. The Divisional Court allowed the subsequent appeal by way of case stated. The Court held that the words, sent within an envelope, was not a display of words within the terms of s.5(1)(b) and the fact that the letter was opened without Chappell being present meant that his words or behaviour was not being used within the hearing or sight of the complainant⁷³.

Therefore, while the courts in *Chappell*⁷⁴ and *S v DPP*⁷⁵ reached different conclusions, they did so because of the different requirements in respect of the chain of causation. Maurice Kay LJ, in *S*⁷⁶ stated that there is a significant difference between s.5 and s.4A of the 1986 Act: s.5 specifically required the display of threatening, abusive or insulting material to be “within the hearing or sight” of a person likely to be caused harassment, alarm or distress. His Lordship was moved to speculate, perhaps somewhat optimistically:

⁷¹ *ibid* [para 13]

⁷² (1989) 89 Cr App R 82

⁷³ Under present English law it may be that Chappell would now be prosecuted for pursuing a course of conduct which amounts to the harassment of another under the Protection from Harassment Act 1997, s 1(1)(a)

⁷⁴ *Chappell v DPP* (1989) 89 Cr App R 82

⁷⁵ *S v DDP* [2008] EWHC 438 (Admin)

⁷⁶ *ibid* [12]

*“That the removal of the “sight and sound” requirement was conditioned by an appreciation of the problems created by the posting of offensive material on websites.”*⁷⁷

It may be that the finding of the court in *S v DPP* can be viewed as providing a foundation for future internet-related public order cases. In the judgment, the court provides a hypothetical analogue to illustrate the way in which the law should apply. The example given is of “a pervert” who posts an altered image of an identifiable woman on to a website, “falsely representing her in circumstances of indecency”⁷⁸. Police, as the result of an unrelated investigation, then discover this image and show it to the woman. Providing that the accused had the requisite intent (and, as a result of putting the image into the public ambit, the woman suffers profound distress) their Lordships suggested that the person could be convicted under s.4A of the 1986 Act. Walker J augments the line of reasoning postulating that the posting of material on the Internet with the necessary intent would in all likelihood result in an individual being guilty of an offence even if the person had simply been told of the image, rather than being shown the image as happened in this case⁷⁹.

Speaking on the issue of causation, in *S v DPP*, Counsel for the appellant sought to raise an additional question in relation to the question of intent. In terms of s.4A of the 1986 Act, intention to cause harassment as specified in s.4A(1) appears to limit the scope of the offence to a purposive intention⁸⁰ rather than a wider intention based upon the likely risk perceived by the accused. Maurice Kay LJ stated that there were insuperable procedural difficulties that prohibited the

⁷⁷ *ibid* [12]

⁷⁸ *ibid* [13]

⁷⁹ *ibid* [15]

⁸⁰ The law surrounding intention and the meaning of purposive (or direct) intent as opposed to the wider definition of intent has amassed a considerable amount of case law. The starting point is *R v Mohan* [1975] All ER 193 which held that intent should be regarded as being the accused’s purpose. *R v Hancock* [1986] A.C. 455 HL, *R v Nedrick* [1986] 1 WLR 1025 (CA (Crim Div)) and *R v Woollin* [1998] 4 All ER 103, HL all discussed the wider concept of intent as coming from the foresight of the result of consequences being a ‘virtual certainty’. For further discussion on this highly involved and contentious area of criminal law see Cathleen Kaveny, “Inferring intention from foresight” (2004) 120 LQR 81; and for conceptual issues with the definitional framework surrounding intent see Alan Norrie “Between orthodox subjectivism and moral contextualism: intention and the consultation paper” [2006] Crim LR 486; Also see David Ormerod, *Smith & Hogan Criminal Law* (12th Edn, OUP 2008) 385-393

consideration of such a question⁸¹ and even if the appellant had managed to surmount the procedural difficulties, the intention of the appellant would be inferred due to the evidence of the taking of the photograph, the surrounding text and the placing of it on a freely accessible website⁸².

The issues arising in *S* and *Chappell* are peculiar to the English iteration of low-level public order and reemphasize the ‘catch-all’ nature of the offence. The MPC has incorporated a specific offence within Article 250 of Harassment. The Code states:

*“A person commits a petty misdemeanor if, with purpose to harass another he:
Makes a telephone call without the purpose of legitimate communication; or*

Insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or

Makes repeated communications anonymously or at extremely inconvenient hours or in offensively coarse language; or

Subjects another to offensive touching; or

Engages in any other course of alarming conduct serving no legitimate purpose of the actor.”⁸³

This provision was designed to deal with “*disorderly, anti-social or environmentally destructive behaviour that occurs in non-public areas*”⁸⁴. This provision can be compared with the provisions of the Protection from Harassment Act 1997 which provides that a person must not pursue a course of conduct which amounts to harassment of another⁸⁵ and which he knows amounts to harassment of another⁸⁶. The purpose of the 1997 Act was prompted by media concerns about

⁸¹ Specifically, this was not an issue that the District Judge at first instance had been asked to concentrate upon and no application had been made to remit the case to the District Judge for amendment.

⁸² [2008] EWHC 438 (Admin) [7]

⁸³ §250.4 MPC

⁸⁴ Uniform Laws Annotated, Model Penal Code (Refs and Annos) Part II Definition of Specific Crimes, §250.4 at 1

⁸⁵ Protection from Harassment Act 1997 s 1(1)(a)

⁸⁶ Protection from Harassment Act 1997 s 1(1)(b)

stalking and is designed to address persistent harassment by an obsessive individual⁸⁷.

§250.4 is designed to be broader ranging. It was held in *Rosiak v Melvin*, a case that involved the continued harassment of the victim by her ex-husband⁸⁸, that the statute was broad enough to cover obsessive behaviour following relationship breakdowns and any subsequent domestic violence. As with the 1997 Act, there are some elements (such as §250.4(3) requirement of making repeated anonymous communications) that require a course of conduct⁸⁹. *State v. Berka*⁹⁰, involved a protracted dispute between the victim and the new partner of his ex-wife. The court held that it was sufficient to have purposeful conduct designed to harass by subjecting the victim to a threat. This criteria, approved in *Pazienza v Camarata*⁹¹, means that the scope of §250.4 is broader than the offence under 1997 (although broadly designed to counter the same mischief) but more focused than an offence under either s.4A or s.5 of the 1986 Act.

The offences under §250.4, and indeed under s.1 of the 1997 Act, illustrate the way in which low-level public order can bleed into more serious offences. There is a good deal of overlap between this type of offence and the more sinister phenomenon of stalking. Within Australia⁹² and Germany the scope of both of the offences mentioned above would lie within the sphere of the wider criminal law. In terms of the StGB, the relevant offence of stalking is found under §238 StGB. The offence lists a series of activities that the defendant must commit, with liability arising if the activities seriously infringe the lifestyle of the victim⁹³. §238 specifically requires the victim to complain about the stalking unless the prosecutors believe prosecution is in the public interest⁹⁴. It is not the purpose of this thesis to embark on a discussion of the law relating to stalking and harassment⁹⁵. What this section has served to illustrate is the breadth of the

⁸⁷ Card (n 36) 63

⁸⁸ NJ Super Ch 2002, 798 A2d 156, 351 NJ Super 322

⁸⁹ 702 A2d 570 Pa Super 1997

⁹⁰ 211 NJ Super 717, 512 A2d 592 NJ Super L, 1986

⁹¹ 381 NJ Super 173, 885 A2d 455 NJ Super A D, 2005

⁹² See for example QLD Criminal Code, Chapter 33A s 359A-359F

⁹³ §238 (1) StGB

⁹⁴ §238 (4) StGB

⁹⁵ For a discussion on this specialized area please see Paul Infield, & Graham Platford, *The Law of Harassment and Stalking* (Tottel Publishing 2000)

activity that English low-level public order legislation, particularly s.4A and s.5 of the 1986 Act, has been used to cover.

The Location of the Offence: Public or Private Disorder

The essential conduct elements that go to make up the prohibited conduct of the offence under s.5 of the 1986 Act provide a broad range of prohibited conduct. The inquiry will now examine one of the other key *actus reus* requirements of the offence; the locations where an offence can be committed. In constructing any evaluative commentary on low-level public order, one of the key desiderata will be establishing the range of locations where such low-level public order offences can be committed.

S.5(2) of the 1986 Act states, *inter alia*, that an offence may be committed in a public or private place, except that no offence is committed where the words or behaviour are used by a person inside a dwelling and the other person is also inside that or another dwelling. One of the specific defences⁹⁶ states that it is a defence for the accused to prove he was inside a dwelling and had no reason to believe that the words or behaviour would be heard or seen by a person outside that dwelling.

These twin provisions are common to s.4, s.4A and s.5 of the 1986 Act⁹⁷ and were intended to exclude domestic disputes from the ambit of the Act⁹⁸. In *Chappell v DPP*⁹⁹, it was stated that the offences under s.4 and s.5 of the 1986 Act were clearly designed to have a requisite public element. Potter J went on to state:

“Subsection (2) of each section, whilst providing that an offence may take place in a public or private place, makes clear the intention to exclude conduct taking place within a dwelling house and having its effect solely on another person within that dwelling or another dwelling. Thus a person yelling or gesturing to persons in the street from the confines of his own house might commit an offence in relation

⁹⁶ Public Order Act 1986, s 5(3)(b)

⁹⁷ Specifically s 4(2), s 4A(2) and s 5(2)

⁹⁸ Card (n 36) 125

⁹⁹ (1989) 89 Cr App R 82

*to the persons in the street, but would not commit an offence vis-à-vis another person within his own house or a neighbouring house across the street.”*¹⁰⁰

For the purposes of s.5(2)¹⁰¹, a dwelling is defined in s.8 of the 1986 Act and covers any structure or part of a structure occupied as a person’s home or as any other living accommodation. Clearly, it will be fundamental to engaging the defence under s.5(3)(b) to establish that one was within a dwelling and it is unsurprising that courts have been asked on occasions to provide guidance as to the proper interpretation of s.8 of the 1986 Act.

In *Rukwira, Rukwira, Mosoke and Johnson v DPP*¹⁰², the defendants became involved in a fracas on the landing in a council block of flats. Access to this landing was controlled by means of an entry phone system. The Divisional Court held that the landing was a means of access to the living accommodation but they were not part of the structure that was occupied, as a person’s home, and were not part of the dwelling itself. Furthermore, they could not be described as other living accommodation because the dweller lived inward of the front door and not out on to the communal landing.

The question of whether a communal laundry room could be described as part of a structure that is occupied as part of an appellant’s home was discussed in *Le Vine v DPP*¹⁰³. It was held that the laundry room was a communal room, open to a number of individuals within the building and while this may be only those who are in the flats or those who are connected with people who live in the flats, nevertheless, it is sufficient not to be classed as a dwelling even though access may only be available to a small section of the public. Elias LJ, giving the judgment, went on to state that the intention of the Act was clearly to exclude disputes in people’s homes but not otherwise, and accordingly the communal laundry was not a dwelling for the purposes of s.8 of the 1986 Act¹⁰⁴.

¹⁰⁰ *Ibid* [89]

¹⁰¹ This is equally as applicable for s 4(2) and s 4A(2) of the 1986 Act

¹⁰² (1994) 158 JP 65; [1993] Crim LR 882; (1993) 157 JPN 709; Times June 29 1993 DC

¹⁰³ [2010] EWHC 1128 Admin, 2010 WL 1639693

¹⁰⁴ *Ibid* [7]

The restrictions imposed by s.5(2) and s.8 would appear to be both a significant and wholly necessary limitation. One only has to imagine the words said in the privacy of a dwelling that may well cause harassment, alarm or distress. By limiting the scope of s.8 the courts expand the scope of the overall offence. That the courts are defining the parameters of the location that s.5 can be committed might, at first sight, appear to be a natural development of legislation. The omission of locations such as communal stairwells and facilities within shared accommodation from the initial drafting of the bill now seems somewhat egregious.

A revealing aspect of the operation of s.5 of the 1986 Act within English law is the way in which it treats behaviour in a police station. A further examination of the authorities on the relationship between s.5(2) and s.8 leads on to the case of *R v CF*¹⁰⁵. In *CF* the accused was in police custody, and whilst in a police cell, she allegedly made a racially obscene remark to one of the police officers entering the cell. She was charged with intending to cause racially aggravated harassment, alarm or distress contrary to s.31(1)(b) of the Crime and Disorder Act 1998¹⁰⁶.

The question on appeal was as to whether the police cell could fall within the category of “*other living accommodation*”. Moses LJ stated that the offence under s.4A of the 1986 Act is not limited to public places and the locations where a person may indulge in the activities prohibited is to be construed narrowly. A police cell is a place where a person is detained in custody and as such not a home nor was it “*other accommodation where a person lives*” even though someone detained in a police cell may, from time to time, do the same things as they do in their own home or in the place where they live.

At the start of his judgment in *CF*, Moses LJ bemoaned the lack of case law on the issue of whether a police cell could have fallen within the exception of s.4(2). It is surprising that this has not occurred before, given the often heated and confrontational nature of the police station environment. Whether the court was correct in stating that there was no reasonable argument to the contrary that a

¹⁰⁵ [2006] EWCA Crim 3323; [2007] 1 WLR 1021

¹⁰⁶ See p 90 for the operation of racially aggravated offences.

police cell was not “other living accommodation” is somewhat questionable. The decision of the court might well have been different if, for example, that particular police cell was not being used as a place of police detention but as an overflow for the prison service and essentially functioning as a prison cell. In such circumstances, it is conceivable that a prison cell would fall within the ambit of s.8 and, as such, engages the protection from prosecution provided to dwellings.

Location requirements within the other jurisdictions

Manifestly, the location of the offence is a key requirement of disorderly conduct in relation to the other jurisdictions as well as being covered within the Public Order Act¹⁰⁷. Both the Model Penal Code within the USA¹⁰⁸ and the various disorderly conduct provisions within Australia tend to incorporate a specific requirement that the prohibited behaviour occurs in a public place¹⁰⁹. The positioning of disorderly conduct offences within the *Polizeiverordnung*¹¹⁰ made by each Bundeslaender provides an inherently public dimension to the public order offences.

The locational issues outlined above are by no means exclusive to the English public order experience. Within the other jurisdictions the location appears to be a feature of the actus reus, whereas in England, this is dealt with as part of a specific defence under the 1986 Act¹¹¹. Therefore, whilst consideration of the other three jurisdictions may seem a lacuna from this section, it is argued that consideration of these elements sit more properly with the discussion on the ways in which to refute a low-level public order offence in Chapter Four¹¹².

Cross Jurisdictional (and not only American) Graffiti

In addition to indulging in the prohibited conduct which results in harassment, alarm or distress being likely, s.5(1)(b) of the 1986 Act also makes it an offence to “*display any writing, sign or other visible representation which is threatening, abusive or insulting*”. This covers activity ranging from the writing of graffiti on the

¹⁰⁷ See Chapter Four at p 127 for a discussion on the operation of this defence that operates under s 5 (3)(a) of the 1986 Act.

¹⁰⁸ MPC §250.2

¹⁰⁹ Summary Offences Act 2005 (Qld), s 6 and Summary Offences Act 1998 (Vic) s 4

¹¹⁰ These are actually *Polizeiliche Umweltschutz-Verordnung* (Police Environmental Regulations) passed under §10 (1) Police Act 1992

¹¹¹ S 5(3)(b) of the 1986 Act see above at 85

¹¹² See p 121-114

wall¹¹³ through to holding up a sign or a placard¹¹⁴. This aspect of the offence is another throwback to the offence under s.5 of the 1936 Act but has significant resonance when one comes on to discuss this offence in relation to protest and the potential chilling effect upon freedom of expression¹¹⁵.

Utilizing low-level public order measures to combat graffiti is not unique to the English legal system. The offence of *Belästigung der Allgemeinheit*, under §118 OWiG has also been used on occasions in attempting to combat graffiti artists¹¹⁶. In this sense, it can be seen that §118 OWiG encompasses activity every bit as broad as s.5 of the 1986 Act. More significant is the existence of the local ordinances (*Polizeiverordnung*), which deal with graffiti as a specific, environmental issue¹¹⁷ and the use of the Anti Social Behaviour Act 2003 within England to punish those who chose to graffiti. In respect of disorderly conduct within the various States in the USA and Australia, graffiti tends to be regarded as a particular form of anti social behaviour, with a close inter-relationship with artistic expression and an urban identity that lends itself to a form of community-based restorative justice¹¹⁸.

It is germane to note other tangential offences and activities which could fall within disorderly conduct provisions, but which are dealt with by bespoke statutes. In Germany, §126 StGB provides for the criminal offence of breach of the public peace by threatening to commit offences. This offence details a closed list of various offences that threaten the wider public safety. There is no direct analogue between this specific offence and those in the other jurisdictions although either §116 OWiG or §126 StGB would comfortably fall within s.5 of the 1986 Act. It is more likely that such activity prohibited by §126 StGB would be dealt with by other

¹¹³ Card (n 37) 123 states that there is no provision either within or without the 1986 Act which requires the owner of a property to remove graffiti. Though it is speculated that if a person has abusive graffiti on his car and he drives it from his home to a populous area then there may be an offence under s 5(1)(b) of the 1986 Act.

¹¹⁴ *Hammond v DPP* [2004] EWHC 69 (Admin); (2004) 168 JP 93

¹¹⁵ For further details see Chapter Five

¹¹⁶ Störmer, R., *Renaissance der öffentlichen Ordnung, Die Verwaltung*, 1997 quoted in Bornschein, J., *Themenhausarbeit im Polizei- und Ordnungsrecht*, Universität Hamburg, Fakultät für Rechtswissenschaft (GRIN publishers, 2003)) 16

¹¹⁷ See, for example, City of Brackenheim Polizeiliche Umweltschutz-Verordnung §14(1)

¹¹⁸ For a more detailed discussion on graffiti see Ian Edwards, "Banksy's graffiti: a not so simple case of criminal damage?" (2009) 73 J Crim L 345 and for the wider cultural and criminological significance of graffiti as a peculiarly urban phenomenon see Andrew Millie, "Anti-social behaviour, behavioural expectations and an urban aesthetic" (2008) 48(3) Brit J Criminol 379

specific offences such as communicating a bomb hoax¹¹⁹ or that of sending, by a public communications network, a message that is grossly offensive, indecent, obscene or menacing¹²⁰. In a US context, the offence of bomb hoax amongst most States is treated as a felony offence¹²¹ and in Australia it also attracts specific legislative response (as opposed to a general criminal provision¹²²). Therefore while this offence, and indeed this activity, comes within the StGB provisions on public order, they do not come within the purview of this enquiry.

Racially Aggravated Public Order

It is inevitable that any examination of low-level public order is going to include analysis on the way in which public order intersects the issue of hate speech within the various jurisdictions. When examining racist speech within a public order context, in *Wisconsin v Mitchell*¹²³, the US Supreme Court has recognized the inherent threat to public order:

*“(bias inspired) conduct is thought to inflict greater individual and societal harm. For example, according to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims and incite community unrest...As Blackstone said long ago, it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of public safety and happiness.”*¹²⁴

The above case was an unsuccessful appeal against the provisions of a Wisconsin statute, which, *inter alia*, provided for an enhanced sentence where the defendant intentionally selected his victim on account of the victim’s race¹²⁵. In one form or another, all of the jurisdictions under discussion have legislation in

¹¹⁹ Criminal Law Act 1977 s 51

¹²⁰ Communications Act 2003 s 127

¹²¹ Massachusetts, 269 MGL §14

¹²² s. 90A(2)(c) WA Police Act 1892

¹²³ 508 U.S. 476 (1993)

¹²⁴ *ibid* [487-8] (per Chief Justice Rehnquist)

¹²⁵ For a more detailed analysis of the inter-relationship between the First Amendment of the US Constitution and the punishment of offensive thought, see Donald Altschiller, *Hate Crimes: A Reference Handbook (Contemporary World Issues)* (2nd Edn, ABC-CLIO 2005)

place that seeks to protect certain minority groups “*in the face of long standing and disproportionate problems of prejudice related crime*”¹²⁶.

Dealing with a legacy: US Approaches to Hate Crimes

The US legislative approach to dealing with racially aggravated offences can be traced back to 1964, and the creation of the federal crime under 18 U.S.C. § 245 prohibiting intimidation, interference or injury being used to discourage an individual’s participation in voting, employment, or attending school. On a State level, 46 out of the 50 States¹²⁷ have some form of augmented, penalty enhancement¹²⁸, which provides for an increased sentence on a pre-existing offence that has racially aggravated elements. For example, §422.7 California Penal Code adds a potential term of imprisonment to any offences that are not otherwise imprisonable, where the crime committed is classed as a hate crime. In relation to the commission of low level public order offences, §485.10 (2) New York Hate Crimes Act 2000 states that when a person is convicted of a hate crime and the specified offence is a misdemeanour or a class C, D or E felony, the hate crime shall be deemed to be one category higher than the specified offence the defendant committed.

In a comprehensive assessment on hate crimes and their impact in Australia, Mason¹²⁹ has identified there are a mixture of approaches that have been adopted by various States. Western Australia introduced an additional maximum penalty for offences committed in circumstances of racial aggravation¹³⁰. New South Wales, by means of s.21A Crimes (Sentencing Procedure) Act 1999 reacted accordingly and¹³¹ Victoria and Northern Territories have used augmented

¹²⁶ Gail Mason, “Hate Crime Laws in Australia: Are they achieving their goals?” National Judicial Collage of Australia, Sentencing Conference Feb 2010 accessed at <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2010/Sentencing%202010/Papers/Mason.pdf> at p 4

¹²⁷ Anti-Defamation League, *State Hate Crime Law* survey conducted in 2006.

¹²⁸ According to Mason (n 126) 5-6 there are three distinct models of Hate Crime. The Penalty enhancement model imposes an additional maximum or minimum penalty on a pre-existing offence. The other models are the Sentence aggravation model which includes racial motivation as a factor to be considered at the time of sentencing. The final model is the creation of a specific crime based around prejudiced conduct and is known as the Substantive offence model.

¹²⁹ *Ibid* 6

¹³⁰ Criminal Code 1913 (WA), s 313

¹³¹ Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(h)

sentencing provisions, where race is established as an aggravating factor. Where the court finds a racial factor it is required to take it into account when sentencing, but the court is not compelled to increase the sentence.

Hate Crimes and The Augmented Section 5

The English legal system, prior to the inception of the Race Relations Act 1965, had no real effective measures designed to counter low level racist abuse¹³². Even the introduction of the offence of incitement to racial hatred did little to ameliorate the situation. It was not until the introduction of the provisions found in Part 3 of the Public Order Act 1986 that there was any substantial body of law governing all aspects of crimes *specifically designed* to inflame race relations. Nevertheless, there was still no legislative way of dealing with low-level abuse that could not realistically be said to be intended or likely to stir up racial hatred other than by means of s.5 or s.4A of the 1986 Act.

At the same time as the US Supreme Court reached the decision in *Wisconsin*, within England and Wales, there was an increase in incidents possessing a racial and religious element. This upsurge led to a media-driven outcry for the law to be toughened up on race crimes¹³³. The result in England was s.31 of the Crime and Disorder Act 1998, which provided for racially aggravated public order offences¹³⁴. Part 2 of the 1998 Crime and Disorder Act saw the introduction of racially aggravated offences which run in parallel to the basic offences of s.4, s.4A and s.5 of the Public Order Act 1986¹³⁵.

Within the English framework, the racially aggravated element of the offence, as defined in s.31(1)(c), sits on top of the basic s.5 offences and provides for greater punishment if the racially aggravated element is made out. S.28(1)(b) of the 1998 Act states that the offence is to be considered racially aggravated if the offence is

¹³² For a discussion on the development of the law surrounding racial offence within the English legal system see David Williams, "Racial incitement and public order law" [1996] Crim LR 320

¹³³ See Fernne Brennan, "Punishing Islamophobic hostility: are any lessons to be learned from racially hostile crimes" 8 (2003) J Civ Lib 28; For an overview on the subject of racially motivated attacks see Neil Chakraborti & Jon Garland, *Hate Crime: Impact, Causes and Responses* (Sage, 2009)

¹³⁴ For a discussion on the genesis of those provisions of the Crime and Disorder Act 1998 which relate to racially aggravated offences see Card (n 36) 158-160; see also Thornton (n 7) 74-76

¹³⁵ The provisions of the Crime and Disorder Act 1998 also extend to other low level offences such as common assault with a racially aggravated element; see *DPP v Pal* [2000] Crim LR 756

motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group. A racial group is held to mean a group of persons defined by reference to their race, colour, nationality/citizenship, or ethnic or national origins.¹³⁶ Despite the symbiotic nature of the s.31 of the 1998 Act, the racially aggravated offence is intended to be a public order offence in its own right and not simply s.5 of the Public Order Act 1986 with augmented sentencing powers¹³⁷.

Indeed, the recent English case law regarding racially aggravated public order shows an increasing willingness by the courts to broaden the ambit of behaviour that comes within this offence. This is in keeping with the broad pattern of the case law as regards the general provision under s.5. Two cases, whose appeals to the High Court ran almost concurrently, *Johnson v DPP*¹³⁸ and *DPP v Howard*¹³⁹, raised the question as to what extent racial motivation should be taken into account when considering low level public order offences and situations where race may be a factor, but not the significant driving factor, behind the hostility of an individual towards the victim. The court stated that it did not matter whether the appellant's behaviour was motivated partly by racial hostility and partly by other forms of animosity or hostility¹⁴⁰. The effect of s.28 of the 1998 Act is that it is sufficient if, in using the words in question, the hostility demonstrated by the appellant is based in part on the victim's membership or presumed membership of a racial group.

One of the most significant facets of both of these cases is the extent to which the motivation behind the commission of the offence under s.28(1)(b) is intrinsic to the legislation¹⁴¹. This approach is not something that sits comfortably with traditional criminal law doctrine¹⁴². The approach of those either drafting or interpreting the

¹³⁶ Crime and Disorder Act 1998, s 28(4)

¹³⁷ *R v Bridger* [2006] EWCA Crim 3169 reaffirms this.

¹³⁸ [2008] EWHC 509 (Admin); (2008) 105(10) LSG 27; Times, April 9, 2008

¹³⁹ [2008] EWHC 608 (Admin)

¹⁴⁰ In the case of *Johnson* the hostility was directed against the individual who was working as a traffic warden.

¹⁴¹ For a criminological exposition on the motivational element of racially aggravated offences see David Gadd, "Aggravating racism and elusive motivation" (2009) 49(6) *Brit J Criminol* 755

¹⁴² According to Jerome Hall "Hardly any part of penal law is more settled than that motive is irrelevant" quoted in Douglas N Husak "Motive and Criminal Liability" (1989) 8 *Crim Just Ethics* 3, 3

criminal law is to treat all motive, be it benign or malevolent, as being irrelevant to the liability of an accused for an offence (although it may well heavily influence the sentencing of the accused as s.82 of the 1998 Act explicitly states). The finding of the court in *Johnson*¹⁴³ provides some clarity and revivifies the necessary conduct required by s.28 of the 1998 Act. Where the defendant has an amalgam of motives that have an element of racial hostility, but intertwined with an enmity based on other extraneous factors, liability pursuant to s.28 will depend on the existence of some element of racial hostility directed by the accused towards the victim. This will even be the case where that hostility is combined with, subsidiary to, or diluted by other forms of hostility.

Hate Crimes in the German Jurisdiction

It is appropriate at this point to mention the German position in respect of racially biased crimes. There is no bespoke provision within the StGB or OWiG that expressly takes racial, religious or homophobic motivations on behalf of the defendant into account¹⁴⁴. Instead, the approach adopted by §46 StGB provides for augmented sentencing powers, specifically §46(2) StGB states that when sentencing the court shall weigh the circumstances in favour of, and against, the defendant.

These provisions allow for consideration to be given to the motives and aims of the offender. The lack of explicit provision as regards racial motivation has been criticized by human rights organizations¹⁴⁵ although, other than holding a symbolic significance, it is not clear what additional benefit would be gained by including racial motivation within §46(2) StGB when there is already a provision requiring sentencing to take motivation into account. Additionally, it should be noted that there are a number of provisions that provide for the offences of incitement to hatred, specifically §130(1) of the StGB, which provides that:

“Whoever, in a manner capable of disturbing the public peace:

¹⁴³ [2008] EWHC 509 (Admin)

¹⁴⁴ There is, however, provision to deal with Nazi symbols, see p 177 for details

¹⁴⁵ European Commission against Racism and Intolerance, "Fourth Report on Germany," CRI(2009)19, May 26, 2009, http://hudoc.ecri.coe.int/XML/Ecri/ENGLISH/Cycle_04/04_CbC_eng/DEU-CbC-IV-2009-019-ENG.pdf

Incites hatred against segments of the population or calls for violent or arbitrary measure against them; or
Assaults the human dignity of others by insulting, maliciously maligning or defaming segments of the population,
Shall be liable to imprisonment from three months to five years.”

§130 goes on to provide for offences of display and distribution of racially offensive material¹⁴⁶ and criminalizes the glorification of National Socialism¹⁴⁷. While there may not be bespoke, augmented sentencing provisions for biased based crimes, there is provision within the StGB to deal with racial incitement and the general sentencing provisions under §46 are more than adequate to deal with racially aggravated public order offences within the German legal system. Indeed, if one adopts the model of hate crime law proposed by Mason¹⁴⁸, there are clear grounds for suggesting that the provisions contained within the StGB come squarely within the substantive offence model¹⁴⁹.

Establishing the Scope of Prohibited Conduct: The Second Research Question

The foregoing conceptual analysis has provided the appropriate detail to augment the conceptual edifice that was created within Chapter Two. It has also drawn out some of the key issues relating to the breadth of behaviour prohibited within all of the legal systems under consideration. The overbroad nature of conduct permitted by s.5 of the 1986 Act is a central tenet of the research hypothesis. In seeking to establish the optimal pathways of behaviour, the inquiry has encompassed the variant modes of conduct that will attract liability, established the optimal impact of the low-level offences and furnished comparative standardizations in respect of racially aggravated behaviour within the orbit of a low-level public order offence. Fundamentally, the findings of this chapter demonstrate that s.5 is the broadest drafted of all of the criminal provisions and point towards the need for reform of the area.

¹⁴⁶ §130(2) StGB

¹⁴⁷ §130(3) and §130(4) StGB

¹⁴⁸ Mason (n 126) 6

¹⁴⁹ *ibid* 6

Section 5 and the low-level paradigm shift

The various *actus reus* provisions of the respective jurisdictions exhibit some fundamental areas of commonality. There appears to be a uniform requirement that the proscribed conduct has some impact on another person. Within this requirement, there is however a wide latitude of expectations amongst the jurisdictions. The broadest of all of these requirements is found within s.5 whereby all that is required is that the conduct occurs within the sight or hearing of someone who is likely be caused harassment, alarm or distress. There is no requirement that this conduct actually does cause any of these reactions. The corollary of this is that individual conduct may be criminalized where there has been no adverse effect or harm caused. All that will be required is a belief on the part of the police that the conduct would be “likely” to cause harassment, alarm or distress¹⁵⁰.

The lack of a victim is not without parallels and appears to make the offence under s.5 directly comparable to the range of behaviour that can be dealt with under §118 OWiG. This comparison is only partially accurate. The infractions dealt with under the German administrative provision are limited to minor elements of anti social behaviour such as urinating in the street and minor scuffles. If s.5 of the 1986 Act was limited to such incidents then the broadly drafted *actus reus* would be less of a cause for concern.¹⁵¹ Academic comment at the inception of the Public Order Act found that offences within s.5 should be relatively minor ones in their ambit.¹⁵² It will be shown later in this thesis that the scope of s.5 extends beyond mere anti social behaviour and into areas of protest. Therefore this chapter cannot be said to comprehensively answer the second research question. Nonetheless there has been a significant amount of case law concerning almost every aspect of the offences under s.4A and s.5 and as such this chapter provides a fundamental pillar of support to the hypothesis that s.5 is indeed overbroad and that much of the conduct prohibited could be dealt with by means of a non criminal, disorder management model.

¹⁵⁰ For discussion on the wider notion of harm and the lack of a victim within s 5 see p 278

¹⁵¹ Simester and Sullivan argue that criminalization for offensive conduct is compatible with the criminal law discussions surrounding the limits of the criminal law. See Andrew Simester, Robert Sullivan, John Spencer and Graham Virgo, *Criminal Law: Theory and Doctrine* (4th Edn, Hart 2010) 645

¹⁵² ATH Smith *Offences against Public Order* (Sweet & Maxwell, 1987) 116

The Australian legislation is generally focused towards behaviour in a public context and this excludes the disorderly provisions from considering such phenomenon as stalking and Internet bullying¹⁵³, accordingly, victims of cyber-bullying have little by way of legislative protection. The case of *S v DPP* would almost certainly not have fallen within the ambit of the Australian provisions. When considering the application of *S* within the German jurisdiction it can be speculated that whilst clearly falling outside §118 OWiG, the facts of *S* might give rise to a charge under §184 StGB.

The situation is more intricately balanced when looking at the US jurisdiction and the limitations imposed by the First Amendment. The behaviour element is much more focused on countering low-level violence and disorder. The adoption, by most States, of the Model Penal Code provision for disorderly conduct¹⁵⁴ means that the *actus reus* of US disorderly conduct provisions is focused towards fighting, “environmentally unfriendly behaviour” such as letting off stink bombs and “strewing garbage”¹⁵⁵. The prohibition of abusive words within the *actus reus* is contingent on the understanding that courts are predisposed to exclude “mere speech” from disorderly conduct¹⁵⁶. The exclusion of “fighting words” from First Amendment protection means that not all words are exempt from prosecution and this will be explored in the following chapters.

Consensus on Offence: Racial Aggravation and Low-Level Disorder

One area of unanimity amongst the jurisdictions is the provision, in one form or another, of additional sanctions for low-level behaviour that is racially motivated. Research undertaken within the Australian jurisdiction has highlighted that mild anti-social behaviour takes on a more severe dimension when it has a racial connotation possibly reinforcing feelings of persecution amongst minority

¹⁵³ See, for example, concerns relating to the phenomenon of cyber-bullying see the report “Regional Teens worried about internet bullying.” (11/05/11) <http://www.abc.net.au/news/stories/2011/05/11/3213470.htm> and the report by the Telstra foundation www.aph.gov.au/house/committee/jsc/subs/sub_14.pdf that highlights the lack of legislation to deal with such behaviour both accessed on 28th May 2011.

¹⁵⁴ MPC §250.2

¹⁵⁵ *Samaha* (n 8) 427

¹⁵⁶ *WL v State*, 769 So 2d 1132 (Fla Dist Ct App 3d Dist 2000)

communities¹⁵⁷. Examining the respective jurisdictions, there are common threads linking the low-level racially aggravated offences. Such provisions seek to expressly and publicly target crime that is motivated by or aggravated by prejudice and they do this by imposing heavier penalties to those available for non-aggravated offences¹⁵⁸ or, in the case of the German legal system, considering racial motivation as an aggravating factor when sentencing¹⁵⁹.

There has been considerable discussion of the locational requirement of the English offences. This is partly because, in seeking to draw out the optimal pathways, the English offence under s.5 has the broadest ambit of the criminal offences within the four jurisdictions and that the location element serves only to emphasize this unwarranted reach. The location of the offence is critical to the conceptual basis of the offence. The following example has been cited: “*The conduct of a football crowd at a football match would be considered disorderly if it were to be repeated in a theatre during a performance*”¹⁶⁰.

This analogy is incomplete and serves only partially to aid understanding of the dependency that disorderly conduct has upon the context in which it is committed. The situation is, in fact, a good deal more complex. It would be more accurate to say that the conduct of an individual at a football match may be considered disorderly if that individual were to repeat his or her behaviour whilst watching a certain play at a theatre¹⁶¹. In this offence, across all jurisdictions, the context of the offence is clearly of key importance to the chances of conviction.

Conclusion

The cross-jurisdictional ambit of this chapter illustrates how the police and prosecutors are predisposed to utilize low-level, disorderly conduct offences in a wide variety of circumstances. These provisions have the characteristics of a “*dragnet offence designed to catch all types of low-level anti-social behaviour*”¹⁶².

¹⁵⁷ Mason (n 126) 1-3

¹⁵⁸ Mason (n 126) 3

¹⁵⁹ §46(2) StGB

¹⁶⁰ Peter Tain & John Marston, *Public Order Offences* (Sweet & Maxwell 1995) 94

¹⁶¹ Interestingly, this point is made in almost exactly the same way by Douglas (n 3) 81

¹⁶² Thornton (n 7) 37

Yet Australia and Germany limit the application of these offences to situations where there is an overtly public dimension to the behaviour. Within The US the behaviour is not limited to violence, but there is a restriction on the words that can be prohibited by virtue of the First Amendment. In accordance with the research hypothesis, it is the offences at the lower level of the Public Order Act 1986 which cover the most significant breadth of behaviour.

In respect of s.5, the requirement of a partially objective test in respect of the behaviour being threatening, abusive, insulting and disorderly¹⁶³ is not unusual. Indeed, this is an approach common to all of the jurisdictions. There is, however, the imposition of a second element, to be determined by the finder of fact based on all the circumstances. That element requires the prohibited behaviour to have the potential to cause harassment, alarm or distress, and that is unique to s.5 of the 1986 Act. These terms cause two fundamental problems: First, they lack the obvious public dimension required within the other jurisdictions as was evidenced by the prosecution in *S v DPP*. Second, with the finder of fact determining the potential for harassment, alarm or distress, that question may not be resolved until the court reaches a verdict. This lack of certainty, one of the research questions designed to test the hypothesis of the flaws in s.5 will be examined within the next chapter.

¹⁶³ In *Chambers & Edwards v DPP* [1995] Crim LR 896 DC, Keene J stated that the word disorderly does not require any special interpretation beyond the ordinary meaning and that it was, ultimately, a question of fact for the trial court to determine

Chapter Four:

Certainty, Culpability and Defences

Introduction to Chapter Four

It is a central aspect of the research hypothesis underpinning this thesis that one of the fundamental flaws with s.5 of the 1986 Act is the vagueness and breadth of conduct that can be ascribed the stigma of criminality. The previous chapter explored the scope of prohibited conduct is extremely broad ranging. The issue of vagueness leads on to a fundamental difficulty as highlighted by Robinson and Grall:

“(A criminal code should) give citizens fair warning of what will constitute a crime, limit governmental discretion in determining whether a particular individual has violated the criminal law, and provide the distinctions among degrees of harm and degrees of culpability that create the foundation of a fair sentencing system.”¹

Although speaking about the wider criminal code, Robinson and Grall’s comments are particularly appropriate with regard to low-level public order. The adoption of a partially objective test, based on the circumstances of the case², to establish whether the behaviour of the defendant is threatening, abusive or insulting³ means that the accused will have to wait until the court has decided upon this as a *question of fact*⁴ before knowing definitively that his conduct has attracted criminal liability⁵. This test gives significant latitude to the governmental institutions responsible for both policing and prosecuting these offences. Such concerns have

¹ Paul Robinson & Jane A. Grall, “Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond” (1983) 35 Stan L Rev 681, 682

² see p 74

³ *Brutus v Cozens* [1972] 2 All ER 1297, HL

⁴ This test is applicable within Australian as well as English Law; Roger Douglas, *Dealing with Demonstrations* (Federation Press, 2004) 81

⁵ cf the approach of the court in *Percy v DPP* [2001] EWHC Admin 1125, [2002] to the approach in *Norwood v DPP* [2003] EWHC 1564 (Admin), Chapter Seven

given rise to the third research question underpinning this thesis and will be explored herein.

Considering the broad range and potentially unpredictable array of activities inviting liability, the first part of this chapter will seek to examine low-level public order legislation set alongside the requirement for certainty within the criminal law of the various legal systems. A related area of the inquiry is to conduct a comparative evaluation of the various mental elements required in each of the jurisdictions. This will provide another of the fundamental components of liability for low-level public order and logically segues into an examination of the different approaches to the defences of lawful justification or excuse. This is critical to establishing the way in which a person may be relieved of liability for a low-level public order offence.

An Uncertain Defence: Compounding the Problems with Section 5

Pursuant to the above inquiry, it is necessary to explore the ways in which an accused individual can seek to defend a charge of low-level public disorder. This is of particular importance given the wide scope and possible uncertainty of the prohibited conduct. Such an examination is contingent upon the premise that there are a number of different ways in which a defendant can seek to dispute such a charge⁶. Whilst each of the jurisdictions has slightly different procedures and principles, the taxonomy of these approaches remains fundamentally similar⁷. The accused can invoke a defence either excusing or justifying the conduct or claiming that it was involuntary⁸. In addition to these general defences the Public Order Act 1986 integrates specific defences within the various low-level provisions. These defences, unique to the English low-level provisions, mandate that the defendant acknowledges (or at least does not dispute) the commission of the *actus reus* with the appropriate *mens rea* but then seeks to assert one of the following: either he had no reason to believe that his conduct was within the sight or hearing of a person who might be caused harassment, alarm or distress⁹, or

⁶ This draws upon the discussions as to the nature and interplay of *actus reus* and *mens rea* as seen in Andrew Ashworth, *Principles of Criminal Law* (6th Edn, OUP 2009) 84

⁷ See E Colvin, "Exculpatory Defences in Criminal Law." (1990) 10 OJLS 381 for a discussion spanning the issues of defences at common law

⁸ David Ormerod, *Smith & Hogan Criminal Law* (12th Edn, OUP 2008) 321-379

⁹ Public Order Act 1986 s 5 (3) (a)

that the accused was in a dwelling and had no reason to believe that his conduct could be heard or seen by anyone outside that or any other dwelling¹⁰.

In addition, there is another defence available; that the conduct of the accused was reasonable¹¹. The defence of reasonableness is available for all low-level offences within the English Public Order Act¹². It is contended that the principal justification for conduct (as examined by the higher courts in England and Wales) would fall within this final defence. The defendant would maintain that any words, behaviour or disorderly conduct was part of a protest and as such, was inherently reasonable. The corollary of this argument is that to criminalize the prohibited conduct would violate the defendant's statutorily guaranteed rights to free expression¹³. The attempts by the respective judiciaries to grapple with the inherent tension between constitutional guarantees of freedom of expression and the regulation of low-level public order have been subject to much scrutiny and will be the focus of the next chapter. Often ignored in rights-based analyses of low-level public order¹⁴, the next stage of inquiry is to examine another constitutionally guaranteed provision, the requirement for certainty.

Desiring Certainty in Public Order Law

The principle of *nullum crimen, nulla poena sine lege*¹⁵ is embedded in various ways within all of the jurisdictions under consideration. The principle of certainty is closely related to the non-retroactivity principle. As Ashworth states, “a vague law may operate retroactively, since no one is quite sure whether given conduct is within or outside the rule”¹⁶. The English legal system has long recognized the principle of maximum certainty¹⁷, but this has been given further effect by the

¹⁰ Public Order Act 1986 s 5 (3) (b)

¹¹ Public Order Act 1986 s 5 (3) (c)

¹² Public Order Act 1986 s 5 (3) (c)

¹³ See p 12-14 for further details of the UK commitments under the European Convention on Human Rights and Fundamental Freedoms.

¹⁴ See, for example; Sophie Turenne, “The compatibility of criminal liability with freedom of expression” [2007] Crim LR 866 and David Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era*, (OUP 2010) 25- 57

¹⁵ Literally translated as meaning ‘no crime, no punishment without law’

¹⁶ Ashworth (n 6) 64

¹⁷ See for example *Phillips v Eyre* (1870) LR 6 QB 1, 23 which has an implicit statement that the courts will not interfere with the will of parliament and impose retrospectively where none has been provided for.

provisions found in Article 7 of the ECHR. Within the American legal system, the certainty requirement is to be found in the “*fair warning*” or “*void for vagueness*” principles¹⁸. Requirements of certainty within the German legal system are explicitly provided for by the principle of *Rechtssicherheit* and within the opening sections of both the OWiG and the StGB.¹⁹

Central to the research hypothesis and the resultant third research question is the notion that all of the jurisdictions under consideration recognize the need for not only certainty but also the requirement for predictability. Within the English legal system, Article 7 of the ECHR states, *inter alia*, that:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.”²⁰

In *Kokkinakis v Greece*²¹, the European Court of Human Rights (ECtHR) elucidated that Article 7 was particularly relevant to clarity, as an offence must be clearly defined in law so that the individual knows he is committing an offence²². Furthermore, *Gillan v UK* saw criticism of the granting of excessively arbitrary powers to the police²³. Indeed, in order to satisfy the wider convention requirement of “*prescribed by law*”²⁴ the state has to show that the relevant piece of legislation satisfies a “*quality of law*” test. The Strasbourg Court developed this in the case of *Sunday Times v UK*²⁵ where it was stated:

“(The citizen) must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case... he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”²⁶

¹⁸ Ashworth (n 6) 63 citing Article I of the US Constitution; see p 112 below

¹⁹ §1 StGB and §3 OWiG

²⁰ Article 7(1) ECHR

²¹ *Kokkinakis v Greece* (1994) 17 EHRR 397

²² *ibid* para [1]

²³ *Gillan v UK*, Application No. 4158/05, judgment 12.01.2010

²⁴ See, for example the provisions of Article 10(2) of the ECHR, which, *inter alia*, provides that a state can interfere with convention rights only when the limitations are prescribed by law. The same is true mutatis mutandis of Articles 8-12 of the ECHR.

²⁵ (1979) 2 EHRR 245

²⁶ *ibid* para [49]

English Approach to Certainty: A Dishonest Perspective

Difficulties surrounding the certainty of the English criminal law are by no means exclusive to low-level public order law. Dishonesty is a key *mens rea requirement* of the Theft Act 1968 but is only partially defined within that Act²⁷. The Court of Appeal in the case of *Ghosh*²⁸ provided a two-limbed test for dishonesty, with the first part comprising an objective element and the second part incorporating a subjective element. Critics have claimed that this test contravenes Article 7 of the ECHR. Despite considerable judicial activity in this area, these concerns have yet to be resolved²⁹.

Comparisons with the Theft Act 1968 highlight the potential uncertainty of the low level provisions of the Public Order Act 1986: the *actus reus* elements of theft³⁰ are not without vituperative criticism. The concept of “appropriation”³¹, in particular, has been given a very broad scope by the decisions in the cases of *Gomez*³² and *Hinks*³³. Within low-level public order law, there is an arguably more potent mixture of uncertainty. The uncertainty stems from the scope of prohibited activity, combined with the arbitrary powers granted to police. This points to concerns over the compatibility of s.4, s.4A and s.5 of the 1986 Act with Article 7 of the ECHR. These concerns have not been addressed within the body of case law surrounding the Act³⁴.

The first area of uncertainty for a defendant is whether his conduct will be threatening, abusive or insulting and is determined as a matter of fact³⁵. Additionally, whether the outcome of the behaviour is likely to cause harassment,

²⁷ Theft Act 1968, s 2(1) provides for three cases where an appropriation of property belonging to another will not be dishonest; if the accused (i) believes in a legal right to the appropriated property, (ii) belief that the owner of the property would have consented to the appropriation and (iii) a belief that the owner of the property cannot be traced.

²⁸ [1982] 2 All ER 689

²⁹ See Alan Reed & Ben Fitzpatrick, *Criminal Law* (3rd Edn, Thomson 2006) 454, fn 62

³⁰ Provided by s 3, s 4 and s 5 of the Theft Act 1968 respectively

³¹ Theft Act 1968 s 3

³² *R v Gomez* [1993] AC 442, HL, [1993] Crim LR 304. See also Simon Cooper, & Michael Allen, “Appropriation after Gomez” (1993) 57 J Crim Law 186

³³ *R v Hinks* [2000] 4 All ER 833, [2001] Crim LR 162; Stephen Shute, “Appropriation and the Law of Theft” [2002] Crim LR 445

³⁴ Theft is not the only area where there has been such criticism. The law surrounding Gross negligence manslaughter has attracted significant debate. See for further details Glenys Williams, “Duty of Care in ‘Drugs cases’: *R v Evans*” [2009] Crim LR 631

³⁵ *Brutus v Cozens* [1972] 2 All ER 1297, HL

alarm or distress is also determined based on all of the circumstances³⁶. All of the elements of the offence with reference to the defendant's behaviour under s.5 are not definitively established until the trial. The concerns of certainty are not so severe in relation to the outcome elements of the offences of s.4 and s.4A whereby a victim, or at least a witness, can attest to the results of the behaviour.

The Australian legal system, despite operating within a federal, supreme constitution, shares many common characteristics with that of the English legal system³⁷. It is therefore not surprising that within the Australian jurisdiction, the approach of the states mirrors that of England. As Douglas states:

*"To prove disorderly conduct, all that need be proved is the defendant intentionally engaged in acts which viewed objectively, constituted disorderly behaviour."*³⁸

Nonetheless, of all jurisdictions under consideration, it is the Australian that has the least dogmatic position in respect of certainty³⁹. The Australian criminal and summary codes have attempted to provide clarity and replace the common law provisions with either fully codified criminal law or comprehensive statutory provisions⁴⁰. When examining the case of *Coleman v Power*⁴¹, the Australian High Court made no reference to the broadness of the statutory provision⁴², appearing to be satisfied that broad activity was an inherent aspect of these offences.

Social Defence: Forsaking Certainty for Pragmatism

The courts in both England and Australia are satisfied that the objective test provides sufficient certainty. The case law suggests that the courts are satisfied

³⁶ *Chambers v DPP* [1995] Crim LR 896 DC

³⁷ Tony Blackshield, & George Williams, *Australian Constitutional Law and Theory* (5th Ed Federation Press 2010) chapter 1

³⁸ Douglas (n 4) 90

³⁹ Blackshield & Williams (n 38) Chapter 13

⁴⁰ See for example, Queensland Criminal Code (brought into force by Criminal Code Act 1899), Western Australia Criminal Code (brought into force by Criminal Code Act 1913) are both codified criminal structures, Victoria operates within the common law but still has a comprehensive Crimes Act 1958

⁴¹ *Coleman v Power* [2004] HCA 39, (2004) 220 CLR 1

⁴² Vagrants Gaming and Other Offences Act 1931, s 7 (Q) provides for the commission of an offence whereby any person who in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear uses any threatening, abusive or insulting words to any person. This case will be discussed in greater detail in chapter five at p 155

that the ordinary meaning of the words threatening, abusive or insulting give sufficient indicators to the defendant as to the full range of actions prohibited by such public order legislation. Furthermore, as a counter-argument to the need for certainty, Ashworth highlights the policy of social defence⁴³ whereby some vagueness is acceptable and even desirable in that:

*“It enables the police and courts to deal flexibly with new variations in misconduct without having to await the lumbering response of the legislature.”*⁴⁴

This view would appear to be consistent with the continued deployment by the police and acceptance by the courts of s.5 of the 1986 Act within England. The view is indicative of the acquiescence of the courts within Australia to the various low-level provisions. Wells and Quick highlight that media and politicians remain comfortable with the broad ranging low-level powers as they can be deployed against those groups who threaten public safety⁴⁵.

The concerns that broad ranging low-level offences delegate far too much *de facto* power over citizens' lives to police officers are dismissed by social defence theorists⁴⁶. Their response is that police disciplinary procedures and the independence of the judiciary will ensure that appropriate checks and balances within the criminal justice system restrain the broad discretionary powers⁴⁷. Such an assertion, it is suggested, would provide scant consolation for the individual who has already been deprived of their liberty and provides, at best, an *ex post facto* resolution.

Historically, the courts have also afforded leeway to broad ranging powers, providing they have sufficient objectivity and content neutrality. In *Knulier v DPP*⁴⁸, it was held that individuals who know their conduct is on the boundary of criminal

⁴³ For a classical exposition of social defence theory see M Ancel, *Social Defence* (Routledge & Kegan Paul 1965).

⁴⁴ Ashworth (n 6) 66

⁴⁵ Celia Wells, & Oliver Quick, *Reconstructing Criminal Law* (4th edn Cambridge University Press 2010) 181-189, 198-232

⁴⁶ Ashworth (n 6) 67

⁴⁷ Wells & Quick (n 46) 225-232

⁴⁸ [1973] AC 435

behaviour take the risk that they will be judged accordingly. As stated by Lord Morris:

*“Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he will fall in.”*⁴⁹

Coupled with the social defence theory, the so-called ‘thin ice’ theory makes for a powerful refutation of the arguments requiring the imposition of a strict certainty requirement on public order legislation. In the quest for an optimal pathway in respect of certainty, the focus of the inquiry will shift to the American courts’ approach to statutes that are overly vague.

American Certainty: The Void for Vagueness Doctrine

Within the United States, Article I of the Constitution provides that no State shall pass any *ex post facto* law⁵⁰. The majority of States have incorporated this provision into their individual constitutions⁵¹. This prohibition is designed to protect private individuals by providing fair warning as to what the law prohibits and restrict arbitrary government action⁵². According to Galinsky, a crime must be defined with definiteness and certainty⁵³. This is not only a requirement of the courts but also is regarded as an element of due process⁵⁴.

In response, the US Supreme Court has developed the “*void for vagueness*” doctrine⁵⁵, which objectively measures vague laws by employing a two-limbed test. A law will be invalid if it fails to give fair warning to individuals as to what the law prohibits and allows arbitrary and discriminatory criminal justice administration⁵⁶. In other words:

⁴⁹ *ibid* [463] (per Lord Morris)

⁵⁰ Article I, §10 of the Constitution of the United States

⁵¹ Jerome Hall, *General Principles of Criminal Law*, (2nd edn Lawbook Exchange, 2010), 31-32

⁵² Joel Samaha, *Criminal Law* (8th edn Thomson, 2005) 27

⁵³ M S Galinsky, “Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct.” 12 A L R 3d 1448 (2010) at fn 1

⁵⁴ The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit federal and state governments from taking any individual’s “life, liberty or property without due process of law.”

⁵⁵ John Calvin Jeffries Jr, “Legality, Vagueness and the Construction of Penal Statutes” 71 Va L Rev 189 (1985)

⁵⁶ See for example *State v Metzger* (1982) 319 N.W. 2d 459 (Neb 1982) where the court in Lincoln, Nebraska applied the ‘void for vagueness’ doctrine in relation to an ordinance forbidding any indecent, immodest or filthy act in the presence of any person. The statute was ruled invalid

*“In substantive criminal law, the relation between courts and legislatures is prescribed by three doctrines. The principle of legality... condemns judicial crime creation. The constitutional doctrine of void-for-vagueness forbids wholesale legislative delegation of lawmaking authority to the courts. Finally, the rules on strict construction direct that judicial resolution of residual uncertainty in the meaning of penal statutes be biased in favor (sic) of the accused.”*⁵⁷

The limits of this test have been explored in relation to low-level public order offences. In *Lanzetta v New Jersey*⁵⁸, the Supreme Court held:

*“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed what the state commands or forbids... A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”*⁵⁹

The case of *Kolender v Lawson*⁶⁰, saw the definitive restatement of the “void for vagueness” doctrine. The case involved Lawson challenging a Californian statute that required persons who loiter or wander on the streets to identify themselves and account for their presence upon request from a police officer⁶¹. The Supreme Court decided that the statute was unconstitutionally vague because of the amount of discretion afforded to police (in the absence of probable cause to arrest) in respect of whether or not to stop and question a suspect. In reaching this decision, the Court observed that there was a requirement that in making laws, the legislature had to establish minimal guidelines to govern law enforcement⁶².

on the grounds that the line between what is lawful and what is unlawful in terms of “indecent”, “immodest” or “filthy” is too broad to satisfy any constitutional requirements of due process.

⁵⁷ Jeffries (n 55) 189

⁵⁸ 306 U.S. 451 (1939)

⁵⁹ 306 U.S. 451 (1939) At 453 quoted in Samaha (n 52) 28

⁶⁰ (1983) 461 US 352

⁶¹ California Penal Code §647(e)

⁶² *Kolender v Lawson* 1983, 461 U.S. 352 at 357

Unlike the English Courts, those in America have considered disorderly conduct provisions for vagueness in considerable detail⁶³. Ordinances that describe the prohibited conduct merely with reference to the word disorderly have been held to be unconstitutionally vague⁶⁴. In *Dunn v Wilmington*⁶⁵, the defendant was arrested on a street corner indulging in drunken behaviour and using obscene language. The ordinance itself, although titled “*Disorderly Conduct*” within the body of the law prohibited participation in drunken or violent conduct and using obscene or abusive language. The defendant challenged the Delaware State ordinance as being void for vagueness. The Delaware Court of Appeal rejected this challenge stating that the ordinance “*specifically condemned the enumerated acts set forth*”⁶⁶. In *Squire v Pace*⁶⁷, an ordinance that prohibited individuals from “*behaving in riotous or disorderly manner in a public place*”, was held as unconstitutionally vague. The Court held, *inter alia*, that the statute failed to specify any proscribed conduct beyond riotous or disorderly⁶⁸.

The development of The Model Penal Code was an attempt to provide a codified “American criminal law” that is constitutionally compatible⁶⁹. It has been identified that many of the states have directly imported the low-level public order provisions into their criminal codes. In relation to the disorderly conduct provision under §250.2, the courts have held it does provide sufficient certainty as to the limit of conduct⁷⁰ by detailing three separate prohibited courses of conduct⁷¹. The approaches to interpreting these three courses of conduct, especially the use of abusive language, have been in line with the rules of strict construction⁷².

⁶³ Galinsky (n 53) for a full discussion on the breadth of judicial activism in respect of vagueness of conduct, vagueness of limitation as to time or place and disorderly conduct statutes.

⁶⁴ *Griffin v Smith* (1937) 184 Ga 871, 193, SE 777

⁶⁵ (1965, Del) 212 A2d 596, affd (Sup) 219 A2d 153

⁶⁶ Galinsky (n 53) §3[b]

⁶⁷ (DC Va) 380 F Supp 269, affd (CA4 Va) 516 F2d 240, cert den (US) 46 L Ed 2d 58, 96 S Ct 68(1975)

⁶⁸ *ibid* [9]

⁶⁹ Jeffries (n 55) fn 67

⁷⁰ *Com. v. Mastrangelo*, Pa 198, 414 A. 2d 54 (1980)

⁷¹ These are fighting in public, making unreasonable noise or using abusive language and creating a hazardous or physically offensive condition. See chapter 3

⁷² Jeffries (n 55) 189

Rechtssicherheit: Legal Certainty within the German Law

Much like the situation in America, the German legal system has certainty embedded within the very core of the Constitution. The individual requires legal certainty (*Rechtssicherheit*) in order to correspond with the requirements of the law⁷³. The principle of *nullum crimen, nulla poena sine lege* is embodied in §103(2) of 'Basic Law' (*Grundgesetz*, GG). This principle is restated both in §1 StGB as relates to the criminal code and §3 OWiG for the administrative provisions. Bohlander elucidates this notion of *Bestimmtheitsgrundsatz* as follows:

*"it requires the law to be as precise as possible in defining the prescribed conduct, which is similar to the principle of fair labeling."*⁷⁴

The concept operates in concert with the ban on retrospectivity (*Rückwirkungsverbot*) and there are similarities with the approach adopted by the American Courts. Foster illustrates how the German system operates by means of a hypothetical statute. This statute penalizes, "*actions that are detrimental to the environment*"⁷⁵. Such a statute would present the individual citizen with no real guidance as to the scope of the activity that would come within this law and consequently he could not moderate his behaviour accordingly. The lack of specificity in the prohibition would render such a law unconstitutional⁷⁶.

Unlike the American courts, the German criminal law is more comfortable with allowing some flexibility within the elements of the offence. This is contingent upon such flexible terms:

*"Form(ing) part of the traditional criminal law norms and (that) there is a consistent jurisprudence on their interpretation."*⁷⁷

The decision of the Federal Court of Justice (*Bundesgerichtshof*, BGH) in the *Tree Protection Statute*⁷⁸ case saw the Court deciding that, due to their supervisory

⁷³ Nigel Foster & Satish Sule, *German Legal System and Laws* (4th edn OUP 2010) 181

⁷⁴ Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 25

⁷⁵ Foster & Sule (n 73) 181

⁷⁶ *ibid* 181

⁷⁷ Bohlander (n 74) 25

nature, certain terms within the Administrative Offences under the OWiG would require a degree of interpretation based on the individual facts of the case. Nonetheless, the BGH went on to state that where such ordinances have broad terms, they must be consistently interpreted. This recognizes the regulatory nature of OWiG provisions, recognition absent from the English jurisdiction owing to the criminal nature of the offences within the Public Order Act.

Section 5: A Cross Jurisdictional Analysis

The requirements for certainty do not vary to any great extent within the jurisdictions. What appears to vary is the method and rigour with which those requirements are imposed upon the criminal sanctions. The “*void for vagueness*” doctrine within the United States means that imprecise and widely drafted provisions would be challenged and overturned. The integral requirement of *Bestimmtheitsgrundsatz* within the OWiG means that §118 can survive as a broadly drafted administrative provision within the OWiG.

From a cross-jurisdictional perspective, the chances of survival for s.5 of the 1986 Act within the other jurisdictions would appear to be mixed. The various Australian public order provisions in operation within each state have not been substantively challenged until 2004 when, the decision in *Coleman v Power*⁷⁹ stopped short of invalidating the operative legislation⁸⁰. The lack of judicial intervention on overly vague public order legislation means that it is unlikely that the Australian courts would encounter any difficulty with the operation of s.5 of the 1986 Act.

The two jurisdictions with guaranteed requirements for specificity of conduct, America and Germany, would undoubtedly prove a more hostile constitutional environment for s.5 of the 1986 Act. The codified nature of German law requires the deployment of “*general terms in the definition of the elements of offences*”⁸¹, and there is a requirement that the interpretation of these terms follows a consistent line of judicial reasoning. The provisions of §118 OWiG require the commission of a “grossly improper act”. This has already been identified as a

⁷⁸ BGH 3 StR 506/95 - Decision of 15 March 1996 (OLG Dusseldorf)

⁷⁹ *Coleman v Power* [2004] HCA 39, (2004) 220 CLR 1

⁸⁰ See Chapter Five for further details of the decision of the court.

⁸¹ Bohlander (n 74) 25

*Gummiparagraph*⁸² with a “catch all” purpose. But, both the declaration of the BGH⁸³ and the underlying principle of *Rechtssicherheit* combine to suggest that, if suddenly deposited within the legal environs of the OWIG, while the skeleton of s.5 of the 1986 Act may survive, the actual operation of the Act may well be transmogrified into something significantly more restrictive⁸⁴.

The “*void for vagueness*” doctrine, within the American jurisdiction, would provide the sternest test of the certainty of the terms found within s.5. An examination of numerous state-based disorderly conduct provisions⁸⁵ all show enumerated lists of prohibited conduct far in excess of those of the English provisions. While it could be argued that the requirement under s.5 that the behaviour is threatening, abusive or insulting, satisfies the “thin ice” principle elucidated in *Knüller v DPP*⁸⁶, it is unlikely that these conditions would satisfy the American courts as to the certainty of behaviour.

The final analysis to which s.5 has not been tested is that of the compliance with the English legal system requirements for certainty in light of the obligations under the ECHR. As has been stated neither the higher courts in England and Wales nor the ECtHR have been asked to adjudicate on the compliance of s.5 with Article 7 of the ECHR (or indeed the prescribed by law element under Article 10(2) or 11(2)). In *Kokkinakis* the Strasbourg Court recognized the need for some flexibility within the law providing there was a settled body of case law to reduce the degree of vagueness and enable the suspect to receive effective legal advice⁸⁷.

The “quality of law” test established in the *Sunday Times* case⁸⁸ was reaffirmed by the ECtHR in *Hashman and Harrup v UK*⁸⁹ a case with particular resonance as it

⁸² Erich Göhler, et al., *Gesetz über Ordnungswidrigkeiten – OwiG*, 15th Ed. (Beck Legal Publishing, 2009), §118, 4

⁸³ BGH 3 StR 506/95 - Decision of 15 March 1996 (OLG Dusseldorf)

⁸⁴ This is especially the case when taking into account the bespoke German law regulating protest under the *VsIgG*. See p 222 for details

⁸⁵ See p 51-57 for details of MPC §250.2, NY Penal Code §240, Ohio Revised Code (§2917.11,2002)

⁸⁶ *Knüller v DPP* [1973] AC 435

⁸⁷ *Kokkinakis v Greece* (1994) 17 EHRR 397 para 40

⁸⁸ *Sunday Times v UK* (1979) 2 EHRR 245 para 49, see above p xx

⁸⁹ (2000) 30 EHRR 241

related to protestors who disrupted a fox hunt by blowing horns. They were not prosecuted under public order legislation; instead they were bound over to keep the peace on the basis that their behaviour was *contra bonos mores*⁹⁰; behaviour judged to be “*wrong rather than right in the judgment of the majority of contemporary citizens*”⁹¹. It was held by the ECtHR that this;

“... failed to describe the impugned behaviour at all whereas other provisions (such as conduct likely to provoke breach of the peace) are acceptable because they describe behaviour by reference to its effects.”⁹²

This test provides something of a quandary when analyzing the terms of s.5. On the one hand, the terms of s.5 undeniably criminalize the behaviour (which must be threatening, abusive or insulting) with reference to its effects (that the behaviour is witnessed by someone who is likely to be caused harassment alarm or distress). The problem with the certainty of s.5 is that both the behaviour *and* the effects of that behaviour are only criminal when the finder of fact at a trial determines them as being criminal, leaving both the accused and the legal adviser uncertain as to whether their activity was criminal or not until judgment has been passed.

Conclusion: An untested certainty issue

When considering the certainty of s.5 from a cross-jurisdictional perspective, it is likely that the American legal system would be highly inimical to the broadness of s.5 in its present form. Only a clearly enumerated list of what behaviour constituted disorderly conduct or, more likely separate and bespoke criminal offences for each activity would bring s.5 to a standard acceptable to American courts. It is not only s.5 of the 1986 Act that would be challenged within the void for vagueness doctrine. Several of the offences within the Australian jurisdiction would be liable to a challenge. Whilst the German requirements of certainty are similar to those under the ECHR, the German legal system obviates such difficulties by not bringing disorderly conduct within the criminal sphere.

⁹⁰ A common-law requirement that is not regarded as criminal sanction. See *Hughes v Holley* (1988) 86 Cr App R 130

⁹¹ Ashworth (n6) 65

⁹² *ibid*

The existence of recalcitrant bedfellows in the Australian jurisdiction does not, however, mitigate the uncertainty of the English offence. The lack of analysis of the construction of s.5 from the perspective of Article 7 of the ECHR, and taking into account the decision of the ECtHR in *Kokkinakis*⁹³, by the higher courts of England and Wales means that any assessment of compliance is speculative in nature. The discussion on the similarity with offences in relation to dishonesty provide some indication of the difficulties, however dishonesty offences have been held to satisfy certainty requirements because dishonesty “*is but one element of a more comprehensive definition of the proscribed behaviour*”⁹⁴.

Yet the requirement that an offence must be clearly defined so that the individual knows he is committing an offence does not sit comfortably with the elements of s.5. The court determines whether the conduct has been abusive, insulting or harassing or disorderly. The court then makes a determination as to whether the conduct occurred within the sight or hearing of someone who may be harassed, alarmed or distressed. Even having decided this, the court must then go on and determines whether the accused has, on balance made out that his conduct was reasonable. Therefore all elements of the *actus reus* as well as the existence of the specific defence, is determined by the court at the time of the trial. It is submitted that an accused, cannot in all cases, be aware that he is committing an offence, nor can a legal adviser provide effective counsel. Such a conclusion would seem to reinforce the hypothesis that one of the fundamental flaws with s.5 of the 1986 Act is an unacceptable level of uncertainty surrounding both the prohibited conduct and the effect that such conduct is likely to result in.

The Mental Element for Low Level Disorder

Thus far, the analysis has focused upon the scope of the physical, behaviourally based elements and the racially aggravated variants of the disorderly conduct offence. When analyzing the elements of criminality within the offence, it has been identified⁹⁵, that whether the conduct is threatening, abusive or insulting is, as

⁹³ See p 104

⁹⁴ *Hashman and Harrup v UK* (2000) 30 EHRR 241 para 39 quoted in Ashworth (n6) 65

⁹⁵ Ormerod (n 8) 1071

mentioned above, considered to be prohibited behaviour⁹⁶. As such it is considered to be an element of the *actus reus* (and indeed one could argue that this is explicit with reference to s.6(4) of the 1986 Act⁹⁷). It has been identified by one observer, “as a matter of common sense one would think that surely these terms connote a mental element”⁹⁸. When looking across the provisions in the other jurisdictions, it is clear that the conduct itself sits squarely within the *actus reus*.

Consequently, having analyzed the extent and the certainty of the conduct, the next logical point of analysis is the required mental element for the various provisions. With the coming into force of the English offence, it was speculated that the mental element was complicated for a comparatively minor provision. There were initial concerns that this would place a greater onus on the prosecutor than was warranted for such a minor offence⁹⁹. The *mens rea* of the offence is explicitly stated in s.6 of the 1986 Act:

*“A person is guilty of an offence under section 5 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly.”*¹⁰⁰

The essence of this element of the offence is that the accused must either have intention as regards his conduct, or awareness that his conduct may be viewed as being threatening, abusive, insulting or disorderly. It was held in *DPP v Clarke*¹⁰¹ that this test is entirely subjective and must be viewed in the context of the offence as a whole. It was also decided in *Clarke* that the burden of proving the appropriate intent or awareness rests fully upon the prosecution.

In respect of s.5, the culpable behaviour does not need to be directed towards another. For all of the misgivings regarding the mental element of the offence,

⁹⁶ Richard Card, *Public Order Law* (Jordans 2000) 133-8

⁹⁷ See p 121

⁹⁸ Peter Thornton et al *The Law of Public Order and Protest* (OUP 2010) 30

⁹⁹ ATH Smith *Offences against Public Order* (Sweet & Maxwell, 1987) 122

¹⁰⁰ Public Order Act 1986, s 6(4)(a)

¹⁰¹ (1992) 94 Cr App R 359 DC

subsequent case law has not reflected this in practice. There is little by way of controversial case law regarding this issue, especially when compared to the significant discussion on the physical elements of the offence¹⁰². The only possible lacuna within the *mens rea* is where an individual gives no thought to his conduct and honestly believes there is no risk of it being threatening abusive or insulting, he will not commit an offence¹⁰³. This will be discussed further within the context of intoxicated behaviour.

The *mens rea* requirement of an offence under s.4A of the 1986 Act is that of a specific intent to cause harassment, alarm or distress. Irrespective of any intoxication, it has been held in *Rogers v DPP*¹⁰⁴, that intent can be inferred where the behaviour is in the context of a large crowd expressing their disapproval, though this is not automatic and depends on the circumstances as determined by the appropriate finder of fact.

For the more focused offence under s.4 of the 1986 Act, the *mens rea* takes the form of a two-tier approach. The first element requires that the defendant intends his words or behaviour to be threatening, abusive or insulting, or is aware that they might be¹⁰⁵. The offence can only be committed, however, if in addition to that intention or awareness, the defendant also intended that the victim should believe immediate unlawful violence would be used, or the defendant intended to provoke such violence. These are both measures of subjective intent¹⁰⁶. The offence can also be committed if the defendant has the requisite intent outlined in s.6(3), whereby the other person was likely to believe that immediate unlawful violence will be used or whereby it is likely that such violence will be provoked. These requirements allow for an objective appraisal¹⁰⁷.

There are also issues of criminal procedure arising from the *mens rea* requirement for s.4. It was held in *Winn v DPP*¹⁰⁸, that where there is a substantial discrepancy between the information provided by the police and the facts

¹⁰² See the discussion on Intoxication p 124

¹⁰³ Thornton (n 98) 47

¹⁰⁴ *Rogers et al v DPP* (1999) CO/404 cited in Thornton (n 98) 47

¹⁰⁵ Public Order Act 1986, s 6(3)

¹⁰⁶ Public Order Act 1986, s 4(1)

¹⁰⁷ Thornton (n 98) 33

¹⁰⁸ (1992) 156 JP 881

subsequently found at trial, then it is likely that the conviction will not be upheld and an alternate offence will not be accepted. Violence is given a broad definition in s.8 of the 1986 Act and includes violence towards property as well as people. As with all offences under the Public Order Act 1986, the violence must be unlawful violence¹⁰⁹.

The situation in respect of Australian low-level public order offences mirrors that of the English legal system. It has been identified that there is some ambiguity as to the exact mental state required of defendants¹¹⁰. The South Australian case of *Daire v Stone*¹¹¹ held that the prosecution had to show:

*“...that there is a conscious and deliberate course of conduct which interferes with the comfort of other people such as to leave the tribunal of fact with no reasonable doubt that the conduct of the accused person was intentionally done to bring about such interference.”*¹¹²

Another South Australian authority, *Police v Pfeifer*¹¹³, saw discussion of the dichotomy between conduct that is intended to cause offence and conduct which the defendant is aware *may* cause offence. In *Pfeifer*, the defendant wore a t-shirt in public bearing the slogan “*Too Drunk to Fuck*”. The court held in this case that it was not necessary for the prosecution to prove knowledge that conduct was likely to be offensive. Instead, Doyle CJ stated that:

*“To convict only those who intentionally or knowingly offend will achieve a good deal, but does not go that extra step of requiring members of society to take care to ensure that they do not breach generally accepted standards of behaviour.”*¹¹⁴

In support of this conclusion, it was held that, on a strict interpretation of s.7 of the Summary Offences Act 1953, there was no requirement for defendants to act knowingly, wilfully or with intent to offend. The court presumed that by omitting the

¹⁰⁹ See p 124 as regards self-defence.

¹¹⁰ Douglas (n 4) 89

¹¹¹ *Daire v Stone* (1991) 56 SASR 90

¹¹² *ibid* [93] (per Legoe J)

¹¹³ *Police v Pfeifer* (1997) 68 SASR 285

¹¹⁴ *ibid* [292]

mens rea requirements, the legislature was seeking to ensure that people took care to ensure that their activities did not offend people¹¹⁵.

Intention, the Model Penal Code & American Low-Level Public Order

Robinson and Grall have identified that the majority of American jurisdictions have implemented criminal codes that utilize the general requirements of culpability taken from the Model Penal Code (MPC)¹¹⁶. These requirements represent a fundamental first step in understanding the requisite mental element for low-level public order. The minimum culpability requirements of the MPC are to be found in §2.02 and specify that a person will not be guilty of an offence unless he acted (1) purposely, (2) knowingly, (3) recklessly or (4) negligently *with respect to each material element of the offence*¹¹⁷. MPC §2.02(3) imposes a *mens rea* requirement of recklessness where an offence element does not specify a particular level of culpability. This is reinforced by MPC §250.1, which creates a minimum *mens rea* requirement of purposive intent or recklessness. It has been pointed out that while the majority of States have adopted the four fault elements found in §2.02(1), only a few jurisdictions adopt a provision equivalent to §2.02(3) or §250.1. Thus, in the States where there is no mention of the mental element, the courts are left to decide upon the appropriate culpability requirement¹¹⁸.

The MPC holds that the primary (most blameworthy) mental element is that of purposive or specific intent whereby it is the conscious object of the defendant to engage in the conduct of that nature. Despite the misgivings of Robinson and Grall, the courts have held that in order to convict for disorderly conduct, the mental element required is of a general intent to disturb the public peace¹¹⁹. The Courts have not required a specific intent to engage in unlawful conduct such as fighting or making unreasonable noise¹²⁰. Courts have also held that intent can be inferred from the defendant's conduct and also from other such circumstantial evidence¹²¹.

¹¹⁵ Douglas (n 4) 89

¹¹⁶ Robinson (n 1) 683

¹¹⁷ MPC § 2.02 (1) (emphasis added)

¹¹⁸ Robinson (n 1) 712-713

¹¹⁹ This was made explicit in *State v Sargent*, 74 Or App 50, 701 P2d 484 (1985)

¹²⁰ E M Larsson, "Disorderly Conduct: I. Nature and Elements of Offence: Defence" 27 CJS Disorderly Conduct §3

¹²¹ *State v Cole*, 150 Vt. 453, 554 A.2d 253 (1988) quoted in Larsson (n 113) at fn 26

The case of *Com v Troy*¹²² is representative of the confluence of *mens rea* provisions within the different disorderly conduct statutes. The defendant was charged with disorderly conduct¹²³ for mailing ‘garbage’ to a landlord whose tenants had caused disruption to a neighbourhood. The specific intent requirement of the Pennsylvanian statute “may be met by a showing of a reckless disregard of the risk of public inconvenience,” annoyance, or alarm, even if the appellant’s intent was to send a message to a certain individual, rather than to cause the forbidden conduct¹²⁴. The reasoning of the Court in *Troy* drew on the case of *Com. v Gilbert*¹²⁵, in which it was held that the prosecution must prove that the defendant, by virtue of his conduct, intentionally or recklessly created risk or caused public inconvenience annoyance or alarm. Consequently, a male who entered a female restroom in a college dormitory was held to have recklessly created a risk of public annoyance even though there was only one person present¹²⁶.

The notion of recklessness was further discussed in *U.S. v Mather*¹²⁷, in which the defendants, who masturbated in front of each other, were convicted under the federal offence of disorderly conduct within a national park area contrary to 36 C.F.R. §2.34. The court accepted evidence that they had not intended to be seen and had, indeed, made a conscious effort not to be seen. The defendants conceded that they knew that their actions would cause public alarm if they were seen, yet they proceeded nonetheless. Accordingly, the court held that this was a “*classic case of reckless behaviour*”¹²⁸.

¹²² 2003 Pa.Super 340

¹²³ § 5503(a)(4) of the disorderly conduct statute, which reads in pertinent part as follows: A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he... (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

¹²⁴ *Com. v Troy*, 2003 Pa.Super 340 at para 15

¹²⁵ Pa Super 1996, 674 A2d 284, 449 PaSuper 450

¹²⁶ *Com. v Young*, Pa Super 1988, 535 A 2d 1141, 370 Pa Super 42

¹²⁷ *U.S. v Mather*, 902 F Supp 560 (E D Pa. 1995)

¹²⁸ R P Shafer, “Validity, Construction and Operation of Federal Disorderly Conduct regulation (36 CFR § 2.34)” (2002) 180 ALR Fed 637

OWiG & The Tripartite German Approach to culpability

Up to this point in the thesis, the differing elements of a criminal offence have been referred to by the conventional common law nomenclature of *actus reus* and *mens rea*. While this has been convenient shorthand, the structure of criminal offences within the codified environs of the OWiG (and the StGB) employs a different approach. Each administrative offence has an offence description (*Tatbestand*), which is defined by reference to the ‘objective facts’ (*objektiver Tatbestand*) and ‘the subjective element’ (*subjektiver Tatbestand*)¹²⁹.

If the two elements of the *Tatbestand* have been proven then, as with the StGB, the general element of unlawfulness will have been established (*Rechtswidrigkeit*) unless one of the justificatory elements contained within the OWiG are averred, such as self-defence¹³⁰ or an emergency threatening life and limb¹³¹. Within the StGB, the next stage of culpability is the element of ‘guilt’ (*Schuld*). The counterpart to *Schuld* within the OWiG, is that of ‘responsibility’ (*Verantwortlichkeit*).

The mental element of the offence of disorderly conduct¹³² is to be found within §10 OWiG. It states that only intentional acts can be punished, unless negligence is expressly specified within the provision. In his commentary to the OWiG, Göhler¹³³ states that there must be an intention to commit the act but that intention is irrelevant in respect of the grossly improper nature of that act, all that prosecutors are required to demonstrate is that the defendant intended to do the act and knew it might be so regarded. In relation to the activities of the so-called ‘*Nacktläufer*’¹³⁴, the defendant stated, *inter alia*, that he should not be convicted, as he did not *intend* his activities to be grossly improper. He provided evidence that his exposure contained no sexual undertones. This assertion and held that the commission of the act provided the evidence of intention. This was determined to be grossly improper by reference to an objective standard.

¹²⁹ For a full description on the operation of the StGB and the tripartite structure of criminal offences see Bohlander (n 74) 16-17

¹³⁰ §15 OWiG

¹³¹ §16 OWiG

¹³² As per §118 OWiG

¹³³ Göhler (n 82) 4

¹³⁴ Literally means the ‘Naked Runner’

When dealing with the administrative offences under the OWiG, the basic approach required is the same as when dealing with the offences under the StGB. The first point of inquiry when trying to analyze potential defences to a charge to an offence committed under the OWiG is to the General Provisions detailed in Part One of the OWiG¹³⁵. §1-7 outlines the scope of the OWiG offences dealing with such matters as defining misdemeanours¹³⁶, objective validity¹³⁷, temporal and territorial application¹³⁸ and providing that an act will be punishable as a misdemeanor only if the law provided for the possibility of punishment before the act was committed¹³⁹.

General Defences & Intoxication

The general defences available within the criminal law of the three common law jurisdictions with regard to capacity, such as insanity¹⁴⁰, automatism¹⁴¹ and infancy¹⁴² apply equally to low-level public order offences as they do to the more serious counterparts. Within Germany, the OWiG states that anyone who is not able to comprehend the forbidden nature of the offence because of a pathological mental disorder due to a profound disturbance of consciousness or because of mental retardation or serious other mental abnormality shall be not guilty of the offence¹⁴³. It is for the prosecution, with the aid of medical experts, to clear up issues relating to sanity¹⁴⁴. There is little by way of case law in any of the jurisdictions to indicate how such defences might operate in respect of public order. Indeed, given the inherent dependence upon (expensive) medical evidence it is likely that the relevant authorities would not proceed with such a case.

¹³⁵ The OWiG is broken down into four parts. Part One contains the General Provisions (Allgemeine Vorschriften). Part Two deals with the administration of Summary proceedings (Bußgeldverfahren) and Part Three contains the Individual Offences (Einzelne Ordnungswidrigkeiten). Part Four contains the final provisions (Schlussvorschriften).

¹³⁶ §1 OWiG

¹³⁷ §2 OWiG

¹³⁸ §4-5 OWiG

¹³⁹ §3 OWiG

¹⁴⁰ Ormerod (n 8) 263

¹⁴¹ *ibid* 272

¹⁴² Within the English legal system, no child under the age of 10 can be guilty of an offence s.50 Children & Young Persons Act (CYPA) 1933 as amended by s. 16 CYPA 1963. Between the ages of 10-14 s.34 Crime Disorder Act 1998 abolished the defence of *doli incapax* altogether, see R v T [2009] UKHL 20.

¹⁴³ §12(2) OWiG

¹⁴⁴ Bohlander (n 74) 132

The situation applies equally to the so-called general defences in respect of necessity/duress¹⁴⁵, prevention of crime and self-defence. As with the capacity based offences, whilst there is a lack of case law on the doctrine of self defence operating within low-level public order, it is almost inconceivable that these two issues have not overlapped. Like insanity, it is suggested that this lack of litigation is due to police and prosecutorial discretion.

One area that does impact upon low-level public order is that of intoxication. The words of Thornton are particularly germane when he states, "*the experience of the courts is that a large proportion of non-protest related public order incidents are alcohol fuelled*"¹⁴⁶. The area of intoxication requires a more detailed inquiry than is possible herein¹⁴⁷. In relation to other low-level public order offences, it is sufficient to stress that intoxication does not operate (in the accepted sense of the word) as a defence within the law of England¹⁴⁸. Just as in America¹⁴⁹ and Australia¹⁵⁰, evidence of voluntary intoxication may lead the jury to find that the *mens rea* is negated for a crime of specific intent, but not to a charge of any other crime¹⁵¹.

Involuntary (unwitting or forced) intoxication does provide an excusatory defence but, within the three common law jurisdictions, this will only be accepted in a narrowly drawn set of circumstances¹⁵². Indeed, Ormerod states that, to all intents and purposes, intoxication is nearly always voluntary¹⁵³. Within the Public Order Act 1986, the distinction is even more narrowly drawn as s.6(5) is a reverse onus provision and requires the defendant to show his intoxication was not intentional.

¹⁴⁵ See Ormerod (n 8) 297

¹⁴⁶ Thornton (n 98) 94

¹⁴⁷ AP Simester, "Intoxication is never a defence" [2009] Crim LR 1

¹⁴⁸ *ibid* 3

¹⁴⁹ *People v Valez* 221 Cal.Rptr 631 (Cal.App. 1986)

¹⁵⁰ An example of the approach adopted by Australian States can be found in s. 428C of the NSW Crimes Act which provides: (1) Evidence that a person was intoxicated (whether by reason of self-induced intoxication or otherwise) at the time of the relevant conduct may be taken into account in determining whether the person had the intention to cause the specific result necessary for an offence of specific intent. (2) However, such evidence cannot be taken into account if the person: (a) had resolved before becoming intoxicated to do the relevant conduct, or (b) became intoxicated in order to strengthen his or her resolve to do the relevant conduct

¹⁵¹ *DPP v Majewski* [1977] AC 443, [1976] 2 All ER 142, [1976] Crim LR 374

¹⁵² Within England see the cases of *R v Kingston* [1994] 3 All ER 353 and Jeremy Horder, "Pleading Involuntary Lack of Capacity" (1993) 52 CLJ 298 quoted in Ormerod (n 8) 275

¹⁵³ Ormerod (n 8) 276

In the German legal system, within the StGB, intoxication falls within the remit of the defence of insanity or diminished responsibility¹⁵⁴ coming under §§20-21 StGB. There is an additional, stand-alone offence of intoxicated wrong doing which integrates §323a StGB and the notion of committing an offence when in a senselessly drunken state with the *actus reus* of the corresponding offence. Within the OWiG there is the offence of Drunkenness (*Vollrausch*)¹⁵⁵ that has a similar effect to the offence §323a StGB in respect of offences within the OWiG.

The provisions of s.4, s.4A and s.5 Public Order Act 1986, were designed to deal with obnoxious and offensive behaviour that is very often the result of intoxication. It would clearly be nonsensical if intoxication could impair the formulation of the requisite mental element. Nonetheless, the core of the mental element of s.5 is that the accused must either intend his conduct or be aware that his conduct may be viewed as being threatening, abusive, insulting or disorderly. The aforementioned lacuna within the *mens rea* for the offences under s.4 and s.5 is the individual who gives no thought to his conduct and who honestly believes there is no risk of it being threatening abusive or insulting¹⁵⁶. Such an individual, in these circumstances, will not commit an offence.

S.6(5) of the 1986 Act states that a person whose awareness is impaired by intoxication shall be taken to be aware of that which he would be aware if not intoxicated. It has been observed¹⁵⁷ that inclusion of this provision was to ensure that *mens rea* of the offences under s.6(4) could not be construed as creating an offence of specific intent¹⁵⁸. Had s.6(5) not been included the accused could assert that the intoxication acted to inhibit or negate his understanding of the nature of the conduct¹⁵⁹. This is one of a number of provisions within the Public Order Act that place the burden of proof onto the accused¹⁶⁰.

¹⁵⁴ Bohlander (n 74) 132-135

¹⁵⁵ §122 OWiG

¹⁵⁶ Thornton (n 98) 47

¹⁵⁷ Card (n 96) 94

¹⁵⁸ For details of the difference between crimes of basic intent and crimes of specific intent see

Ormerod (n 8) 295

¹⁵⁹ *DPP v Majewski* [1976] 2 All ER 142 HL

¹⁶⁰ See p 127

The position is slightly different in respect of s.4A of the 1986 Act. S.6 does not contain any mention of the mental elements for s.4A nor can the provision under s.6(5) be read in a way as to apply to s.4A. The *mens rea* provides for purposive intent, rather than mere recklessness. The nature of a crime of specific intent means that intoxication could provide a potential defence. In this case the defendant would need to show that he was intoxicated and as a result of that intoxication, he could not form the necessary intent.

The offences involving drunkenness will not be examined in any great detail, largely because such offenses, although indisputably part of the public order forum, do not have the scope of behaviour and intention that underpin the offences under the Public Order Act¹⁶¹. This analysis will now move on from the general defences provided by criminal law affecting low-level public order to examine the specific defences provided within the English framework.

Justifying Disorderly Conduct: “Reasonable” Disorder

Within the English legal system, the Public Order Act 1986 provides a defendant with a number of bespoke defences specifically relating to disorderly conduct¹⁶². The defences mentioned here apply *mutatis mutandis* to s.5 and s.4 & s.4A of the 1986 Act, together with the racially aggravated variant offences under s.28-31 Crime and Disorder Act 1998 with the exception of s.5(3)(a), which is unique to the offence under s.5 (and the racial variants)¹⁶³. The defences, as laid down in the Public Order Act 1986, are both separate and distinct enough from the body of the main offence so as to allow for a separation of the *actus reus*, *mens rea* and defence elements of each offence¹⁶⁴. This is the most appropriate way of conducting such an analysis, as this was the way in which Parliament intended the defence to operate¹⁶⁵.

¹⁶¹ For further details see Thornton (n 98) 94-96

¹⁶² S 4A of the 1986 Act is taken within this as being essentially aggravated s5 therefore treated as fundamentally the same offence

¹⁶³ For the sake of brevity, throughout the thesis when speaking about the defences under the Public Order Act, the defences will be those under s 5 of the Act.

¹⁶⁴ This style of analysis is very much along the lines suggested by D J Lanham, “Larsonneur revisited” [1976] Crim LR 276

¹⁶⁵ For further discussion of the evolution of the specific defences see Smith (n 99) 124

S.5(3)(a) of the 1986 Act provides that it is a defence for the accused to prove that he had no reason to believe that there was any person within hearing and sight who was likely to be caused harassment, alarm or distress¹⁶⁶. S.5(3)(b) of the 1986 Act provides, *inter alia*, that it is for the accused to prove that at the material time, he was inside a dwelling and had no reason to believe that the words or behaviour would be heard or seen by a person outside that dwelling. These are determined by reference to a test that is subjective in nature¹⁶⁷. For the purpose of defining a dwelling, reference can be made to s.8 of the 1986 Act which states that a dwelling means, “*any structure or part of a structure occupied as a person’s home or as other living accommodation*”¹⁶⁸. The discussion on this element of the defence perfectly illustrates the clumsy and overlapping nature of *actus reus* and defence elements.

The most controversial of the specific defences provided within the Public Order Act 1986 is to be found under s.5(3)(c). This provides (in a somewhat bald and seemingly innocuous manner) that it is a defence for the accused to prove that his conduct was reasonable. It can be stated, in broad terms¹⁶⁹, that this defence is intended to provide an exemption for the commission of the offence where a criminal conviction is inappropriate. The logical corollary of this assertion is that where the accused can import a sufficiency of circumstance or even sufficiency of motive, then it is open to the court to excuse the guilty conduct.

The very nature of the defence means that it can be said to operate *ex post facto*. Once the police have decided that arrest under s.5 of the 1986 Act is a proportionate way in which to deal with the protest, it is then for the courts to decide whether, in fact, the protest has reached the necessary level of threatening, abusive or insulting behaviour¹⁷⁰. If they do find this to be the case, the next stage – if raised by the defendant – is whether the defendant has proved that his conduct was reasonable.

¹⁶⁶ See *Holloway v DPP* [2004] All ER (D) 278

¹⁶⁷ *Holloway v DPP* [2004] All ER (D) 278

¹⁶⁸ See *Chappell v DPP* (1989) 89 Cr App R 82 and the comments made in respect of the location of the offence.

¹⁶⁹ Card, (n 96) 140

¹⁷⁰ In relation to the elements of prohibited behaviour under s 5(1) of the 1986 Act, it need be only one of the three elements (e.g. the behaviour need only be threatening, abusive or insulting). In terms of the interpretation of the meaning of these phrases, see earlier discussion on the test laid down in *Brutus v Cozens* [1972] 2 All ER 1297.

There are two fundamental difficulties with this requirement. The first of these problems is the lack of any form of statutory guidance: at no point in the Public Order Act 1986 is there any explanation provided by the legislators as to the construction of what may or may not be viewed as reasonable. In *Clarke*¹⁷¹, it was held that the question as to whether the conduct in question was reasonable can only be determined by objective standards of reasonableness as assessed by the finders of fact in any tribunal, be they magistrates or the jury¹⁷².

The defences under s.5(3)(a) and s.5(3)(b) are both judged subjectively¹⁷³. The nature of the reverse onus provision and the nature of the assertion being made¹⁷⁴ ensure that the courts make use of an objective test to determine the nature of the conduct¹⁷⁵. This, potentially harsh test, is mitigated by the finding of the court in *DPP v Clarke*¹⁷⁶. Nolan LJ stated, in respect of the required mental element, that:

*“...the question whether the defendant had the intention or awareness which is required as a condition of guilt under section 6(4) can only be answered subjectively by reference to the state of mind of that defendant. The state of mind of a defendant must be judged in the light of the whole of the evidence (including, most particularly, the evidence of the defendant himself, if he chooses to give it) concerning his words and behaviour and the surrounding circumstances.”*¹⁷⁷

If the English statute remains silent as to the scope of a reasonable excuse, the case law of the higher courts in the English legal system provide little by way of cast-iron guidance as to where reasonable excuse can operate. It has been held that a protestor can be seen to have a reasonable excuse for burning an American flag in front of a US Air Force base¹⁷⁸ with passing US service

¹⁷¹ (1992) 94 Cr App R 359

¹⁷² *ibid* 365

¹⁷³ Thornton (n 98) 42 citing *DPP v Clarke* (1992) 94 Cr App R 359

¹⁷⁴ *Le Vine v DPP* [2010] EWHC 1128 Admin, 2010 WL 1639693

¹⁷⁵ *Brutus v Cozens* [1973] A.C. 854.

¹⁷⁶ (1992) 94 Cr App R 359

¹⁷⁷ *ibid* [12]

¹⁷⁸ As in the case of *Percy v DPP* [2001] EWHC Admin 1125, [2002]

personnel¹⁷⁹ It was also accepted of an unlicensed ice cream trader who had been told, incorrectly, by a police officer that his van could be seized was held by the Divisional Court to have a reasonable excuse when he subsequently told the officer “*you’re not taking my fucking van*”¹⁸⁰. These isolated decisions provide little by way of clarity, suggesting that whilst the courts are open to interpret ‘reasonableness’ on an ad-hoc basis, the suspect will not know whether his actions are reasonable until the court reaches its verdict. This provides clear difficulties when set alongside the need for certainty within the body of the offence, as has already been considered¹⁸¹, As will be seen, once an ECHR based approach to the issue of the defence under s.5(3)(c) is introduced, this confusion is only intensified.

Reverse Onus Provisions and s.5(3) of the 1986 Act

The second of the fundamental issues with the defences under s.5(3) concerns the operation of the defence. It is significant to note that all three of the defences enunciated in s.5(3) of the 1986 Act involve a reverse burden, specifically the burden of proving the defence is placed upon the accused and the appropriate standard of proof for such provisions is to a balance of probabilities. Therefore, once the prosecution has established that the defendant has a case to answer, it is for the defendant to make out, on a balance of probabilities, that one of the defences under s.5(3) applies. Placing the burden of proof on to the defendant has raised questions as to whether such provisions offend against Article 6(2) of the ECHR¹⁸². Indeed, there is a rich case history, both domestically and at the ECtHR, which tracks the development of the respective courts attitudes to reverse onus provisions and their Convention compliance¹⁸³.

¹⁷⁹ It could be argued that the notion of reasonableness can equate to the free speech requirements under the First Amendment of the US Constitution. For further discussion on this see p 171

¹⁸⁰ *Kwasi-Poku v DPP* [1993] Crim LR 705, DC

¹⁸¹ For the discussion on certainty within the body of the offence see p 108

¹⁸² Art. 6(2) ECHR states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law

¹⁸³ For the ECtHR see *Lingen v Austria* (1981) 26 D&R 171, ECommHR and *Salabiaku v France* (1988) Ser A, no 141-A; 13 EHRR 379 ECtHR. For the position in England and Wales *R v DPP ex p. Kebeline* [1999] 4 All ER 801, HL. However it is the position adopted by the House of Lords in *Sheldrake v DPP* [2005] 1 AC 264 that reflects the current law as it stands in relation to the Public Order Act 1986 and various reverse onus provisions which exist therein.

In *Sheldrake v DPP*¹⁸⁴, it was established that no reverse burden is placed on any of the essential elements of the offence. Additionally, and as has already been identified, the defences under s.5(3)(a) and (b) are subjective. As has been identified:

*“it would be very hard for the prosecution to prove that a person believed he was in a dwelling or that he was not in the presence of someone likely to be caused harassment, alarm or distress in the absence of presumption.”*¹⁸⁵

The reverse onus nature of the defence would seem to be perfectly adequate for ss.5(3)(a) and (b), although there are significant issues that arise when considering the reverse burden in respect of reasonable conduct under s.5(3)(c). As has been discussed above, it is accepted that certainty in the drafting of law does not preclude the interpretive activities of the courts. The case of *SW v UK*¹⁸⁶ shows that the ‘resultant development’ of an offence by the courts must be ‘consistent with the essence of the offence’ and such development must be reasonably foreseeable.¹⁸⁷ The nature of the ‘reasonable excuse’ defence may encompass many distinct permutations of excuse that require interpretation by the court¹⁸⁸.

Australian Defences: Limiting the scope of offence

When considering the defences available to the various disorderly conduct offences within the Australian legal system, it is worth noting at the outset of this discussion that the underlying perspective of the courts is to determine offensiveness or abuse by reference to the wider context of the conduct¹⁸⁹. This echoes with the English experience following the case of *Brutus v Cozens*¹⁹⁰, where it has been the accepted orthodoxy that terms such as ‘offensive’ are clearly a matter for the finder of fact rather than a point of law. Different States within Australia employ slightly different statutory measures to deal with disorderly

¹⁸⁴ [2005] 1 AC 264

¹⁸⁵ Thornton (n 98) 42

¹⁸⁶ [1995] 21 EHRR 363

¹⁸⁷ *SW v UK* [1995] 21 EHRR 363 at para [35]

¹⁸⁸ It should be noted that the Strasbourg Court has not been asked to enquire into the German legal position. This is because German criminal law does not recognize reverse onus provisions. See Michael Bohlander, *The German Criminal Code* (Hart 2008) 3

¹⁸⁹ *Worcester v Smith* [1951] VLR 316 at 317

¹⁹⁰ [1972] 2 All ER 1297, HL

conduct. One significant area of commonality is that the offences are all required to be committed in public. This negates the need for a defence along the lines of s.5(3)(b) of the 1986 Act.

The panoply of offences in Australia, as they exist within certain individual States, do incorporate defences that are, in some ways, very similar to the provisions under s.5(3)(c) of the 1986 Act in England. In New South Wales, for illustration, s.4 of the Summary Offences Act 1988, in relation to offensive behaviour, provides that it is a sufficient defence to satisfy the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged. In *Connors v Craigie*¹⁹¹, it was held by the presiding judge that:

*“In my opinion, reasonable excuse involves both subjective and objective considerations, but these considerations must be related to the immediately prevailing circumstances in which the offensive words etc are used, just as in self-defence or provocation the response of the accused must be related in some way to the actions of the victim and the particular circumstances.”*¹⁹²

This pronouncement provides an illuminating contrast between the English approach under s.5(3)(c) and the approach of the Australian court in respect of reasonable excuse. This is a clear statement by the judge in this case seeking to limit the scope of the defence of reasonable excuse. As opposed to permitting a broad range of situations whereby the individual can seek to justify the behaviour¹⁹³, Dunford J likens the defence to that of provocation, requiring an immediate event to trigger the disorderly conduct rather than allowing consideration of wider circumstances:

“Although in an appropriate case it may also be proper to look at the immediate surrounding circumstances against the background of the defendant’s antecedents, prior experience and other related events, there must, in my view,

¹⁹¹ (1994) 76 A Crim R 502

¹⁹² *ibid* [507] (Per Dunford J); in Douglas (n 4) 82

¹⁹³ As is the case with the English defence under s.5(3)(c) of the 1986 Act see for example *Percy v DPP* [2001] EWHC Admin 1125, [2002]

*always be something involved in the immediate particular circumstances before there can be a reasonable excuse.”*¹⁹⁴

The relationship between the behaviour of the accused and the strength of the contextual support required under s.5(3)(c) of the 1986 Act is a key area of distinction between the English and Australian operation of public order law. In English Law, it is for the defendant to firstly assert that he thought his conduct was reasonable, and then prove that it was on the balance of probabilities. In Australia, the scope of reasonableness is considered within the *actus reus* element of the offence¹⁹⁵.

Negating the Actus Reus – Defending the Offence in Australia

When examining the case law of the different States, one is struck by the uniformity of approach adopted by the courts. In Queensland, the offence of Public Nuisance under s.6 of the 2005 Act states that a person must not commit a public nuisance offence¹⁹⁶. There are no explicit defences outlined within this act. In such cases the defendant is left with no defence other than to dispute the various elements of the offence.

Issues surrounding the physical location of the offence provide the starkest contrast between Australian solutions to low-level public order and that of other jurisdictions. The New South Wales provision, found in the Summary Offences Act 1988, creates the offence of offensive behaviour. This provides that:

*“a person must not conduct himself in an offensive manner in or near, or within view or hearing from a public place or a school.”*¹⁹⁷

S.4A of the 1988 Act goes on to state that a person must not use offensive language in or near, or within hearing of, a public place or a school. In relation to the Queensland statute, s.6(2) then states that a person commits a public

¹⁹⁴ *Connors v Craigie* (1994) 76 A Crim R 502, 507 (Per Dunford J)

¹⁹⁵ *Worcester v Smith* [1951] VLR 316, 317

¹⁹⁶ The Summary Offences Act 2005 (Qld) s 6(2) states that a person commits a public nuisance offence if a person behaves in a disorderly way or an offensive way or a threatening way or a violent way and the person's behaviour interferes, or is likely to interfere with the peaceful passage through, or enjoyment of a public place by a member of the public.

¹⁹⁷ Summary Offences Act 1988 (NSW) s 4

nuisance offence if a person behaves in a disorderly way¹⁹⁸ or in an offensive way¹⁹⁹ or a threatening way²⁰⁰ or a violent way²⁰¹ and the person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public. There are certain American States that employ these location-based factors as a "bolt-on"²⁰² but the provision of them within the main body of the offence is unique to certain Australian States.

Instead of allowing for political expression to be included within a "reasonable conduct" defence, the Australian approach seeks to deal with unpopular political speech by treating it as part of the *actus reus*, as opposed to acknowledging the criminality of the behaviour and then absolving the behaviour with subsequent justification. This reasoning goes back to the case of *Worcester v Smith*²⁰³, which was concerned with a demonstration against the involvement of the United States in the Korean War. The demonstration took place outside the United States Consulate in Melbourne. It was held by the court that a banner reading "*Stop Yank Intervention in Korea*" was not offensive. The court held that to be 'offensive', the behaviour or writing must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of the reasonable person²⁰⁴.

Subsequent decisions of courts within other states have viewed with approval the decision of the Victorian Supreme Court in *Worcester*. In *Ball v McIntyre*, it was re-emphasized that behaviour could be hurtful, blameworthy or improper without necessarily being offensive. The essential element was that the behaviour was likely to provoke a strong emotional reaction²⁰⁵. As with the English position, it has been determined that the context of the behaviour is as important as the actual behaviour itself²⁰⁶. The New South Wales Supreme Court has stated that

¹⁹⁸ Summary Offences Act 2005 s 6(2)(a)(i)

¹⁹⁹ Summary Offences Act 2005 s 6(2)(a)(ii)

²⁰⁰ Summary Offences Act 2005 s 6(2)(a)(iii)

²⁰¹ Summary Offences Act 2005 s 6(2)(a)(iv)

²⁰² See p 51

²⁰³ *Worcester v Smith* [1951] VLR 316

²⁰⁴ *Worcester v Smith* [1951] VLR 316, 318; Douglas (n 4) 79

²⁰⁵ Douglas (n 4) 81

²⁰⁶ *Sully v Louguch* (Unreported NSWSC, Scully J, 12 Nov 1991)

offensive conduct is heavily context dependent. In *Saunders v Herold*²⁰⁷, Higgins J stated that:

*“Conduct and language engaged in at a football match or on a tennis or squash court may be acceptable or at least unremarkable, but offensive if engaged in during a church service or a formal social event.”*²⁰⁸

When drawing together the case law from the various Australian States a number of areas of commonality with that of the English legal system become apparent. The majority of State legislators did not incorporate the defences that appear in s.5(3) of the (English) Public Order Act 1986. This is partly due to the clear emphasis that disorderly conduct is inherently viewed as occurring in a public place (thus negating the need for the defence under s.5(3)(b)).

Perhaps of greater significance for this discussion is the approach to reasonableness adopted by the Australian judiciary. The clear implication is that the reasonableness of the conduct of the defendant is viewed as being part of the *actus reus* of the offence and not as a specific defence. In *Connors v Craigie*²⁰⁹, the test relating to the offensiveness of the conduct was revisited. The reformulated test examines whether the reasonable person, hypothetically present in the circumstances of the case, would have been offended²¹⁰.

This line of reasoning in respect of reasonableness has two significant differences to the English approach to defending low-level public order. First, it should be noted that the acceptance of the hypothetical reasonable person removes the need for the defence under s.5(3)(a)²¹¹, and while this is not an overly litigated area, it is nonetheless a point of divergence. Perhaps of more relevance is that the Australian approach is clearly similar in nature to the defence under s.5(3)(c) but without the attendant reverse onus provision. It is the contention of this thesis that the English model could benefit greatly from the approach adopted within the

²⁰⁷ (1991) 105 FLR 1

²⁰⁸ *ibid* [5] (per Higgins J)

²⁰⁹ (1994) 76 A Crim R 502

²¹⁰ *Connors v Craigie* (1994) 76 A Crim R 502, 506

²¹¹ S.5(3)(a) of the 1986 Act provides that it is a defence for the accused to prove that he had no reason to believe that there was any person within hearing and sight who was likely to be caused harassment, alarm or distress

Australian jurisdiction because the offensiveness of the conduct is for the prosecution to prove²¹² and not, as in the English model, for the defendant to disprove²¹³.

Defences to Disorderly Conduct in the USA

There are similarities of both form and interpretive method within Australia and England. As with the slight diversity between the offences, each of the States within the US has slight variations within their criminal codes in respect of defences to such a charge. More than any other jurisdiction, it is within the US that the overlaps between discussions of defences and elements of the offence itself become apparent²¹⁴. Despite this, it has been identified that for disorderly conduct (as it exists within all criminal codes as a statutory offence), the general rules of criminal law as they apply to statutory offences, also apply in respect of prosecutions for disorderly conduct offences²¹⁵.

The examination of the defences to disorderly conduct will be conducted primarily in respect of the Model Penal Code (MPC). In terms of the structure, the MPC operates on three levels²¹⁶, not dissimilar to the StGB and OWiG within the German legal system. The first step is to examine the prohibited action together with the requisite mental element. Once the guilty act and appropriate mindset has been established, the MPC then requires an assessment of whether a justificatory defence exists. Finally, if the criminality of conduct and the wrongful nature of the conduct (i.e. unjustified) can be shown, the model then seeks to assess whether there exists an excusatory defence. This will examine whether the individual, in actually committing the conduct, was sufficiently blameworthy²¹⁷.

The disorderly conduct offence, as detailed within MPC²¹⁸, provides no specific defence within the model statute. That is not to say that there are no regional

²¹² *Worcester v Smith* [1951] VLR 316

²¹³ *Dehal v DPP* [2005] All ER (D) 152

²¹⁴ E.M. Larson, "Disorderly Conduct: III Proceedings" 27 CJS Disorderly Conduct § 9 at 143

²¹⁵ This basic maxim was held in the Indiana case, *Alison v State*, 240 Ind. 556, 166 N.E. 2d 171 (1960)

²¹⁶ Paul Robinson & Markus Dubber, "The American Model Penal Code: A Brief Overview", 10 *New Criminal Law Review* (2007) 319

²¹⁷ Robinson and Dubber, (n 211) 326

²¹⁸ MPC §250.2

variations within the differing States. Wisconsin has adopted a somewhat unorthodox approach in respect of dealing with disorderly conduct and a defendant is presented with a number of options in respect of defending the charge. The offence is found in chapter 947 of the Wisconsin Criminal Code. The provision seeks to deal with crimes against public peace, order and other interests. The disorderly conduct offence is found within §947.01 and it states

*“Whoever, in a public or private place, engages in a violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance shall be guilty of a class B misdemeanor.”*²¹⁹

There is a clear implication within §947.01 that, in fact, the defendant can commit the offence in either public or private. This provision has echoes of the defence under s.5(3)(a) of the 1986 Act²²⁰. But it is somewhat unusual in respect of the statutes in other States, the majority of which require some element of public disorder within them. The Pennsylvania disorderly conduct statute found under §5503 of the Criminal Code provides an illuminating contrast to that of Wisconsin. It states *inter alia*:

“A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
(1) engages in fighting or threatening, or in violent or tumultuous behaviour;
(2) makes unreasonable noise;
(3) uses obscene language, or makes an obscene gesture; or
*(4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.”*²²¹

The Pennsylvania statute, in marked contrast to the English Public Order Act, is typical of the position within the majority of American States in that it does not incorporate a specific defence. Instead, as with many Australian States²²², the

²¹⁹ Wis. Penal Code Crimes – Public Peace §947.01

²²⁰ See above at p 92 for a full discussion on location of the offence

²²¹ 18 Pa C S A §5503

²²² 18 Pa C S A §5503(b) defines public as ‘affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport

accused would dispute the key elements of the offence. With Pennsylvania, there are two elements that need to be made out. The first required ingredient is that the offence was committed in public²²³. The second element that needs establishing is that the behaviour falls within one of the four conditions. In relation to the second requirement the prosecution must establish that the language or gesture itself was obscene²²⁴.

In determining the validity of, or in construing and applying ordinances that prohibit the use of "obscene" language in public, courts have specifically discussed the effect or application of the United States Supreme Court decisions, beginning with the case of *Roth v US*²²⁵. This case focused specifically on obscenity and held that obscene speech was not within the ambit of constitutionally protected speech²²⁶. This theme was developed in *Miller v California*²²⁷ that a statute prohibiting indecent or obscene language in public was:

*"..unconstitutionally overbroad, since the standard "indecent or obscene" did not meet constitutional requirements laid down by the United States Supreme Court as to a state's power to prohibit obscene expression."*²²⁸

The German Perspective on defending Disorderly Conduct

When considering the low-level public order provision *Belästigung der Allgemeinheit*, (Disorderly Conduct) provided within §118 OWiG, it does not have a specific defence in the way that s.5 of the 1986 Act does, and operates in a markedly similar fashion to many of the Australian provisions²²⁹. The accused must look instead to dispute either the physical or the mental aspects of the offence that has been described²³⁰. Disputing these elements of the offence are not, it should be noted, defences *per se* rather they are positive or negative

facilities, schools, prisons, apartment houses, places of business or amusement, any neighbourhood, or any premises which are open to the public.

²²³ J Smith, "Validity and Construction of statute or ordinance prohibiting use of "obscene" language 2 ALR.4th 1331 by Fn [3]

²²⁴ *Re Nawrocki* (1972) 15 Md App 252, 289 A2d 846,

²²⁵ (1957) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, 14 Ohio Ops 2d 331

²²⁶ Smith (n 223) at fn [4]

²²⁷ (1973) 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, reh den (rehearing denied) 414 US 881, 38 L Ed 2d 128, 94 S Ct 26

²²⁸ Smith (n 223) at fn [4]

²²⁹ cf s6 of the Summary Offences Act 2005 (Qld)

²³⁰ See p 56-57 for further details on the structure of the German offences,

elements of the *Tatbestand*²³¹. However, such an approach does still fall within the taxonomy of disputing a low-level public order offence.

In relation to §118, unlike s.5 of the 1986 Act, the location of the offence is not specified and it is possible for the offence to be committed in public or private. The essential *objektiver* element of the offence is that the grossly improper conduct must be perceivable to the general public²³². This was a key issue in the case of the “*Nacktläufer*”²³³, which explored concepts, and issues of nudity within places that may be considered ‘private’ (such as a garden) yet are visible to members of the public.

The *Nacktläufer* case also illustrated another area of *objektiver Tatbestand* that may be disputed by an individual seeking to dispute guilt for a public order offence. Specifically, the accused may seek to deny that he has engaged in an activity that is grossly improper. As has already been stated²³⁴, according to the commentary on the OWiG, it would appear that the notion of a grossly improper act equates to;

*“...an action that, from an objective viewpoint, ignores that minimum of norms (rules), without which even a society that is open to new developments cannot do.”*²³⁵

This test, being objective in nature, would appear to leave a little room for manoeuvre for the accused, with the court and not the individual determining whether the conduct was grossly indecent. There is nothing by way of case law (in the major appellate courts) to indicate the nature of the conduct that this could encompass, although the question of certainty once again arises when considering an objective test in relation to the prohibited behaviour.

²³¹ Bohlander (n 74) 27

²³² Göhler (n 82) 9

²³³ Literally means the ‘Naked Runner’

²³⁴ See p 61

²³⁵ Göhler (n 82) 4

Section 5(3)(c): Reasonableness Compounding Uncertainty

The bespoke defences provided under s.5 of the 1986 Act have a number of elements to them. The accused can dispute that the conduct was witnessed²³⁶. The accused may claim that he was in a dwelling, the conduct was directed at another person within the dwelling and there was no chance that the conduct was seen or heard by someone outside the dwelling. The location of the offence is, within the other three jurisdictions, dealt with as part of the *actus reus* of the disorderly conduct provision.

The most contentious element of defending a charge under s.5, however, is found under s.5(3)(c) whereby it is for the defendant to show that his conduct was “reasonable”. One of the key problems faced by those who seek to rely on the defence of reasonable excuse is that the English Parliament declined to provide any statutory explanation of what will, or indeed what will not, constitute a reasonable excuse in respect of either offence. It is contended that the statutory ambiguity inherent in construction of the ‘reasonable excuse’ defence places an undue interpretive burden upon the courts. This has resulted in courts indulging in an ad-hoc limitation of acceptable excuses to the point where the essence of the defence may well be being compromised.²³⁷ Furthermore, as the reasonableness of conduct would seem to be a central element of the offence: a finding of reasonableness by the court means that there is no criminal sanction attached to the conduct²³⁸. If reasonableness is determinative of conviction and the reasonableness of the conduct is a central element of the offence then this may well place it beyond the boundaries of ECHR compliance in relation to the reverse onus nature of the defence²³⁹.

Thornton postulates that an objective assessment of reasonableness is not within the defendant’s knowledge, and that it would be more logical to have the prosecution prove unreasonableness beyond reasonable doubt in all of the

²³⁶ Public Order Act 1986 s 5(3)(a)

²³⁷ For discussion on the notion of ad hoc balancing in an international context see Adrienne Stone, “The Limits of Constitutional Text and Structure” (1999) 23 MULR 668

²³⁸ Thornton (n 98) 42

²³⁹ *Sheldrake v DPP* [2005] 1 AC 264, 266

circumstances²⁴⁰. These are two theoretical considerations that, as stated above, remain untested in the higher courts. The principal issue regarding reasonableness of conduct is the inter-relationship this has with specific articles of the ECHR. The trio of protest cases²⁴¹, *Percy*²⁴², *Norwood*²⁴³ and *Hammond*²⁴⁴, will be considered later on in the thesis. They further emphasize the inconsistency of reasoning and the lack of certainty by a defendant seeking to rely on s.5(3)(c) of the 1986 Act.

When considering specific defences to public order, the American position is inherently linked to restrictions provided for by the First Amendment. These themes will be explored further in the context of the relationship between low-level public order and protest in the following chapters. Instead of allowing for political expression to be included within a “reasonable conduct” defence (as it is within England and Wales), the Australian approaches deal with unpopular political speech by treating it as part of the *actus reus*, and as such acknowledging that it is determinative of conviction. Within the OWiG in Germany,²⁴⁵ disputing these elements of the offence are not defences and are unlike s.5(3) of the 1986 Act²⁴⁶.

Whereas *Nacktläufer* dealt with freedom of expression, the import of the case from the defendant’s perspective was very much focused around disputing nudity as a ‘grossly indecent act’ rather than on the state interference of his right to free expression. §118 OWiG is a broadly drafted provision that can encompass a wide range of activity. The provisions of §3 OWiG ensure that a consistent line of judicial reasoning is employed when interpreting the provision. The location of the offence requires a public element and the reasonableness of the conduct is determinative of guilt, rather than a defence for the accused to prove. Additionally, §118 OWiG is not a criminal offence. Manifestly, it would not be appropriate to deal with a protest using the provisions of §118 OWiG.

²⁴⁰ Thornton (n 98) 42

²⁴¹ A phrase coined by Mead (n 14) 224

²⁴² *Percy v DPP* [2001] EWHC 1125 (Admin)

²⁴³ *Norwood v DPP* [2002] EWHC 1564 (Admin)

²⁴⁴ *Hammond v DPP* [2004] EWHC 69 (Admin)

²⁴⁵ See p 57-65 for further details on the structure of the German offences,

²⁴⁶ Bohlander (n 74) 27

The Third Research Question: Uncertainty and Vagueness

One of the key elements of the research hypothesis was the notion of the vagueness of s.5 and the way in which this might offend against constitutionally guaranteed provisions such as those found within Article 7 of the ECHR. In order to address the third research question (that specifically examines whether low-level public order law offends against certainty), this chapter has three distinct but concomitant areas of inquiry. The first element examined was the certainty of the low-level offences within the four legal systems. Secondly it was necessary to examine the *mens rea* requirement of these provisions. Finally, the key area of defences to disorderly conduct offences was explored and critiqued. This triptych represents an inherently interlinked but crucial step in modeling the low-level provisions across the four jurisdictions and providing a diagnostic for s.5.

The first pre-requisite of this investigation was the identification of the certainty requirements inherent within each of the jurisdictions. These desiderata provided the platform against which the low-level public order provisions could be measured. The motivations for, and indeed the attraction of, permitting broadly drawn public order legislation are clear. In defending the role of such provision, it is argued that this allows police and prosecutors sufficient latitude to deal with a wide variety of circumstances. At its lowest level, s.5 of the 1986 Act ascribes the stigma of criminality to the defendant who says something insulting whereby that insult is likely to cause someone (who need not be present) to be distressed. When looking across the jurisdictions, it is contended that this represents an extreme example of a widely drawn and uncertain criminal provision. Nonetheless, the English and Australian legal systems have not yet seen a challenge to their individual statutes in respect of certainty. Moreover, the courts seem satisfied that the respective provisions specify a blend of objectively and readily understandable terms²⁴⁷ which, in turn, provides the requisite clarity of proscribed activity.

²⁴⁷ Such as Threatening, Abusive or Insulting under s 5 of the 1986 Act

The German legal system accepts that within regulatory provisions, such as §118 OWiG, there can be a degree of broadness providing the statutory provision has a consistent body of jurisprudence²⁴⁸. The American jurisdiction requires that a list of behaviour be enumerated within the disorderly conduct provision as a fundamental prerequisite for such statutes to pass muster. The American Courts are vigilant in respect of their role as constitutional guardians of overly vague statutes and this extends to low-level public order statutes. This watchfulness, coupled with the doctrine of strict constitution²⁴⁹ would appear to be an optimal way of ensuring certainty within low-level public order.

Having examined the certainty of public order legislation within a comparative context, the second area of inquiry related to issues of *mens rea*. There is a degree of commonality as regards the requisite mental element from the three common-law jurisdictions. The *mens rea* requirement of a low-level public order offence appears to be *at least* awareness that their behaviour is likely to impact upon the public order. The American position, under MPC §250.1, imparts a requirement of either purposive or reckless intent whereby conscious risk creation is the minimum level of culpability²⁵⁰. The American courts have held that it is not necessary to analyze each element of the offence for intention. Instead all that is required is proof of a general awareness that the conduct was liable to cause public disorder in some respect²⁵¹.

The American position does differ slightly from the operation, in England, of s.5 of the 1986 Act. The English prosecutor must show that the defendant intended that, or was aware that, his words were “threatening”, “abusive” and “insulting” or his conduct “disorderly” and was also was aware his conduct might cause “harassment”, “alarm” or “distress”. The Australian position in relation to the requisite mental state of the defendant is somewhat uncertain.²⁵² The decision in *Police v Pfeifer*²⁵³, however, indicates that the Australian requirement is closely

²⁴⁸ BGH 3 StR 506/95 - Decision of 15 March 1996 (OLG Dusseldorf)

²⁴⁹ Jeffries (n 55) 189

²⁵⁰ Samaha (n 52) 427

²⁵¹ See Robinson (n 1)

²⁵² Douglas (n 4) 89

²⁵³ *Police v Pfeifer* (1997) 68 SASR

aligned to the other two common law systems by requiring an awareness of risk creation as the lowest level of culpability.

Within the German Administrative law, the *subjektiver tatbestand* for §118 OWiG is defined in §10 OWiG. This provides that only intentional acts of disorderly conduct will be punished. It has been held that there must be an intention to commit the action, but intention is irrelevant in respect of the grossly improper nature of the action²⁵⁴. Accordingly under §118, prosecutors are only required to prove the defendant intended to do the act, not intention as to the nature of the conduct.

Conclusion

This chapter has established concerns regarding the certainty of s.5 of the 1986 Act within the criminal law are valid concerns. Establishing this aspect of the hypothesis upon which the research is based, the nature of the vagueness of s.5 can be truly appreciated. By examining public order statutes from alternate jurisdictions, it is clear that they all adopt a similar level of mental culpability; at least requiring an awareness that the conduct (that the defendant is engaged in) may be disorderly. The provisions all have elements of uncertainty as to the scope of the conduct, but it is s.5 that provides the most concerning levels of vagueness. Under this provision, the scope and effect of the conduct is determined as a matter of fact, at the trial. In addition, the defendant has to introduce a reasonable excuse for his conduct, and will similarly not have a definitive answer as to whether this defence is liable to be accepted until after deliberations by the finder of fact. The logical corollary of this is that, whilst there is an inevitable degree of latitude afforded to police and prosecutors in respect of low-level public order across all of the relevant fora, the lowest entry point to criminality within England and Wales is at best blurred and at worst, dangerously uncertain in comparison to the other jurisdictions.

²⁵⁴ Göhler, (n 82) 4

Chapter Five:

Public Order and Guaranteed Freedom of Speech

Introduction to Chapter Five

The previous chapters have drawn together a picture of the operation of low-level public order law within the four jurisdictions based. The areas of inquiry were defined by the first three research questions. These research questions provide a clear understanding into the flawed nature of s.5 of the 1986 Act with the overarching aim of using these findings to propose solutions, either within the context of reforming the criminal law surrounding low-level disorder or shifting the focus to a more managed approach to public order, limiting the broad discretion afforded to police and prosecutors. The discussion will now assess disorderly conduct within the context of protest and dissent. It is suggested that the scope of s.5 cannot properly be appreciated until the interaction between managing disorder and suppressing free speech is properly explored. This will in turn provide a clearer picture of the full spectrum of activity covered by low-level public order legislation, providing further research in answer to the second research question.

Scope of Free Speech Analysis

Accordingly, this analysis will tighten the focus upon those occasions when the actions of a vehement protestor may fall within the ambit of low-level offences and the subsequent response of the courts within the respective jurisdictions. Fundamental to such an inquiry is the way in which low-level public order offences can be used to suppress, or at least restrict, an individual's right to protest. Turenne states that:

*“The 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 behaviour during a demonstration.”*¹

This statement was made in connection with English public order law, but it is contended that this statement can be examined in the context of each of the jurisdictions under consideration. 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 order².

The position of the Australian High Court is of particular significance as it is the only jurisdiction under consideration where there is no constitutional guarantee of free speech. The traditional position adopted by the Australian Courts has been to narrow the scope of the freedom of political speech, especially where the protest may give rise to the potential for disorder. One case, however, that of *Coleman v Power*³, provides insight as to the current relationship between public order law and freedom of expression and how the traditional orthodoxy might be shifting⁴.

Research into the operation of s.5 of the Public Order Act 1986 was initially conducted in the 1990's and indicated that disorderly conduct provisions were not widely deployed as a means to police protest⁵. The constitutional position within the English legal system has changed since the time of this research with the enactment of the Human Rights Act 1998 giving 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

¹ Sophie Turenne “The Compatibility of criminal liability with freedom of expression” [2007] Crim LR 866, 866

² Eric Barendt, *Freedom of Speech* (2nd Edn, OUP 2008) Chapter 8

³ *Coleman v Power* [2004] HCA 39, (2004) 220 CLR 1

⁴ See John Uhr, “The Performance of Australian Legislatures in Protecting Rights’ 41-61 in Campbell Goldsworthy and Stone (eds) *Protecting Rights without a Bill of Rights* (Ashgate 2006)

⁵ D Brown & T Ellis, *Policing low-level disorder: police use of section 5 of the Public Order Act 1986* (HORS/195 1995)

increasing willingness to give strong protection to a protestor engaging in political speech⁶.

A protestor, prosecuted under s.5 of the 1986 Act, would seek to utilize the defence under s.5(3)(c) of the 1986 Act claiming that his conduct was reasonable⁷. Mead explains that:

*“The specific reasonable conduct defence under both s.4A and s.5 ought to mean greater protection for peaceful protest. Surely it must always be ‘reasonable’ conduct peacefully to exercise a Convention right?”*⁸

The essence of this defence, as expressed by Mead, is that for the Courts to criminalize the prohibited conduct would violate the defendant’s rights in respect of statutorily guaranteed rights to free expression⁹. This defence is given extra potency when considered alongside the interpretive duty of the English Courts under s.3 of the Human Rights Act 1998¹⁰.

The impact of the Human Rights Act poses a particular challenge for the policing of such protest. Whilst not straying 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 on Convention rights as the judiciary¹¹. 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. This is particularly apposite when considering the

⁶ Barendt (n 2) 160

⁷ For details of the broader operation of this defence see the previous Chapter, specifically pp 130-133

⁸ David Mead, *The New Law of Peaceful Protest* (Hart 2010) 223

⁹ See p 13-14 for further details of the UK commitments under the European Convention on Human Rights and Fundamental Freedoms.

¹⁰ Human Rights Act, s 3 provides that primary and secondary legislation must, so far as is possible, be read and given effect to in a way which is compatible with the Convention rights, and this means even if there is contrary authority on the question

¹¹ Human Rights Act 1998, s 6(1)

concerns around the certainty of the legislation that has been identified as being central to the research hypothesis¹².

An examination of the protection afforded by the courts to political debate will benefit from having the perspective of the different jurisdictions and their contrasting approaches to protecting such speech. One leading commentator asserts that the courts in the United States give particularly strong protection to political speech¹³ by virtue of the First Amendment. A “conceptual cornerstone” of the U.S. Constitution¹⁴, it provides that any legislation that interferes with freedom of speech can be struck down by the courts. The US perspective, therefore, provides perhaps the clearest and most direct restriction upon low-level public order legislation.

Nowhere is the contrast in approaches more apparent than when examining the German legal system approach to regulating protest. It is at this point that the first divergence in approach within the jurisdictions can be identified. German Basic Law, Article 5 and 8 GG, regulates all aspects of protest. The statute by which this is accomplished is the *Versammlungsgesetz*¹⁵, (VslgG). This regulation, under the VslgG, is all encompassing, providing a wide range of pro-active provisions and reactive offences. The case law from Australia suggests a tendency to employ obstruction offences and disorderly conduct only as a last resort, relying instead on discretion of the police¹⁶. Meanwhile, the US solution is to utilize disorderly conduct provisions whilst the “victims” of extreme protest seek redress through the civil courts¹⁷. The English approach is manifested through the Public Order Act 1986 with the statute providing for the regulation of individual behaviour alongside pro-active regulation for protest.

¹² See p 10

¹³ Barendt (n 2) 155

¹⁴ Barendt (n 2) 2

¹⁵ ‘*Versammlungsgesetz in der Fassung der Bekanntmachung vom 15. November 1978 (BGBl. I S. 1789), das zuletzt durch Artikel 2 des Gesetzes vom 8. Dezember 2008 (BGBl. I S. 2366) geändert worden ist*’ translated as ‘Assembly Act in the version published on 15 November 1978 (Federal Law Gazette I 1789), which was last amended by Article 2 of the Act of 8 December 2008 (Federal Law Gazette 2366)’.

¹⁶ *Stone v Ford* (1993) 65 A Crim R 459 whereby the Northern Territories Supreme Court held that offensive behaviour had to be genuinely offensive and intended by the defendant to be so – rather than merely an extreme form of protest

¹⁷ *Snyder v Phelps* 562 U.S. ___ (2011)

The regulatory structures governing protests provide a key framework in which low-level public order legislation operates and will be discussed in detail in the next chapter. This chapter will initially deal with those occasions where disorderly conduct and protest interweave outside such regulatory frameworks, starting with the Australian perspective.

Implied Rights v Uncertain Statutes: Lessons from Australia

Of all of the jurisdictions under consideration, Australia has the least distinctive body of law relating to freedom of expression and the protection offered to protestors charged with a public order offence¹⁸. Australia has no bespoke Bill of Rights and commentators have lamented that “*the general absence of a Bill of Rights might make Australia outstanding but not necessarily admirable*”¹⁹. The absence of constitutionally guaranteed rights means that there is no explicit protection afforded to freedom of speech within the main instrument of government²⁰. This becomes crucial when one considers that most offences with which protestors are charged are low-level public order offences defined by elements that have little to do with the collective context within which the offence was committed²¹.

Commentators have suggested that the primary effect of enacting a Bill of Rights within Australia would be to shift institutional responsibility for making rights claims from legislatures to courts²². In the last decade of the Twentieth Century, however, the case law would suggest exactly the opposite; that rights protection has come almost exclusively from the higher courts. The case of *Australian*

¹⁸ Roger Douglas, *Dealing with Demonstrations: The Law of Public Protest and its enforcement* (Federation 2004) 30

¹⁹ Uhr, (n 4) 42

²⁰ Adrienne Stone, “The Limits of Constitutional Text and Structure” (1999) 23 MULR 668

²¹ Douglas (n 18) 30

²² B Galligan & F L Morton, “Australian Exceptionalism: Rights Protection without a Bill of Rights” in Campbell, Goldsworthy, & Stone, (eds) *Protecting Rights without a Bill of Rights* (Ashgate, Aldershot, 2006) 1-40

*Capital Television Pty Ltd v The Commonwealth*²³ saw the High Court imply a freedom of political communication from the terms of the Constitution. It has been stated “*this is a limited kind of free speech right, which exists to protect only certain kinds of political speech*”²⁴.

The essence of this key constitutional concept is that the courts look at the constitution as establishing a system of representative and accountable government within the framework of a parliamentary democracy. In order to facilitate representative government, the courts have ruled²⁵ this implicitly means that the legislature should not pass any law that interferes with the operation of the democratic system. It has been noted²⁶ that in the early 1990s, there were a number of decisions that expanded this implied protection afforded by the courts to speech, particularly the decision in *Theophanous v Herald & Weekly Times Ltd*²⁷, which struck down important federal legislation that appeared to limit speech²⁸.

The “expansive” approach to protecting speech was somewhat reigned in by the High Court by virtue of the decision in *Lange v Australian Broadcasting Corporation*²⁹. In *Lange*, the court laid down a test by which stated that where a law ‘effectively burden(s) freedom of communication about government or political matters’, the law must be ‘reasonably appropriate and adapted to serve a legitimate end’³⁰. This was developed into a two-stage test in *Levy v Victoria*³¹, which looked at the nature of the restriction that the law was imposing upon the protestor. The first question asked is whether that restraint had effectively burdened freedom of communication in respect of government or political matters either in terms, operation or effect. If that is the case, then the court goes on to

²³ (1992) 177 CLR 106

²⁴ Adrienne Stone “The Australian Free Speech Experiment and Scepticism about the UK Human Rights Act” 391-409 in Campbell, Ewing & Tomkins, (eds) *Sceptical Essays on Human Rights* (OUP 2001) 391

²⁵ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106

²⁶ Adrienne Stone & Simon Evans, “Australia: freedom of speech and insult in the High Court of Australia.” 4 (2006) *IJCL* 677, 678

²⁷ (1994) 182 CLR 104

²⁸ Stone (n 24) 392

²⁹ (1997) 189 CLR 520

³⁰ *ibid* at 567 quoted in Stone (n 20) at fn 67

³¹ (1997) 189 CLR 579

ask whether it was reasonably appropriate and adapted to serve a legitimate end, the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative government³².

Coleman v Power: A Reluctant Paradigm Shift?

The decisions in both *Lange* and *Levy* saw the court emphasizing the limits of the implied protection of speech with reference to the 'text and structure' of the constitution³³. It was the decision of the High Court in the case of *Coleman v Power*³⁴ that provides an examination of the (still) current approach to freedom of speech and public order concerns taken by the Australian Courts³⁵. It also affords some insight as to the difficulties faced by the other common law jurisdictions under consideration in balancing the right to protest, the form of that protest and the extent to which low-level public order can, or should, be used to restrict any form of protest.

As previously mentioned³⁶, *Coleman v Power* occurred in the state of Queensland. The regulation of disorderly conduct, at the time of commissioning the offence, was dealt with by s.7 of the Vagrants Gaming and Other Offences Act 1931 (Q) which, so far as is relevant here, provides that:

"7(1) Any person who in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear...

(d) uses any threatening, abusive or insulting words to any person

*Shall be liable to a penalty of \$100 or to imprisonment for up to six months."*³⁷

³² Douglas (n 18) 36-37

³³ Stone (n 19) 678

³⁴ *Coleman v Power* [2004] HCA 39, (2004) 220 C.L.R. 1

³⁵ There is considerable discussion of this case and its progenitor in the Court of Appeal, see Elisa Arconi, "Politics, Police and Proportionality - An opportunity to explore the Lange Test: *Coleman v Power*" (2003) 25 Sydney LR 379; See also Stone, A., (n 19) from 668

³⁶ See p 46

³⁷ This legislation has now been repealed and has been replaced by s 6 of the Summary Offences Act 2005 see p 47

Clearly within such a law, there is significant latitude already given to the judiciary as to how to interpret such terms as threatening, abusive or insulting. In terms of what behaviour may constitute insulting, citing the case of *Thurley v Hayes*³⁸, May J stated in his judgment that:

*"'Insulting' is a very large term, and in a statement of this kind is generally understood to be a word not cramped within narrow limits."*³⁹

The power of arrest for this offence is conferred by means of s.35 of the Police Powers and Responsibilities Act 1997 (Q) which so far as is relevant here, provides that:

"35(1) It is lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an offence if it is necessary for one or more of the following reasons -

to prevent the continuation or repetition of an offence or the commission of another offence."

The parallels with the English statutory provision under s.5 are clear. The offence is a low-level public order offence⁴⁰, the requirement is for behaviour that corresponds with any of those conditions and as such mimics s.5 of the 1986 Act in England⁴¹. From the date of the Act, it is possible to surmise that the draftsmen did not have notions of free speech uppermost in their thoughts when writing this piece of legislation. The prohibited conduct, specifically the use of threatening, abusive or insulting words, means that this is precisely the kind of dilemmatic choice facing the English courts.

The facts of *Coleman v Power* provide a model case study of the approach adopted by the Australian High Court to a minor public order infraction being

³⁸ (1920) 27 CLR 548

³⁹ *ibid* [550] (per May J)

⁴⁰ S 7 (1) of the 1931 Act was a summary only offence

⁴¹ *cf* Public Order Act 1986, s 5(1) p 31

rebuffed by an individual claiming protected speech. In this case the appellant was handing out pamphlets in Townsville, Queensland, which had the heading “*Get to know your local corrupt type cops*”. The pamphlet went on to name the respondent, a serving police officer as being corrupt declaring, “*I got witnesses so kiss my arse you slimy lying bastards*”. Immediately behind where the appellant was standing was a placard that stated, “*Get to know your local corrupt type cops - please take one*”⁴². The respondent, named within the pamphlet, approached the appellant and following a brief confrontation, the appellant was arrested and charged, *inter alia*, with committing the above mentioned public order offences under legislation enacted by the Queensland Parliament in 1931 of using insulting words and distributing material containing insulting words⁴³.

Following conviction, an appeal was lodged on the grounds that the legislation under which the appellant had been charged and convicted had infringed the appellant’s implied constitutional right to freedom of political communication⁴⁴. The appellant contested that not only did this render his conviction void, but the law under which he had been arrested would also have to be considered as inoperable and invalid. Had the Court accepted this, the arrest and detention by the police would have been unlawful as well.

The seven judges in the High Court of Australia upheld the appeal by the margin of four to three⁴⁵. Of greater significance is that of the four who found for the appellant, it was only McHugh J who discussed the issue from the standpoint of invalidating the law due to incompatibility with the *Lange* test⁴⁶. McHugh J argued that the law was invalid because it was “*not reasonably appropriate and adapted*

⁴² *Coleman v Power* [2004] HCA 39, (2004) 220 CLR 1, 42

⁴³ In addition to the offence under s7, the appellant was also accused of *inter alia* an offence under s7A(1)(c) of the Vagrants Gaming and Other Offences Act 1931 (Q) Any person: (a) who by words capable of being read either by sight or touch prints any threatening, abusive, or insulting words of or concerning any person by which the reputation of that person is likely to be injured, or by which the person is likely to be injured in the person’s profession or trade, or by which other persons are likely to be induced to shun, or avoid, or ridicule, or despise the person; or ... (c) who delivers or distributes in any manner whatsoever printed matter containing any such words

⁴⁴ As laid down in the *Lange* test above p 153-155

⁴⁵ McHugh, Gummow, Kirby and Hayne JJ upheld the appeal and Gleeson CJ, Callinan and Heydon JJ dissenting).

⁴⁶ Stone (n 20) 679

for preventing breaches of the peace⁴⁷. The other three majority judges disposed of the case by interpreting s.7(1)(d) of the 1931 Act as not being applicable due to the training and temperament of police officers which means they must be expected to resist the sting of insults directed to them⁴⁸. In his lengthy judgment, McHugh J initially emphasized the difficulties facing the judiciary when trying to decide at what point free expression needs to be limited. He stated:

*“Under the Constitution, a law that, without qualification, makes it an offence to utter insulting words in or near a public place cannot validly apply to insulting words that are uttered in the course of making statements concerning political or governmental matters. A law that seeks to make lawful the arrest of a person on such a charge is as offensive to the Constitution as the law that makes it an offence to utter insulting words in the course of making statements concerning political or governmental matters.”*⁴⁹

He then went on to discuss how, in his opinion, these issues could be satisfactorily resolved:

*“(That) freedom of communication always trumps federal, State and Territorial powers when they conflict with the freedom.”*⁵⁰

McHugh J is alone amongst his fellow judges in seeking to position the High Court in Australia to take a more proactive and interventionist view in respect of low-level public order laws that unduly impinge on the right to protest. Such conclusions are the logical corollary of the assertions made by McHugh J, although more litigation is needed to establish whether this is a distinct trend or an aberrant decision. Despite the fact that the Australian courts do not have the guardianship role of Convention rights imposed on the English courts by the Human Rights Act 1998⁵¹, the *Lange* test is illustrative of the guardianship

⁴⁷ *Coleman v Power* [2004] HCA 39, (2004), 220 CLR 1, 102 (per McHugh J)

⁴⁸ See Blackshield, T and Williams G., (2005) *Australian Constitutional Law and Theory Commentary and Materials 4th edition* Sydney: Federation Press

⁴⁹ *Coleman v Power* [2004] HCA 39, (2004) 220 CLR 1, 36 (per McHugh J)

⁵⁰ *ibid* at 91 (per McHugh J)

⁵¹ Human Rights Act 1998, s 6

function having been adopted developmentally (by virtue of the case law) rather than a specific legislative or constitutional intent⁵².

There has been no significant case law on this matter in the post-*Coleman* legal landscape. The decisions of the other three majority judges provide little by way of a general comment on free expression. The judgments of Gummow, Hayne and Kirby JJ held that the material section of the Vagrancy Act to be valid, whilst concurring with McHugh J that it infringed the second limb of the *Lange* test. Instead of invalidating the Act, they read down the legislation so it did not offend against the *Lange* Test. It is therefore not known as to whether future judgments will reflect the primacy of freedom of expression as espoused by McHugh J or whether pragmatism will reassert itself, much as it did in the judgments of his colleagues in this case.

The English Position in respect of Public Order & Protest

If the Australian development of protestors' rights emerged gradually through case law, the legal system of England and Wales has been jolted into action through legislative means. From the start of the new millennium, the English legal system gave further effect to the rights enunciated in the ECHR⁵³ by means of the Human Rights Act 1998. The operative rights from the purpose of this inquiry are the Article 10 right of freedom of expression and the Article 11 right of freedom of association⁵⁴. The impact of this relatively recent development needs to be considered when examining the operation of the defence of reasonable excuse under s.5(3)(c) of the 1986 Act. Thornton⁵⁵ states that the incorporation of the positive right to free expression has been described as a "*constitutional shift in English law*"⁵⁶. With the previously dominant common law provisions that had

⁵² Even within the decision of the judges in *Coleman* there is varying degrees of deference to the legislative intent of the state parliament see *Coleman v Power* [2004] HCA 39 (2004) 220 C.L.R. 1, 296-299 (per Callinan J)

⁵³ European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) as scheduled by Human Rights Act 1998

⁵⁴ For the conception, gestation and birth of the Human Rights Act 1998 see John Wadham, et al, *Blackstone's Guide to The Human Rights Act* (5th Edn, OUP 2009) 1.01 – 1.57

⁵⁵ Peter Thornton et al, *The Law of Public Order and Protest* (OUP 2010) 398

⁵⁶ *Redmond-Bate v DPP* [2000] HRLR 249, [1999] EWHC Admin 732 (per Sedley LJ); in Thornton (n 55 above) 302

developed being described as “*hesitant and negative*”⁵⁷ the focus of analysis will be upon the post HRA legal landscape. Reference will be made to the English common law position only where it has direct relevance to the current legal framework governing low-level public order⁵⁸.

Clearly, the defence of reasonable excuse has significant ramifications for those individuals who seek (rightly or wrongly) to challenge the prevailing orthodoxy within society and the case law demonstrates that determining whether the conduct was reasonable or not tends to engage Article 10. Article 10 of the ECHR states *inter alia* that:

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...*⁵⁹
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety for the prevention of disorder or crime, for the protection of the reputation or rights of others...*⁶⁰

When discussing the human rights framework, this thesis will generally deal with Article 10 considerations. Article 11 is, nevertheless, equally significant in the context of protection of protest. Article 11 of the ECHR provides *inter alia* that:

“Everyone has the right to freedom of peaceful assembly and to the freedom of association with others, including the right to form and join trade unions for the protection of his interests.”

⁵⁷ *R (Laporte) v CC Gloucester Constabulary* [2007] 2 AC 105, 34 (per Bingham LJ); in Thornton (n 55 above) 302

⁵⁸ The common law does have a critical role to play in respect of dealing with low-level public order offences by virtue of the common law provision for dealing with Breach of the Peace. This will be examined later on in the thesis: see chapter seven

⁵⁹ Art 10(1) goes on to state that: “This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

⁶⁰ Art 10(2) goes on to provide that States can further limit the right under Art 10(1): “..for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

Article 11(2) provides the qualifications that operate in much the same way as those found in Article 10(2). Article 11(2) does provide an explicit statement that the armed forces and the police can be lawfully excluded from such rights. It has been stated that Article 11 is the “*lex specialis*” with Article 10 as the “*lex generalis*”⁶¹. Thornton makes the point that both articles are inherently connected and the ECtHR tends to read Articles 10 and 11 together. It is this approach that will be adopted throughout the following analysis⁶².

The Judicial Balancing of Protest and Public Order

As can be seen from the terms of the above Articles of the Convention, the existence of the defence of reasonable excuse under s.5(3)(c) has clear ramifications for protesters within England. Barendt has stated that the broad scope of s.5 of the 1986 Act has serious implications for freedom of speech and it is now necessary for the courts to read s.5 and especially s.5(3)(c) in the context of Article 10⁶³.

This discussion will turn to the case law to try and build a picture of how the courts have managed finding the balance between respecting the individual right to protest and maintaining public order. *Hammond v DPP*⁶⁴, presented the court with a fundamental and dilemmatic choice. The above-mentioned right to freedom of expression, which all of the jurisdictions acknowledge is integral to a free and democratic society⁶⁵, was in collision with the extent to which one section of society can be allowed to express those views that will insult other minority groups. This concern is amplified when such views lead to violence from those who may be listening to or watching the protest.

⁶¹ *Ezelin v France* (1991) 14 EHRR 362 para 35; in Thornton (n 54 above) 401

⁶² Thornton (n 55 above) 401

⁶³ Barendt (n 2) 300

⁶⁴ *Hammond v DPP* [2004] EWHC 69 (Admin)

⁶⁵ Numerous judgments of the ECtHR seek to re-emphasise the importance of Art 10 and 11 specifically *Ziliberberg v Moldova* App. 61821/00 May 2004

The Hostile Audience

The problem of the so-called “hostile audience” or “heckler’s veto”⁶⁶ is one that raises acute difficulties when considering the balancing act. 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 as, in a public order arena, such an audience is as likely to be committing a public order offence as the speaker. The solution of the US Supreme Court, as shown in *Forsyth County v Nationalist Movement*⁶⁷, was to hold 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 Australian High Court⁶⁸, in *Forbutt v Blake*⁶⁹, held that if a potential breach of the peace were likely to result from the exercise of a lawful right, the remedy is:

*“the presence of sufficient force to prevent that result not the legal condemnation of those who exercised those rights.”*⁷⁰

The English position is characterized by what Mead refers to as, “*an unfortunate lack of consistency*”⁷¹. The approach of the court in respect of situations where the audience seeks to use violence against an inherently peaceful protest can first be found in *Beatty v Gilbanks*⁷², and this states that it is the duty of the police to deal with those using violence rather than persons exercising their lawful right to protest⁷³.

⁶⁶ Barendt (n 2) 300

⁶⁷ 505 US 123, 134 (1992)

⁶⁸ Based on the reasoning in *R v Justices of Londonderry* (1891) 28 LR Ir 440 which was, in turn an extension of the reasoning in *Beatty v Gilbanks* [1882] 9 QBD 308, (1882) 15 Cox CC 138

⁶⁹ (1981) 51 FLR 465, 475

⁷⁰ *ibid* [450]; in Douglas (n 18) 144

⁷¹ Mead, (n 8) 329

⁷² *Beatty v Gilbanks* [1882] 9 QBD 308, (1882) 15 Cox CC 138

⁷³ Barendt (n 2) 303

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*⁷⁴. Despite being decided on slightly different facts⁷⁵, *Jones* held that a protestor could be convicted for doing a lawful act (i.e. protesting) if they know that doing that act may cause another to do an unlawful act. Mead states that the majority of cases since then have followed the *Jones* line of reasoning.⁷⁶ There is a concern that the definitive legal position has not been sufficiently clearly set out so as to make an outcome predictable to any potential protestor. 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.

Hammond: Relating Low-Level Disorder and Protest

In *Hammond*, the protestor was a lay preacher, who, in order to emphasize the impact of his preaching, had a large, double sided sign with the words “Stop Immorality”, “Stop Homosexuality”, and “Stop Lesbianism”⁷⁷, on each side. As he was preaching, a crowd of thirty to forty people gathered around the appellant and began shouting and arguing with him, clearly agitated both by the sign and by his preaching. At one point, someone tried to pull the sign from him and the appellant fell to the ground. In spite of this, he continued with his preaching whereupon a member of the public poured a glass of water over him.

Police officers attended the scene and asked the appellant to take down his sign, but the appellant refused. Whilst the police were deciding on an appropriate course of action, several members of the public approached them. These people expressed outrage that the appellant had not been arrested⁷⁸. The police officers decided that Hammond was provoking violence and he was arrested to prevent a

⁷⁴ *Duncan v Jones* [1936] 1 KB 218

⁷⁵ In *Beatty* the clash was between the Salvation Army and a group who opposed them, the Skeleton Army. In *Duncan* the violence was going to come from people who Duncan was trying to stir into political action; in Mead (n 8) 329

⁷⁶ Mead (n 8) 329

⁷⁷ *Hammond v DPP* [2004] EWHC 69 (Admin), para 5(b)

⁷⁸ *Hammond v DPP* [2004] EWHC 69 (Admin), para 5(k)

breach of the peace⁷⁹. He was subsequently charged with an offence contrary to s.5 of the 1986 Act.

At trial, the justices decided that the words displayed on the appellant's sign were, in fact, insulting and that they had caused distress to those present, indeed a number of people had given their names to police. It was held that the appellant was aware of the distress his sign was causing. The defendant maintained that his actions were reasonable under s.5(3)(c) of the 1986 Act, by virtue of his right to freedom of expression under the ECHR⁸⁰. The justices stated that since he had refused to stop displaying the sign when it was clearly causing such offence, the appellant's behaviour was not reasonable and as such did not bring him within the defence laid down in s.5(3)(c) of the 1986 Act.

It is, perhaps, illustrative of the thinking of the lower courts on this matter that rather than follow the common law position in *Beatty v Gilbanks*, the justices felt that there was a pressing social need to restrict the appellant's right to freedom of expression under Article 10 in order to promote tolerance towards all sections of society. Additionally, the restriction of the appellant's right to freedom of expression was deemed to be legitimate when balanced against the threat of disorder from the crowd of people reacting to the sign⁸¹.

The matter was appealed by way of case stated to the Divisional Court. May L.J. accepted that it was open to the magistrates to find the words and signs used by the appellant as falling within s.5(1)(b) of the 1986 Act. In relation to the question of reasonableness, in light of Article 9 and 10 of the ECHR, the court held that the magistrates had sufficiently considered the questions that they were obliged to in reaching the conclusion that the appellant's conduct was not reasonable⁸². It was stated that Convention rights had to be brought into play and if freedom of expression was to be curtailed, this had to be done in a way that was compatible with Convention rights. The appellant, upon whom the burden lay, had to

⁷⁹ Breach of the Peace is a common law power, codified in the case of *R v Howell* [1982] QB 416; [1981] 3 All ER 383; [1981] 3 WLR 501, CA; see also Chapter Seven

⁸⁰ The questions posed by way of case stated are detailed in para 20 of the *Hammond* judgment

⁸¹ *Hammond v DPP* [2004] EWHC 69 (Admin), para 19

⁸² *ibid* [para 24] (per May J)

establish that his actions were reasonable and thus he could come under the terms of s.5(3)(c) of the 1986 Act. The Court concluded that the magistrates had given due consideration to the Convention rights of the appellant and that they reached a conclusion that the appellant's conduct was not reasonable. Of greater significance, and arguably the key finding from the case of *Hammond*, is the following:

*“...the Human Rights Convention generally, does not, as such, provide a defence to the information but... that human rights considerations have to be brought into play in an appropriate way when the offence created by this section is looked at and when the facts as found by the justices are applied to it.”*⁸³

It is settled case law that Convention rights cannot operate as an absolute defence to a charge under s.5 of the 1986 Act. This does highlight one of the fundamental problems with the broadness of the offence of disorderly conduct within the English legal system. Specifically, when faced with a protest that arouses strong feelings, the practical effect of the judgment in *Hammond* is that the protestor is left with no effective way of communicating his beliefs. There is a potential risk of a chilling effect on speech such as this⁸⁴. More than that, it is submitted that such a decision leads to a lack of clarity as to when a protestor might be arrested and convicted. At each stage of the prosecutorial process, the protestor is subject to a discretionary judgment by the police, Crown Prosecutors and finally the finders of fact as to whether their conduct was reasonable.

A similar dilemma to that of *Hammond* was explored in the earlier case of *Norwood v DPP*⁸⁵. Norwood was convicted under s.31 of the Crime and Disorder Act 1998 for the racially aggravated version of the offence under s.5 of the 1986 Act⁸⁶. The appellant had displayed a poster, containing words in very large print “*Islam out of Britain*” and “*Protect the British people*”⁸⁷. There was also displayed

⁸³ *ibid* [para 20] (per May J)

⁸⁴ Andrew Geddis, “Free speech martyrs or unreasonable threats to social peace? - “Insulting” expression and section 5 of the Public Order Act 1986” [2004] PL 853, 865

⁸⁵ [2003] EWHC 1564 (Admin)

⁸⁶ For details on the operation of this offence see p 96-98 and also the case of *Johnson v DPP* [2008] EWHC 509 (Admin); (2008) 105(10) L.S.G. 27; Times, April 9, 2008

⁸⁷ *Norwood v DPP* [2003] EWHC 1564 (Admin), para 6

a reproduction of a photograph of one of the twin towers of the World Trade Centre in flames and a Crescent and Star surrounded by a prohibition sign. Norwood was a member of the British National Party and he contended that his actions were reasonable and as such protected by s.5(3)(c) of the 1986 Act. Auld LJ held in *Norwood* that:

*“in effect that the appellant’s conduct was unreasonable, having regard to the clear legitimate aim, of which the section (section 5 Public Order Act 1986) was itself a necessary vehicle, to protect the rights of others and/or to prevent crime and disorder.”*⁸⁸

A case that is the mirror image of *Norwood* is the very recent decision of *Abdul v DPP*⁸⁹. The defendant was part of a group of protesters who had attended a parade to celebrate the homecoming of British service personnel. As part of their protest, they brandished placards, chanted slogans such as "*British soldiers burn in hell*", and had called the soldiers "*murderers, rapists and baby-killers*"⁹⁰. They had, in turn, been threatened and abused by members of the public. The protest had been planned in conjunction with the local police and on the day the protestors had complied with police directions throughout. Furthermore, they had not been warned about their behaviour, nor been asked to desist. The protestors were not arrested at the time of the protest. Instead the decision to prosecute was not taken until months later – following the viewing of hours of video footage and in consultation with the Complex Trial Unit of the CPS.

The court held that the words and behaviour of the protestors in *Abdul* crossed the threshold of legitimate protest. It was 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. The threat of violence, missing from *Norwood* and plainly present in *Hammond*, emphasizes that the central concern of the courts in such cases is focused around the

⁸⁸ *Hammond v DPP* [2004] EWHC 69 (Admin), para 24 (per May J)

⁸⁹ *Abdul v DPP* [2011] EWHC 247

⁹⁰ *ibid* [paras 13-17]

prevention of public disorder rather than enabling protestors⁹¹. *Hammond* might have wished for the court to apply the common law rule in *Beatty v Gilbanks*, but it was the *Duncan v Jones* orthodoxy that prevailed. As Barendt points out, where the speeches or general behaviour are designed to provoke violence from opponents then prosecution and conviction becomes likely⁹² even where the protest has initially peaceful aims⁹³.

The decision in *Abdul* would have been consonant with this if the arrest had not been some months after the protest had occurred. That the court found the words used by the defendants in *Abdul* 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 decisions⁹⁴. Even if they had chosen to carry their message on placards instead of shouting, the evidence given at trial by the police indicated that they would have relied on placards that the defendants were carrying⁹⁵. After fully co-operating with the police and responding to all instructions given it is difficult to see how else the defendants in *Abdul* could have made their protest⁹⁶.

A more successful application of the defence of reasonableness can be found in the altogether different case of *Dehal v DPP*⁹⁷. The facts provide an illuminating analogue to those in *Hammond* and *Norwood* and further illustrate the difficulty in trying to predict how the English courts will manage the conflicting rights. In this case, the defendant, a practicing Sikh, placed a notice on a notice board within the temple, which he attended. The notice, *inter alia*, described the President of the Temple as a “*Hypocrite President*”, “*a liar*” and a “*proud, mad dog*”⁹⁸. It was found in the trial before Luton Magistrates, and the subsequent appeal to Luton

⁹¹ Thornton (n 55) 410

⁹² Barendt (n 2) 303

⁹³ *Duncan v Jones* [1936] 1 KB 218

⁹⁴ *Abdul v DPP* [2011] EWHC 247, para 21

⁹⁵ *ibid* [para 20]

⁹⁶ This case will be further explored alongside the US counterpart of *Snyder v Phelps* 562 US (2011) in Chapter Seven

⁹⁷ *Dehal v DPP* [2005] EWHC 2154 (Admin)

⁹⁸ *ibid* [para 3] (per Moses LJ)

Crown Court, that the contents of the notice were abusive and insulting and that the President of the Temple had been harassed and distressed by the notice. Accordingly Dehal was convicted of the offence under s.4A of the Public Order Act 1986⁹⁹.

On appeal by way of case stated, the appellant asserted that his actions were reasonable in so far as he believed that the contents of his poster were correct. Moreover, the defendant had a right to freedom of expression under Article 10 of the ECHR and the conviction contravened this right. The court found that there was no evidence of a threat to public order despite the fact that the appellant clearly knew and intended the notice to be offensive. Moses J, stated in paragraph 12 of his judgment:

*“However insulting, however unjustified what the appellant said about the President of the Temple a criminal prosecution was unlawful as a result of section 3 of the Human Rights Act and Article 10 unless and until it could be established that such a prosecution was necessary to prevent public disorder. There is no such finding or any justification whatever given in the case stated.”*¹⁰⁰

It would appear in this case that Moses J was using a two-stage test to protect the appellant’s right to freedom of expression¹⁰¹. The prosecution was required to show that the prosecution was being brought with the legitimate aim of protecting society from violence. The prosecution then was required to demonstrate that a criminal prosecution is the only method necessary to achieve that aim¹⁰². Essentially, the insulting nature of the notice was balanced against the threat to public order both prior to and at the time of the offence. Such a test, if universally applied, would undoubtedly add some certainty to such cases:

“It is neither desirable nor possible to provide any universal test for that which goes beyond being a matter of legitimate protest, save to stress the importance of

⁹⁹ See pp 42-44

¹⁰⁰ *Dehal v DPP* [2005] EWHC 2154 (Admin) at para 12 per Moses LJ

¹⁰¹ *ibid* [para 9] (per Moses LJ)

¹⁰² See *Turenne* (n 1) 876

*providing a justification for invoking the criminal law, namely where there is a threat to public order.*¹⁰³

The reasoning of Moses J echoes the test imposed in *R v Howell*¹⁰⁴ for dealing with breach of the peace. This emerges as a potential area for reform and revivification of the law relating to disorder within England and Wales and will be discussed in detail in conjunction with group protest and low-level public order, in Chapter Seven¹⁰⁵.

Policing, Public Order and Protests in England

An additional, and as yet largely unexplored, area of potential inconsistency concerns the actions of police officers who may be called to deal with such situations as outlined above. It may be possible to argue that the initial arrest of the appellant is potentially unlawful and offends against Article 10 of the ECHR.

S.6(1) of the Human Rights Act 1998 so far as it is relevant states that:

“It is unlawful for any public authority to act in a way which is incompatible with a convention right.”

The Act then goes on to define a public authority as including any person whose functions are of a public nature¹⁰⁶. In this case it is possible to argue that the arresting officer is covered by the ambit of the Human Rights Act 1998. Accordingly in arresting the appellant, the police may have acted in a way that was incompatible with the appellant’s Article 10 ECHR Rights. This is yet another level of guardianship explicitly provided for in the Human Rights Act. Clearly it would be a courageous police officer that ignored the legitimate complaint of a minority group¹⁰⁷, citing freedom of expression and her or his role as a Convention guardian.¹⁰⁸

¹⁰³ *Dehal v DPP* [2005] EWHC 2154 (Admin), para 7 (per Moses LJ)

¹⁰⁴ *R v Howell* [1982] QB 416, 427 CA

¹⁰⁵ See p 254

¹⁰⁶ Human Rights Act 1998, s 6 (3)

¹⁰⁷ It is difficult to import this reasoning for example, in the case of *Hammond*.

¹⁰⁸ The case of *Orum v DPP* [1989] 1 WLR 88 held that a police officer was equally as capable of being Harassed, Alarmed or Distressed, as any other member of the public. Police were, however,

In seeking an optimal pathway as regards the issue of low-level public order and protest, there is a temptation to merely advocate the passing of a whole raft of legislation to protect the interests of minority groups. This is also fraught with difficulties. The most obvious difficulty is the theoretical event horizon posed by the Human Rights Act 1998. S.19 of the 1998 Act requires that all legislation conform to convention rights. As part of the consultation process into the religious hatred provisions to be included within the Serious Organized Crime and Police Act 2005, the House of Lords report highlights the balancing act upon which they were engaged:

*“it is more difficult to define the point at which a particular expression takes on characteristics that can reasonably be proscribed in the spirit of Article 10.2 of the European Convention. Trenchant and even hostile criticism of religious tenets and beliefs has to be accepted as part of the currency of a democratic society, and that is not at issue.”*¹⁰⁹

In addition to this, Card has pointed out that the ECtHR has noted that protection of free speech under Article 10 of the Convention extends to ideas which “*offend shock and disturb*,” a statement supported at least notionally by the judgments in *Redmond-Bate*¹¹⁰ and latterly *Dehal*¹¹¹. In the light of this, there seems to be little mileage in merely calling for more proscription of speech to address the problem. What is clear, is that even when one introduces a rights based discourse, the courts still have to make a case by case decision on whether the protest falls within the terms of low-level public order legislation or whether it is a legitimate protest. The defence of reasonable excuse would appear to offer little more protection and certainty than those jurisdictions that have no bespoke defence and instead rely on the accused claiming the protest was outside the scope of the *actus reus* of the offence¹¹².

expected to be more robust as to the language that they were expected to tolerate as part of their job.

¹⁰⁹ *Religious Offences in England and Wales - First Report published by the House of Lords* (2003) 10 April. Volume II (HL Paper 95-II), Q641, 224 at para 83

¹¹⁰ *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789

¹¹¹ Richard Card, *Public Order Law* (Jordans 2000) 157

¹¹² See Chapter Three, p 71

USA: Tolerating Legislation and Protecting Speech

Unlike the constitution of England and Australia, the US operates with a supreme constitution. As an overture to the discussion on the way in which the various US States have balanced low-level public order and freedom of speech, it is necessary to discuss the way in which the constitutionally guaranteed right to freedom of speech operates within that jurisdiction. The right to free speech is seen as a central tenet of the constitutional process by virtue of the 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.”*¹¹³

It has been noted that; *“rarely has such an apparently simple legal text produced so many problems of interpretation”*¹¹⁴. When discussing conflicts between free speech and the requirements of low-level public order the role of the higher courts becomes crucial¹¹⁵. The history of these higher courts is rich indeed and too voluminous to be considered at any great length within this discussion¹¹⁶. 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 desirability¹¹⁷.

¹¹³ 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 all individuals within that State. This is known as the “Incorporation Doctrine”.

¹¹⁴ Barendt (n 2) 48

¹¹⁵ R Delgado, “Towards a legal realist view of the First Amendment” (2000) 113 Harv LR 778, 795

¹¹⁶ For a detailed discussion see L Bollinger, and G Stone, (eds) *Eternally vigilant: Free Speech in the Modern Era* (Chicago University Press, 2002)

¹¹⁷ Barendt, (n 2) 48

Perversely the two most extreme ‘categories’ of speech directly affect the way in which protest and public order interact. Particularly strong protection is given to political speech¹¹⁸, whilst a second inter-related class of speech that does not fall within the protection of the First Amendment is those words that are classed as “*Fighting Words*” as defined in the case of *Chaplinsky v New Hampshire*¹¹⁹ as:

“(Fighting words) are words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”¹²⁰

The harm concerned is physical harm caused by another who was provoked by the speaker. This interpretation of fighting words highlights the problems considered by the US courts when dealing with cases such as those faced by the English courts in *Hammond v DPP*¹²¹. There are twin dilemmas that the courts must address. First is whether the need for society to balance the freedom of expression of one individual can be set against the fact of that expression leading to the vilification of a section of society. Intertwined with this, and a concern of a more practical nature, is the issue with which police officers must deal with when the freedom of expression of one individual may provoke a violent reaction in another.

An example of this can be found in *Gregory v. City of Chicago*¹²², where demonstrators were marching through a residential neighbourhood protesting about racial segregation in schools¹²³. A number of onlookers who were not involved in the demonstration and who opposed the demonstrators’ viewpoint became irate and disorderly. The police officers on the scene feared “*impending civil disorder*” and demanded that the demonstrators disperse. When they refused, they were arrested for disorderly conduct¹²⁴. At trial, however, the court held that the incident was:

¹¹⁸ Barnedt, (n 2) 48

¹¹⁹ (1942) 315 US 568

¹²⁰ (1942) 315 US 568 572

¹²¹ *Hammond v DPP* [2004] EWHC 69 (Admin)

¹²² 394 US 111 (1969)

¹²³ *ibid* [111]

¹²⁴ *ibid* [111]

*“devoid of evidence that the demonstrators’ conduct was disorderly and that the reaction of the onlookers was not a permissible basis for finding otherwise.”*¹²⁵

Black J stated that the disorderly conduct charge was based exclusively on the police conclusion that:

*“the hecklers observing the march were dangerously close to rioting and that the demonstrators and others were likely to be engulfed in that riot.”*¹²⁶

The contrast between this decision and the finding of the English court in *Hammond* and *Abdul* is stark and reemphasizes the difference in approaches between the two jurisdictions¹²⁷, with the US courts favouring the rights of the demonstrator as well as seeking to maintain order.

The protection afforded to words is illustrated by the approach of the Supreme Court in *Cohen v California*¹²⁸. In this case, a 19 year old was arrested for wearing a jacket on which the words “Fuck the Draft” written. The disorderly conduct provision under which he was charged prohibited the malicious and wilful disturbing of the peace or quiet of any neighbourhood or person by offensive conduct. In the judgment of Harlan J, the State was in violation of the First and Fourteenth amendment criminalizing the display of a single, four-letter expletive¹²⁹. It was held that vulgarity was simply a side effect of an exchange of free ideas. The State of California could not censor the citizens in order to enforce civility¹³⁰. Despite the protection afforded to speech of an extreme nature, legislators in America have tried to legislate for so called “Hate Speech”. Various states have tried, at various times and with varying degrees of success, to introduce legislation that seeks to criminalize more extreme and upsetting forms of expression¹³¹.

¹²⁵ *ibid* [111-112]

¹²⁶ *ibid* [120]

¹²⁷ See pp 163-171

¹²⁸ 403 US 15 (1971)

¹²⁹ *ibid* [26]

¹³⁰ *ibid* [25]

¹³¹ See p 91 for details of the US approach to Hate Speech

In 1992, the city of St Paul in Minnesota had issued an ordinance that prohibited the placement of certain symbols that were likely to arouse anger, alarm or resentment on the basis of race, religion or gender. A teenager, Robert A. Victoria, was convicted of violating this Ordinance after having placed a burning cross in the yard of a black family. The subsequent appeal to the Supreme Court in the case of *RAV v City of St Paul*¹³² saw Victoria's conviction, and the preceding Ordinance held to be unconstitutional. The rationale was that it criminalized a symbolic expression. O Connor J, speaking in a later case of *Virginia v Black*,¹³³ stated that cross burning was different to other forms of communication as "*it carries a message in an effective and dramatic manner*". The Supreme Court also stated that the Ordinance allowed the city to impose special prohibitions on those speakers who express views on "*disfavored (sic) subjects*"¹³⁴. The judgment of Scalia J in *RAV v City of St Paul* tended to suggest that the "fighting words" of *Chaplinsky* are not necessarily wholly invisible to the First Amendment and that the core of the offence was founded on governmental hostility to the underlying message conveyed. As a result, the statute was adjudged to be unlawfully content based.

The Supreme Court was, again, asked to examine a cross burning ordinance, this time passed by the Commonwealth of Virginia in the aforementioned case of *Virginia v Black*¹³⁵. The statute banned cross burning with intent to intimidate a person or group of persons, making it a felony offence. On this occasion the Supreme Court decided to distinguish the decision in *RAV v City of St Paul* on the grounds that cross burning is a particularly virulent form of intimidation that the State of Virginia might legitimately seek to prohibit even though this was a clear example of content based regulation¹³⁶.

¹³² 505 US 377 (1992)

¹³³ 123 US 1536 (2003)

¹³⁴ *ibid* [388] (per O'Connor, J)

¹³⁵ *ibid*

¹³⁶ For significant discussion on the issues behind content based regulation see Ivan Hare, "Method and objectivity in free speech adjudication: lessons from America" (2005) 54 ICLQ 49

Balancing in Action: The Case of Marcavage

As has been seen throughout this discussion, one of the most significant problems when conducting a doctrinal analysis of the battle between low-level public order and protest is that, with the vast majority of low-level public order related free speech cases, the decisions will not be made by the higher appeal courts. In the case of *Commonwealth of Pennsylvania v Marcavage et al*¹³⁷ the (relatively low ranking) Common Pleas court of Pennsylvania made the decision. Yet the case provides a direct illustration of the differences between the various approaches operated by the jurisdictions under discussion.

The defendant in the case was the founder of a Christian fundamentalist group called "Repent America". On 10th October 2004, he and three other members of the group attended the "Outfest" event in Philadelphia, to preach their opposition to homosexuality, based on their belief that it is against the teachings of the bible. This was done in a noisy but peaceful fashion. The police were present during the protest and accordingly the defendant was arrested and charged with a number of offences including riot¹³⁸, ethnic intimidation¹³⁹ and disorderly conduct¹⁴⁰. At trial, the prosecution had said that the defendant and his fellow demonstrators were trying to incite the crowd and videotape was shown of the activities of the defendant. Following a viewing of this tape, Common Pleas Judge Pamela Dembe dismissed the charges stating:

¹³⁷ (2005) CP: 0501-0131 unreported case Delaware Daily Times 18 February

¹³⁸ Riot, 18 Pa CSA 5501: A person is guilty of riot, a felony of the third degree, if he participates with two or more others in a course of disorderly conduct:

(1) with intent to commit or facilitate the commission of a felony or misdemeanour;

(2) with intent to prevent or coerce official action; or

(3) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.

¹³⁹ Ethnic Intimidation, 18 Pa.C.S.A. §2710: A person commits the offence of ethnic intimidation if, with malicious intention toward the actual or perceived race, colour, religion, national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity of another individual or group of individuals, he commits an offence under any other provision of this article or under Chapter 33 (relating to arson, criminal mischief and other property destruction) exclusive of section 3307 (relating to institutional vandalism) or under section 3503 (relating to criminal trespass) with respect to such individual or his or her property or with respect to one or more members of such group or to their property. "Malicious intention" means the intention to commit any act, the commission of which is a necessary element of any offence.... motivated by hatred toward the actual or perceived race, colour, religion or national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity of another individual or group of individuals.

¹⁴⁰ Disorderly conduct, 18 Pa.C.S.A. §5503 see p 53-60 for details of this offence.

“We are one of the very few countries that protect unpopular speech. And (sic) that means that Nazis can march in Skokie, Illinois... that means that the Klu Klux Klan can march where they wish to... we cannot stifle speech because we don't want to hear it or we don't want to hear it now.”¹⁴¹

It is clear that the views being expounded by an individual seeking to try and defend her or his freedom of speech are very often those views which society is uncomfortable in discussing. It is similarly self evident, as was noted in *City of Houston v Hill*¹⁴², that popular, tolerant speech and kind words have little need for constitutional protection. It has been asserted by the Supreme Court in *Cox v. Louisiana*¹⁴³ that the true test of the right to free speech is the protection afforded to unpopular, unpleasant, disturbing or even despised speech.

Obnoxious Speech & Symbols through a Germanic Prism

As with US Constitution, all of the organs of state are governed by the supreme source of German law, known as Basic Law (*Grundgesetz*, GG). According to Article 20(3) GG all of the principal organs of government are subject to the provisions of the Basic Law, including the legislature¹⁴⁴. In this respect, the constitution can be said to be supreme. There are a number of articles of the *Grundgesetz* that are of key interest when examining the law relating to public order and therefore have to be taken into account by both the legislators drafting the law and the judiciary when interpreting the law, specifically Article 5 GG that enshrines freedom of expression and Article 8 GG, which provides for freedom of assembly. The *Grundgesetz* also lays down the underlying principles of criminal liability, incorporated into the StGB, which are of particular interest when considered against the main criticisms of public order legislation in the UK¹⁴⁵. Article 103 GG lays down key principles with special relevance and application to

¹⁴¹ (2005) CP: 0501-0131 unreported case Delaware Daily Times 18 February

¹⁴² 482 US 451 (1987)

¹⁴³ 379 US 536 (1965), 551

¹⁴⁴ Art. 20 (3) GG states that the legislature shall be bound by the constitutional order, the executive and the judiciary shall be bound by law and justice.

¹⁴⁵ See p 3-11 for details of these issues.

this enquiry. The concept of *Gesetzlichkeitsprinzip* requires all criminal liability to be based on a full act of parliament and also incorporates *inter alia* the principle of legal certainty (*Bestimmtheitsgebot*). In addition, the notion of protection of legal rights (*Rechtsgüterschutzprinzip*) is designed to ensure that the criminal law is not in place to enforce one or more concepts of morality, rather to protect individual or societal interests¹⁴⁶.

The above principles are internalized within the *Strafgesetzbuch* (StGB) although the offence under §185StGB of Insult (*Beleidigung*) interacts both with Article 103 (2) GG and Article 5 (2) GG. As previously explored¹⁴⁷, the provision is, in many respects, more closely related to the genus of offences against the person rather than of public order¹⁴⁸. At first sight, the term of the statute seems somewhat broad in its ambit. It contains the threat of punishment for “insult” but no further clarification. Nonetheless, the Federal Constitutional Court (BVerfG) has held that the long case history surrounding the offence of *Beleidigung*, and the existence of the appropriate legislative restraints on the offence being used capriciously, means that §185 does comport within Article 103(2) GG.

At first sight this would appear to bear similarity to the offence under s.4A of the 1986 Act within England. However, the scope of the English offence is much broader. Within §185 StGB, there has to be both evidence of intent to insult and evidence that the individual was actually insulted. There is also some statutory assistance in determining the scope of this offence under §193 StGB, which provides for the defence of fair comment:

“Critical opinions about scientific, artistic or commercial achievements, utterances made in order to exercise or protect rights or to safeguard legitimate interests, as well as remonstrations and reprimands by superiors to their subordinates, official reports or judgments by a civil servant, and similar cases shall only entail liability

¹⁴⁶ Nigel Foster & Satish Sule, *German Legal System and Law* (4th Edn, OUP 2010)

340

¹⁴⁷ See p 63

¹⁴⁸ Steven Ross Levitt, “The Life and Times of a Local Court Judge in Berlin” (2009) 10 German Law Journal 169

*to the extent that the existence of an insult results from the form of the utterance of the circumstances under which it was made.*¹⁴⁹

Crucially, the BVerfG is attenuated to the demands of balancing the Basic Law through the checks imposed by §193 StGB (which also covers public interest and journalism), and also Article 2 (1) GG and Article 5 (2). Whilst the offence under §185 StGB may resemble the English provision, the balancing and constitutional nuancing when it comes to applying *Beleidigung* is more reminiscent of the engrained constitutional discipline of the US jurisdiction.

When one considers the non-criminal nature of the OWiG framework in which the offence of disorderly conduct operates, freedom of expression and low-level public order cases tend to be sporadic rather than the norm. The German legal system provides for numerous offences designed to address behaviour that not only promotes extreme right wing ideologies but also seeks in any way to glorify the National Socialist past. Originating from the *Versammlungsgesetz* (VslgG)¹⁵⁰ §86a StGB provides the offence of using unconstitutional symbols and states *inter alia* that whosoever domestically or publically uses, in a meeting or in written materials disseminated by him, symbols¹⁵¹ prohibited by the code¹⁵² or produces, stocks, imports or exports objects which depict or contain such symbols for distribution or use in Germany or abroad shall be liable under this provision.

Introducing the *Versammlungsgesetz*: A Bespoke Protest Law

The terms of §86a StGB are such that it does not require a breach of the public peace. There is a definite link between the offence under §86a (and other criminal offences within the StGB) and issues of freedom of expression. Unlike the other jurisdictions, the administrative provision of §118 OWiG would not be deployed to deal with a passionate or indeed vehement protestor, and it is highly unlikely that

¹⁴⁹ Translation taken from Michael Bohlander, *The German Criminal Code* (Hart 2008) 141

¹⁵⁰ German law regulating assemblies (VslgG) see below and chapter six for further details.

¹⁵¹ Symbols are defined in §86a(2) as flags, insignia, uniforms and their parts, slogans and forms of greeting. It goes on to say that symbols which are 'so similar to be mistaken for those named shall be equivalent to them'.

¹⁵² §86 provides for the offence of dissemination of propaganda of unconstitutional organizations and lists such organizations as those of a political party declared unconstitutional by the BVerfGG or propaganda materials the contents of which are intended to further the aims of a former national socialist organization.

§185 StGB would be deployed given the requirements of Article 5 I and Article 8 I GG. Instead the relevant law is to be found in the Assembly Law (*Versammlungsgesetz*, VslgG). The use of a bespoke and all encompassing law of protest is unique amongst the four jurisdictions. The VslgG is part of the law of the Federal Assembly and as such operates in the same legal strata as the StGB. The Assembly Law is broken up into five sections. The first section, as with the majority of German law is the general section, the second and third sections deal with the regulation of meetings¹⁵³. The fifth section deals with specific protest within Berlin.

Criminal Offences within the VslgG

The details of criminal offences that accompany the various regulatory provisions are to be found in the fourth section of the VslgG. The offences regarding regulation of a protest that bear a remarkable similarity to those found in Part 2 of English Public Order Act¹⁵⁴ and will be considered alongside the wider discussion on frameworks in Chapter Six. It is the offence of causing violence at a procession or assembly that is most apposite for the purposes of this discussion¹⁵⁵:

§21 VslgG *Whosoever commits acts of violence with the intention of preventing or of disrupting meetings or processions, which have been lawfully authorized, or otherwise threatens their execution, or threatens with or causes disorder will be punished with imprisonment up to three years or a fine.*

The VslgG also contains bespoke legislation for criminalizing the arming of demonstrators or organizers¹⁵⁶. The English and Australian jurisdictions would rely on the regular criminal law to deal with offensive weapons. In America, the position is given an additional dimension when considering the impact of the right to bear arms as laid down in the Second Amendment¹⁵⁷.

¹⁵³ See Chapter Six

¹⁵⁴ See Part 2 of the Public Order Act, especially s 11, s 13 and s 14 for details of the offences.

¹⁵⁵ §21 VslgG

¹⁵⁶ §27 VslgG. §24 VslgG deals with the offence of having an armed escort for the procession

¹⁵⁷ The Second Amendment states 'A well regulated militia being necessary to the security of a free State, the right of the People to keep and bear arms shall not be infringed.' This almost runs counter to the VslgG regulatory principles, which prohibit the militarization of parades and

The other offences contained within Part 4 VslgG also have an echo of the English provisions. These offences include encouraging or publicizing a protest that has already been banned¹⁵⁸. §26 VslgG imposes criminal liability on the organizer of the protest for continuing a public meeting or procession once it has been prohibited¹⁵⁹ or for failing to notify the authorities under §14 VslgG. The comparable English law has three separate offences of organizing¹⁶⁰, participation¹⁶¹ and incitement to join in a procession knowing that it has been prohibited. In English law, failure of an organizer to notify the police of a protest is found under s.11(9) of the 1986 Act. All of these offences are punishable as summary only offences in English law¹⁶².

A number of the offences detailed in Part 4 of the VslgG are aimed at preventing the rise of paramilitary organizations. In this, there is more than an echo of The Public Order Act 1936, which was enacted in England in response to the fascist demonstrations, organized by Oswald Moseley.¹⁶³ §27 VslgG criminalizes the wearing of political uniforms at public meetings. In England this is done by means of s.1 Public Order Act 1936. The punishments for these offences in their respective jurisdictions both include periods of imprisonment within the range of sentencing options¹⁶⁴.

In concluding this part of the discussion, there are a number of significant points to be considered. The focus of the legislative and, indeed, the constitutional provisions laid down in the GG is upon ensuring that all members of society, including those from minority groups are afforded the opportunity to protest. Extremist groups (specifically extreme right wing groups), however, are targeted

assemblies. See the case of *District of Columbia v Heller* 554 US 570 (2008) for the modern scope of the Second Amendment

¹⁵⁸ §23 VslgG

¹⁵⁹ §26(1) VslgG

¹⁶⁰ Public Order Act 1986, s 13 (7)

¹⁶¹ Public Order Act 1986, s 13 (8)

¹⁶² Public Order Act 1986, ss 13(11)–(13)

¹⁶³ For further details on Moseley and the Blackshirt movement of the 1930s see Robert Skidelsky, *Oswald Moseley* (Papermac Revised Edition 1990) and Martin Pugh, *Hurrah for the Blackshirts! Fascists and Fascism in Britain between the Wars* (Pimlico New Edition 2006)

¹⁶⁴ Public Order Act 1936, s 7 provides for conviction upon summary trial, the defendant will be liable to imprisonment not exceeding 3 months or a fine or both.

so that they do not have an opportunity to promote themselves and their beliefs¹⁶⁵.

Curbing the scope of s.5: Suggestions for Reform

This chapter has shifted the focus from the general provisions of disorderly conduct to the specific problem posed by the passionate protestor who infringes the low-level public order legislation. The passionate protestor in a western democracy exposes even the most tightly drafted disorderly conduct provision to rigorous examination. The passionate protestor will try to shock and try to elicit a response which may well stray into the realms of low-level public order. Such a state of affairs provides a microcosm of the research hypothesis and can be expressed in the following terms. Assuming that the protest is not violent and not seeking to incite violence, the protestor would still be uncertain as to whether her or his conduct as part of the protest will be adjudged as coming within the terms of s.5. If the conduct is so adjudged then the protestor will seek to rely on the defence of reasonableness under s.5(3)(c) but again, will be uncertain as to whether this defence will be accepted. The final element of this paradigm is whether the actions of a non-violent protestor should even come within the contemplation of a prosecutor and whether an offence that permits such a capricious prosecution is too broadly drafted.

The English provisions require that the behaviour will be determined by reference to a test that is partially objective in nature. This test requires the words threatening¹⁶⁶, abusive¹⁶⁷ or insulting¹⁶⁸ be given their ordinary dictionary definitions.¹⁶⁹ Whilst the terms threatening is relatively clear to understand, the term abusive is defined with reference to insulting. The Oxford English Dictionary defines the word insulting in the following terms: “*To speak or act so as to offend*

¹⁶⁵ See the provisions of §1(2) VslgG

¹⁶⁶ The Oxford English Dictionary (OED) defines “threatening” as “Expression of intention to punish, hurt or harm”

¹⁶⁷ The OED defines “abusive” as “Using harsh words or insults”

¹⁶⁸ The OED defines “insulting” as “To speak or act so as to offend someone”

¹⁶⁹ The test, as laid down in *Brutus v Cozens* [1972] 2 All ER 1297, HL at 1303 has been adopted by the High Court of Australia explicitly in the case of *Coleman v Power* [2004] HCA 39, (2004) 220 CLR 1 at 42

someone". It is suggested that this definition is highly subjective and can cover mere expressions of dislike¹⁷⁰. The Joint Committee on Human Rights (JCHR) has stated that:

*"We expressed concern that criminalizing insulting words or behaviour would disproportionately stifle freedom of expression and recommended that the word "insulting" should be deleted from the Act."*¹⁷¹

Even removing the word insulting may not alleviate all of the concerns; the word abusive is defined in relation to insulting and the ambiguity and scope may simply be transferred from insulting onto abusive. Removal of both insulting and abusive from s.5, leaving the offence of "*threatening or disorderly behaviour*", still does not overcome the difficulties in respect of the vagueness of harassment, alarm or distress.

Section 5 and Sexual Orientation

The question of whether the court in *Hammond* was simply utilizing s.5 of the 1986 Act to deal with homophobic hate speech may well provide the key to understanding the inherent difficulty with having such a broadly drafted provision. The trial at first instance occurred in 2002, which means that the augmented sentencing powers available under s.146 Criminal Justice Act 2003¹⁷² would not have been available. Irrespective of this, the provisions only serve to add sexual orientation as an aggravating factor at sentencing and unlike the provisions under s.28 Crime and Disorder Act 1998, do not create an additional offence. There is a clear oversight in respect of homophobic harassment in the same way there was racially aggravated harassment before the coming into force of the 1998 Act. That oversight is for the legislature, not the judiciary to fill. The same legislation that can be used to deal with a drunk who urinates in a side street was deployed in *Hammond* to cover the legislative omission in respect of sexual orientation hate crime.

¹⁷⁰ Contrast this with the highly regulated meaning under §184 StGB

¹⁷¹ Joint Committee on Human Rights, *Demonstrating Respect for Rights?* (2008-9, HL 141, HC 522) 54

¹⁷² This provides for tougher sentences for offences motivated for or aggravated by the victims sexual orientation

Any discussion of public order issues must necessarily be viewed against a backdrop of the often-tense and emotive circumstances under which the offences are committed¹⁷³. It is recognized by observers that free speech cannot operate in a vacuum and that restrictions on speech will be justified when the circumstances of that speech are either “*inherently inflammatory or it is likely in the circumstances to lead to violence or disorder*”¹⁷⁴. What this has come to mean, however, is that debates surrounding the operation of the criminal sanctions have tended to be rooted firmly within the sphere of free speech discourse, concentrating upon the occasions where public order legislation is used to combat protestors.

Cross Jurisdictional Perspectives on Low-Level Disorder and Protest

In respect of the Australian position, each of the majority judgments in *Power* that ‘a law creating an offense for the use of insulting words in public must be limited to circumstances in which a violent response is either intended or likely’¹⁷⁵. Through the comparative prism, this statement by McHugh, J indicates that s.5 of the 1986 Act, a provision which has been deployed against protestors on numerous occasions, would not pass constitutional muster in Australia. Yet the court was dealing with the state using the criminal law to suppress a complaint that might more properly have been dealt with in the civil courts. There was no indication of a violent response to Coleman’s protest. There is no case law to suggest how the Court would have ruled on the facts of *Hammond* or *Abdul*¹⁷⁶.

In *Hammond*, the High Court decided that it was open to Magistrates to conclude that H’s conduct was not reasonable because of the pressing need to show tolerance to all sections of society and the fact that the defendant’s conduct was provoking violence and disorder and interfered with others’ rights. In *Abdul*, the

¹⁷³ For a discussion on the intense and conflict-based context that are the backdrop for many public order situations on a cross-jurisdictional canvas see Donatella Della Porta & Herbert Reiter, (eds), *Policing Protest: The Control of Mass Demonstrations in Western Democracies* (University of Minnesota Press 1998)

¹⁷⁴ Barendt (n 2) 269

¹⁷⁵ *ibid* 679 fn 16

¹⁷⁶ *cf* the decision with that of the English Courts in *Hammond v DPP [2004] EWHC 69 (Admin)*

protestors were engaging in a highly controversial protest that was always likely to provoke an outraged response. But the defendants had co-operated with police directions and had tried to facilitate peaceful protest in a way that even the defendants in *Beatty v Gilbanks* had not¹⁷⁷. Given the facts of *Abdul*, despite the finding of the court that the defendants had overstepped the boundaries of legitimate protest, it is difficult to project a way in which the defendants could ever make their point without infringing s.5 even taking into account Article 10 of the ECHR and the defence of reasonable conduct under s.5(3)(c).

This thesis will go on to consider the case of *Abdul* from the perspective of post-9/11 protest in Chapter Seven. It has been established that the passionate protestor was not in the minds of parliament when it was creating s.5 of the 1986 Act. Instead it is aimed at countering low-level, anti social behaviour¹⁷⁸. It has been stated “the starting point is that Parliament itself has decided where the balance should be struck between freedom of expression and unlawful conduct.”¹⁷⁹. In the jurisdictional ambit of England and Wales there is legislation prohibiting a wide variety of controversial words or behaviour¹⁸⁰. The low-level public order provisions are being used in cases where the police and the courts see the speech or expression as undesirable¹⁸¹.

Conclusion

The comparative prism provides a useful evaluative mechanism by which the scope of s.5 can be measured in order to answer the second research question. An emerging pattern is that whilst different low-level provisions would operate with little difficulty in the English legal environment, s.5 of the 1986 Act would be unlikely to survive the attention of the US courts. It is difficult to conclude that an American court would have convicted either *Hammond* or *Abdul*. The case of *Marcarvage* is illustrative of this position. The decision can be dismissed as the musings of a

¹⁷⁷ See p 162 for details

¹⁷⁸ Geddis, (n 84) 873

¹⁷⁹ (HL Paper 95-II), (n108)

¹⁸⁰ See provisions dealt with by Crime & Disorder Act 1998, s 28; Racial Religious Hatred Act 2006; Official Secrets Act 1911 & 1989

¹⁸¹ In this case, the decisions of the court in *Hammond* and *Abdul* as opposed to *Dehal*

minor court, yet there are other cases to support the basic premise that disorderly conduct must be more than “pure” speech even though it may be abusive or offensive¹⁸².

If *Hammond* had directed his speech into a personal, homophobic attack then he might well have fallen foul of hate crime legislation. It has been noted that the type of language required under the provisions of many US States must have a direct tendency to incite a violent reaction in others. The protest in the recent case of *Goldhamer v Nagode*¹⁸³ found that the element of violence was essential in any conviction for disorderly conduct. Clearly, the US jurisdiction and the protection afforded to speech within the terms of the First Amendment provides a significant protection to the passionate protestor.

Within the German jurisdiction, there is clear evidence of a different approach to dealing with protest and the rights of both the protestor and the audience in such a circumstance. The nature of the offence under §86a StGB is such that it does not require a breach of the public peace and criminalizes *any* public use of the prohibited symbols outlined in §86a(3). This is a recognizable, ‘content-based’ restriction but focused on ensuring there is compliance with the GG. While §86a, and other criminal offences within the StGB, such as §185, deal with freedom of expression issues, the administrative provision of §118 OWiG does not. The reason for this is that the *Versammlungsgesetz* (VslgG) covers all aspects of protest law. The cases of *Hammond and Abdul*, had they occurred in the German jurisdiction, would have been dealt with under the provisions of VslgG rather than under the administrative provisions of the OWiG. It is suggested that §21 VslgG is unique amongst the jurisdictions and provides a model of statutory regulation of violence within the context of a protest.

This study has analyzed and critiqued the operation of low-level provisions from the perspective of a single protestor. The next stage of inquiry is an evaluative assessment of the frameworks governing larger protests employed by the four

¹⁸² *W L v State*, 769 So 2d 1132 (Florida District Court of Appeals 3d Dist 2000)

¹⁸³ *Goldhamer v Nagode* ___ F3d ___ (7th Cir Sept 2, 2010)(No 09-2332)

legal systems. This metanarrative will illustrate the operation of low-level public order within the rarified atmosphere of a demonstration and further contribute to the wider discussion regarding the optimal pathways for low-level public order solutions. In doing so, the discussion will move from the diagnostic approach required by the three initial research questions. Although necessary to confirm the hypothesis, the next stage of the inquiry is to begin a study as to whether criminalization is the appropriate method to deal with low level disorder or whether a more administrative structure based around disorder management would provide an effective alternative to criminalizing a vast swathe of conduct.

Chapter Six:

Regulating Protest: Managing Disorder Proactively

Introduction to Chapter Six

The previous chapters have focused upon the disorderly conduct provisions as they have operated within the sphere of regular criminal law. The last chapter demonstrated how these provisions have bled over into situations whereby individual protesters were dealt with using the low-level public order offences. Douglas, writing about dealing with demonstrations in Australia, has stated that:

“An analysis of demonstration law which did not include reference to commonly charged ‘demonstration offences’ would be both misleading and deficient.”¹

The obverse is also true. Any analysis of public order law that does not make reference to the law governing protest and the impact this has upon low-level public order will be equally as misleading and deficient. The recent inquest into the death of Ian Tomlinson at the G20 protests in London² highlights the way in which seemingly low-level public order legislation can be deployed in a situation that is inherently volatile.

The research hypothesis has centred upon the operation of low-level public order law and that the main deficiency of s.5 is that the decision to criminalize an individual for conduct can be based on arbitrary and personal predilections of the prosecutor. In assessing the reach of s.5 this chapter starts with a premise; that in

¹ Roger Douglas *Dealing with Demonstrations: The Law of Public Protest and its Enforcement* (Federation Press 2004) 70

² <http://www.guardian.co.uk/commentisfree/2011/may/04/editorial-ian-tomlinson-inquest-verdict> accessed Monday 23rd May 2011 at 22:16

a “regular”³, low-level public order theatre, irrespective of the jurisdiction, there are three different “actors” involved. The first is the individual engaging in the proscribed fashion using either words or conduct. The second of the ‘public order actors’ is the recipient, the person who might be harassed, fearing unlawful violence or generally disturbed by the conduct⁴ (of course, another key element to the research hypothesis is that critically, this can be missing from the offence under s.5). The third protagonist is the police officer(s), the executive arm of the State concerned with ensuring that disorder does not ensue and that any criminality is investigated⁵.

Organized Protest: Differing Models of Low-Level Disorder

When considered in the context of protest, a number of crucial changes occur to this model. Significantly, a fourth party becomes an active participant within the arena, the general public. This group may not be offended by the content of the protest but they also may not be interested in the cause and, more significantly, object to any disruption that such a protest might cause. In *Austin & Saxby v Commissioner of the Police for the Metropolis*⁶, the complainant was not a protestor, but simply a member of the public who happened to be in the centre of London when the Metropolitan Police instituted the now infamous “kettling” tactic. The courts have emphasized the importance of minimizing any disturbance caused by protestors. In relation to the disruption caused by the “Climate Camp” protest in the case of *R (Moos & McClure) v Commissioner of the Police of the Metropolis*⁷ the court held that:

“The prolongation of the demonstration, thus blocking the highway until the morning, had no justification and would continue to cause serious disturbance and disruption to traffic and pedestrians wishing to use the highway. The police had a

³ “Regular” in this case means a low-level public order incident not in the context of a protest.

⁴ Under Public Order Act 1986, s 5 in England, §118 OWiG in Germany, and the majority of provisions within the States of Australia and America, there is no direct requirement of a victim but the case of *Holloway* states that (in England) the behaviour must be conducted within the sight of someone who may suffer harassment, alarm or distress

⁵ For a discussion on the role and behaviour of the police within an English context see David Mead, *The New Law of Peaceful Protest* (Hart, 2010) 18-20

⁶ *Austin & Saxby v Commissioner of the Police for the Metropolis* [2007] EWCA Civ 989; [2008] 2 WLR 415 CA

⁷ *R (Moos & McClure) v Commissioner of the Police of the Metropolis* [2011] EWHC 957 (Admin)

*duty to clear the highway, which could not be done without removing the protestors by force if necessary.*⁸

This duty leads on to another deviation from the standard model outlined. Mead states that the policing of protest is overtly political whereas the ordinary “bobby on the beat” policing is not⁹. This is not to say that the police in a non-protest scenario do not encounter hostility and conflict when engaging in ordinary low-level public order. But it is the combination of the threat of widespread disorder and the intensity of feeling within demonstrations that pose unique problems for the police in respect of applying what would be otherwise routine low-level provisions¹⁰.

The next change from the emerging non-protest, low-level public order model is that the “recipient” of the conduct may well be a militant, hostile audience, opposed in equal passion to the views promulgated by the protestor¹¹. This poses a problem as Barendt has identified:

*“The law must preserve the peace, but if it is preoccupied with that objective it will inevitably confer de facto censorship powers on individuals and groups who are determined to break up a public meeting. The fear of disruption from the hostile audience may induce the police to disperse a demonstration when the risk of violence is in fact relatively slight.”*¹²

The ‘hostile audience’ and the difficulties posed in dealing with such protest was considered by ECtHR in *Plattform ‘Ärzte für das Leben’ v Austria*¹³. In its judgment, the court stated that the right to counter-demonstrate should not extend to inhibit the exercise of the right to demonstrate and that there was a duty upon States to ensure that protestors can hold their demonstrations without fear of violence from their opponents¹⁴. This, in turn, operates as another dynamic upon

⁸ *ibid* [63] (per Sweeney J)

⁹ Mead (n 5) 19

¹⁰ David Waddington, *Policing Public Order: Theoretical and Practical Issues* (Willan 2007) 9-34

¹¹ See the role of the audience in *Hammond v DPP* [2004] EWHC 69 (Admin)

¹² Eric Barendt, *Freedom of Speech* (2nd Edn, OUP 2008) 303

¹³ *Plattform ‘Ärzte für das Leben’ v Austria* (1991) 13 EHRR 204

¹⁴ *ibid* [para 32]; in Mead (n 5) 72

the role of the police and their deployment of what have been shown to be broad ranging discretionary low-level offences¹⁵.

Dissent, Disorder and Regulation

These preliminary points serve to highlight the significant distinctions between the application of low-level public order provisions within a protest and their operation in other contexts. It is unsurprising that the jurisdictions have chosen to adopt different mechanisms to regulate the way in which protest occurs. Understanding these different regulatory regimes is critical to understanding this aspect of the operation of low-level public order law. It is the purpose of this chapter to engage in a holistic and comparative analysis of the divergent frameworks as they operate within the different jurisdictions. Such an inquiry is crucial to appreciating the context in which s.5 and, indeed, all low-level legislation is applied.

Until this point in the thesis, the terms “*low-level public order*” and “*disorderly conduct*” have been used somewhat interchangeably. When considering the context of protest, it will be necessary to broaden the range of offences that fall within the umbrella of low-level public order law¹⁶. In respect of the English perspective, focus will shift from the specific offences found within Part 1 of Public Order Act to the regulatory provisions under Part 2 of the 1986 Act¹⁷. These regulations impose requirements upon the organizers of protests and impose criminal sanctions for non-compliance.

Such sanctions may also fall within the ambit of low-level public order and will be examined accordingly, but perhaps of more relevance for the thesis, it may point towards a harmonized, regulatory approach to dealing with all disorder rather than merely criminalizing a broad range of conduct. In that respect such a discussion directly contributes to the fourth research question by introducing non-criminal methods for disorder management.

¹⁵ See also the comments on *Jones and Gilbanks* at pp 159-171

¹⁶ For a description of the range of these offences see chapter two and also see Peter Thornton *The Law of Public Order and Protest* (OUP 2010), pp 1-51

¹⁷ Specifically the provisions under s.11-16 of the Public Order Act 1986 which require that protestors notify the police and permit the police to impose conditions and in some cases prohibit a procession and impose conditions upon assemblies.

The Assembly Law (*Versammlungsgesetz*, VslgG), which functions within the German legal system, has already been introduced, together with an examination of the operation of the criminal sanctions available to deal with individual, errant protestors¹⁸. This inquiry will seek to further examine the VslgG and the framework it establishes for the right of protest to be exercised. An analysis of low-level public order and protest is impossible within the German context without looking at the pro-active, regulatory framework in which the low-level protest offences operate. At the other end of the spectrum is Australia, which has no uniform public order requirement across the States. Instead, there is a blend of regulatory frameworks, with one State imposing an obligation upon protestors to obtain permission to protest¹⁹ whilst at the other extreme, another State²⁰ regulates protest entirely by means of a voluntary code. This analysis will juxtapose the fully codified and regulated system for dealing with all aspects of protest in Germany against the ad-hoc, patchwork arrangements in Australia.

In the next chapter, analytical focus will shift on to developments affecting low-level public order that have arisen since the terrorist attacks upon New York that occurred on September 11th 2001²¹. However, the US regulation of protests significantly precedes these events and it is logical that they be discussed within this context. The regulatory framework for protest differs in form depending upon the approach of the State legislature. Nonetheless, as with other aspects of low-level public order, the First Amendment runs through the regulation of protest. The first element of this was considered previously in respect of the individual protestor. That discussion will now be developed in respect of larger protests and the creation of the public order 'environment' in which the low-level offences will operate within the US.

¹⁸ See Chapter Five at p 179

¹⁹ As is the case in Tasmania, see Police Offences Act 1935, s 49AB

²⁰ The state of Victoria has no regulation of protest see p 200 for details.

²¹ See p 229 onwards

Regulating US Protest: Preventative rather than Punitive

When examining protests within the US context, the approach that the courts take can be summarized as:

*“A citizen’s right to speak on matters of public concern is more than self-expression; it is the essence of self-government.”*²²

Broadly speaking, when the court decides that the discussion is a matter of public concern²³ 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 which the court has “accorded no protection,” such as obscenity or “fighting words”²⁴. Although First Amendment protection is undoubtedly a powerful shield for free expression, the courts have provided a framework whereby those officials seeking to regulate protest can do so whilst not offending against First Amendment principles. The legislative mechanisms by which protests can be regulated in the American jurisdiction are down to the discretion of individual Cities, Districts and States.

Any concept of regulation within the US jurisdiction must first be set against the competing notions of content-based and content-neutral restrictions²⁵. The First Amendment is specifically directed towards Congress and the resultant legislative activity. The Supreme Court has held that restrictions placed by the government upon freedom of speech apply to all branches of the State by virtue of the due process clause²⁶ of the Fourteenth Amendment²⁷. Therefore both State and

²² *Dun & Bradstreet, Inc v Greenmoss Builders, Inc*, 472 US 749, 759 (1985)

²³ *United States v. Nat’l Treasury Emps. Union*, 513 US 454, 461, 466 (1995) held that a plaintiff’s lectures on religion were matters of public concern

²⁴ *Hustler Magazine v. Falwell*, 485 US 46 (1988) in respect of the test laid down in *Chaplinsky*; see p 171

²⁵ For a full discussion on this see E Kagan “Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine” (1996) 63 U Chi L Rev 413, 443

²⁶ Amendment XIV to the United States Constitution states *inter alia* at Section 1 “No 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”

²⁷ “For present purposes we may and do assume that freedom of speech and of the press - which are protected by the 1st Amendment from abridgment by Congress - are among the fundamental

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.”*²⁸

Content-based restrictions are given more severe judicial scrutiny than content-neutral ones²⁹. 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*³⁰ in that it must serve a compelling State interest and be narrowly tailored to achieve that end³¹. 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 aim³².

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” restrictions³³. These

personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the states” *Gitlow v New York*, 268 US 652, 666 (1925)

²⁸ Ivan Hare, “Method and objectivity in free speech adjudication: lessons from America.” (2005) 54 ICLQ 49, 51

²⁹ *Regan v Time Inc* 468 US 641 (1984)

³⁰ Elizabeth Craig, “Protecting the President from Protest: Using the Secret Service’s zone of protection to prosecute protestors.” (2006) 9 J Gender Race & Just. 665, 684

³¹ Hare (n 28) 52

³² *Simon & Schuster, Inc v Members of New York State Crime Victims Board* 502 US 105 (1991)

³³ Christopher Dunn, “Balancing the Right to Protest in the aftermath of September 11.” (2005) 40 Harv CR-CL L Rev 327, 329

doctrines are well established³⁴, and the terrorist attacks of the 11th September 2001³⁵ have placed a new focus on the restrictions that the State may place upon protest. The fear is that heightened judicial deference to “*terrorism related concerns*” might see the judiciary fail to challenge over burdensome restrictions³⁶.

There exists a heavy presumption against the constitutional validity of prior restraint³⁷. The complete banning of protest activity enjoys the highest level of constitutional protection and to date the US Supreme Court has never sustained a prior restraint³⁸. *Carroll v Princess Anne*³⁹ saw members of a white supremacist group convene a militantly racist public rally. The organizers announced that the rally would resume the next night. Local officials obtained an *ex-parte* restraining order prohibiting the organizers from holding rallies for 10 days which would “disturb and endanger” the citizens of the county. At trial, 10 days later, the Circuit Court extended the earlier order for 10 months. The Maryland Court of Appeals⁴⁰ affirmed the 10-day banning order, but held that the ban of 10 months was an unreasonable period of time. Upon appeal to the Supreme Court, the 10-day order was set aside due to the *ex-parte* nature of the order given the requirements of the First Amendment that the opposing parties should have the opportunity to participate in adversarial proceedings⁴¹.

The banning of protests, whilst constitutionally possible within the theoretical scope of the First Amendment, is afforded the most extreme and careful scrutiny. As such, it has no real established case law other than the cases where the ban has been overturned. Of much more utility are schemes used, on a local and State level, to regulate protest activity through licensing⁴². These are generally content-neutral restrictions that are designed to ensure the effective policing. It

³⁴ *ibid* at 329

³⁵ See Chapter Seven

³⁶ Nick Suplina, “Crowd Control: The troubling mix of First Amendment Law, Political Demonstrations and Terrorism.” (2005) 73 *Geo Wash L Rev* 395, 397

³⁷ *New York Times Co v United States*, 403 US 713, 714 (1971) and also *Bantam Books v Sullivan*, 372 US 58, 70 (1963)

³⁸ *Dunn* (n 33) 330

³⁹ *Carroll v Princess Anne*, 393 US 175 (1968)

⁴⁰ *Carroll* 247 Md. 126, 230 A 2d 452

⁴¹ *Carroll v Princess Anne*, 393 US 175 (1968), 179-185

⁴² *Dunn* (n 33) 330

has been held that where any discretion exists in the issuing of a permit⁴³, this is likely to result in censorship:

“If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted.”⁴⁴

Perhaps the most celebrated protest case, known as the *Skokie Affair*, occurred in Illinois. A neo-Nazi group had planned a demonstration march through the village of Skokie, a number of whose residents were holocaust survivors. The Circuit Court of Cook County, where the march was planned, had issued an injunction prohibiting the march on the grounds that the marchers had planned to wear Nazi uniforms and prominently display swastikas. The group appealed and, in *National Socialist Party of America v Village of Skokie*⁴⁵, the Supreme Court overturned the injunction. The reasoning of the court in this case was that the imposition of an injunction violated the appellants’ rights under the First Amendment without incorporating any procedural safeguards or allowing the injunction to be subject to immediate appellate review. The decision in *Skokie*, which is still held to be good law, serves to emphasize the protection granted to even the most unpopular protest from direct State censorship.

Acceptable limitations and low-level solutions

The courts more readily accept content-neutral “time, place and manner” restrictions. For example, in *Snyder v Phelps*⁴⁶, the police directed the protestors to a 20 by 25-foot area behind a plastic fence, located on public land that was 1000 feet from the church. This in no way restricted the content of the protest. Providing the restriction is narrowly drawn to serve a significant governmental interest and leaves ample opportunities for the protestors to communicate their views (i.e. satisfying the intermediate scrutiny requirements) then it is likely that

⁴³ *Pro-Life Cougars v Univ. of Houston*, 259 F Supp 2d 575, 577-78 (SD Tex 2003)

⁴⁴ *Forsyth County v The Nationalist Movement*, 505 US 123, 131 (1992); in Dunn (n 32) 330

⁴⁵ *National Socialist Party of America v Skokie* 432 US 43 (1977)

⁴⁶ *Snyder v Phelps* 562 US __ (2011) this case is discussed in greater detail in Chapter Seven in respect of the post 9/11 phenomenon of funeral protests.

(as in *Snyder*) the court will uphold such a restriction⁴⁷. Breaching such a restriction, in Maryland, will result in the individual being arrested for disorderly conduct⁴⁸.

The regulation of protest in the State of Colorado is typical of the approach adopted by the States within America. Instead of onerous conditions, within Article 9 of the Criminal Code, there are a number of content neutral, low-level offences designed to prevent public disorder, such as disrupting lawful assemblies⁴⁹ which states that:

*“A person commits disrupting lawful assembly if, intending to prevent or disrupt any lawful meeting, procession, or gathering, he significantly obstructs or interferes with the meeting, procession, or gathering by physical action, verbal utterance, or any other means.”*⁵⁰

Within the State of Iowa, the disorderly conduct provision under §723.4 of the Iowa Code incorporates a similar provision⁵¹ and the situation is echoed in the New York Penal Code⁵². These specific provisions point more generally to an identifiable trend in the American regulation of protest. The First Amendment is the basis upon which this regulation is built. The Skokie Affair indicates that the courts will not tolerate state restrictions where the content of a protest is undesirable. The individual State legislatures have utilised low-level, content neutral provisions⁵³ to inhibit interference on the right to protest. The case of *Snyder* will be discussed in the next chapter, but it highlights the nature in which protest is regulated. The framework deployed within the American jurisdiction is therefore predicated upon compliance with the First Amendment. There is the deployment by the police of regular, low-level public order provisions *augmented*

⁴⁷ *City Council of Los Angeles v Taxpayers for Vincent* 466 US 789 (1984); in Hare (n 28) fn 15.

⁴⁸ Md CRIMINAL LAW Code Ann §10-201 Disturbing the public peace and disorderly conduct

⁴⁹ Colorado rev stat §18-9-108

⁵⁰ Subsection 2 goes on to say that Disrupting lawful assembly is a class 3 misdemeanor; except that, if the actor knows the meeting, procession, or gathering is a funeral, it is a class 2 misdemeanor.

⁵¹ Without lawful authority or color of authority, the person disturbs any lawful assembly or meeting of persons by conduct intended to disrupt the meeting or assembly

⁵² NY Penal Code §240.20(4).

⁵³ Following on from Hare's example (n 28), Colorado rev. stat §18-9-122 (2) makes an offence of obstructing an entrance to a medical facility. Colorado rev stat §18-9-122 (3) creates the offence of engaging in oral protest within 100 ft of a medical facility.

where appropriate to deal with a specific kind of protest⁵⁴. Additionally, an individual who suffers emotional distress can pursue a civil action against the protestor⁵⁵.

Australian Permit Based Regulation

This discussion will now examine the Australian approach, where the courts are completely unfettered by any of the requirements imposed by the First Amendment in the US. There are two fundamental issues that need to be addressed at the outset. As with all of the other Australian low-level public order provisions, there are diverse requirements that vary within the different States. It is significant that these provisions remain largely unaffected by the tumult that the events of “The War on Terror” have caused in the English and US jurisdictions⁵⁶. Another disparity between the Australian and English position is that, despite different legislative approaches, a number of the Australian States require the possession of a permit. This is a subtle but significant difference from the English position under s.11 of the 1986 Act where the requirement is for *notification* not *permission*⁵⁷.

Douglas⁵⁸ has identified three different types of regulatory permit systems, which operate in the different States and covers a range of regulatory requirements. Although this is not a universally recognized taxonomy, and is directed solely at the Australian public order framework, it nevertheless provides a useful frame of reference by which to navigate and evaluate the various State-based solutions.

The first method of regulating protest is by means of a traditional permit system⁵⁹ whereby organizers of a demonstration apply to either the police or the local

⁵⁴ In the case of Colorado rev stat §18-9-122, the statute deals with the conduct of both pro and anti abortion campaigners. See also the finding of the *U.S. Supreme Court in Hill v Colorado* 530 US 703 (2000)

⁵⁵ See p 250 for further explanation as to how the use of civil actions seeking damages is a common approach to dealing with disputes where First Amendment violations are alleged.

⁵⁶ See chapter seven

⁵⁷ Richard Card, *Public Order Law* (Jordans 2000) 213

⁵⁸ Douglas (n 1) 58-69

⁵⁹ Douglas (n 1) 59-62

authority for permission. These systems were, historically, the dominant approach adopted in respect of regulating protest⁶⁰. Permits were applied and administered inconsistently. Some protests were banned outright and some protests were refused a permit by the police despite initially receiving local authority consent⁶¹.

Only two States⁶² retain the traditional permit framework. It is the Tasmanian model that stands in starkest contrast to the other jurisdictional approaches. S.49AB of the Police Offences Act 1935 makes it an offence for any person who is organizing or conducting a demonstration to do so without a permit. The permit is issued by “a senior police officer”⁶³ and in determining whether or not to issue the permit, the senior police officer⁶⁴ may take account of the safety and convenience of the public⁶⁵, the arrangements made for the safety and convenience of the participants⁶⁶ and any other considerations that may appear relevant⁶⁷.

The most significant disparity between the Tasmanian legislation and the regulatory requirements of other jurisdictions is the lack of recognition of the rights of the protestors, either embedded within the statute, or within the wider constitutional framework. As there is no free standing right to protest within the Australian constitution, those whose protest has been suppressed must rely on the implied freedom of political communication that the courts have derived in conjunction with the test laid down in *Lange*⁶⁸.

Statistics are not available detailing either the number of permits issued or the number of prosecutions under s.49AB, and there is no (Tasmanian) Supreme

⁶⁰ Douglas (n 1) 59

⁶¹ L Richardson ‘Political Protest in Woollongong’ in J Mackinolty (ed) *The Wasted Years: Australia’s Great Depression* (Geo. Allen & Unwin 1982)

⁶² Summary Offences Act (NT), s 74(3)

⁶³ Police Offences Act 1935, s 49AB(2)

⁶⁴ <http://www.police.tas.gov.au/services-online/permits-for-events/demonstrations-street-processions/> defines a senior police officer as the Commander of the nearest District Police headquarters

⁶⁵ Police Offences Act 1935, s 49AB(4)(a)

⁶⁶ Police Offences Act 1935, s 49AB(4)(b)

⁶⁷ Police Offences Act 1935, s 49AB(4)(c)

⁶⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

Court or (Australian) High Court case law around this permit-based regulation⁶⁹. This leads to two key assumptions being drawn. Either the police do not refuse the issue of permits and there are no subsequent challenges or the protestors in Tasmania are content with this provision. Either way, given the robust attitude of the High Court in *Coleman v Power*⁷⁰, it is doubtful that this law would survive a challenge based on the *Lange* test⁷¹. It is almost certain that courts in England, America and Germany would not tolerate such a discretionary approach to protest regulation.

Modern Permission Systems & Informal Arrangements: Australia

The second system in the taxonomy of regulative processes is that of the 'Modern Permission System'⁷² employed by the majority of Australian States. These systems encourage demonstrators to notify the relevant authorities of an intention to stage a particular demonstration. In return for this notification, and subject to following any conditions that the relevant authority may lay down, the participants are given immunity for what might otherwise be obstruction offences and will escape civil liability for nuisance offences⁷³. The States of Queensland⁷⁴, New South Wales⁷⁵, South Australia⁷⁶ and Western Australia⁷⁷ all adopt variations of these permission systems and it is these that most closely echo the English provisions within Part 2 of the Public Order Act 1986.

Victoria, Australian Capital Territories and Commonwealth law provide a third model for Australian protest regulation. Within these States, there is no regulation of protest in statutory form⁷⁸. Instead, there is reliance placed upon informal negotiations and police engagement with protestors. In Victoria, protest is regulated by an informal code, drafted by various interested parties and accepted as binding by police. Brennan, writing in 1983, highlights the focus of such a code

⁶⁹ As of 30/04/2011 as per http://www.austlii.edu.au/cgi-bin/cases_status.cgi

⁷⁰ See p 155

⁷¹ For details on the *Lange* test see p 153

⁷² Douglas (n 1) 62-68

⁷³ Douglas (n 1) 62-63

⁷⁴ Peaceful Assembly Act 1992

⁷⁵ Part 4 of the Summary Offences Act 1988

⁷⁶ Public Assemblies Act 1972

⁷⁷ Public Order in the Streets Act 1984

⁷⁸ Douglas (n 1) 68

being to enable individuals to effectively manifest their right to protest to the extent that the police should consider arresting for summary offences “with great discretion”⁷⁹. Douglas comments that perhaps a measure of the success of this partnership approach is that whilst other States (notably Queensland) have contemplated removing the regulatory framework surrounding protest, successive Victorian governments have seen no need to legislate on this area.

It is only Western Australia, one of the States which employs a modern permission system, that goes so far as to delineate between meetings and processions, although helpfully, unlike the English counterpart, provides a definition as to what *both* of these terms mean⁸⁰. S.7 of the Public Order in the Streets Act 1984 states that the Commissioner⁸¹ shall not refuse to grant a permit for a public meeting or a procession unless he has reasonable grounds for apprehending serious public disorder or damage to property⁸², create a public nuisance⁸³, give rise to an obstruction too great or too prolonged⁸⁴, or place the safety of any person in jeopardy⁸⁵. This is different from the traditional permit systems. The emphasis of the legislation is focused much more on enabling protest rather than merely permitting it.

Authorization and Specific Immunities

One common feature regarding all permission systems across the jurisdictions is the lack of litigation regarding police decisions to issue permits or indeed any aspect of the regulatory process⁸⁶. Overall there seems to be little by way of judicial challenges to the Australian approach to regulation. In New South Wales, the case of *Commissioner of Police v Rintoul*⁸⁷, illustrated the approach of the Australian higher courts. In *Rintoul*, police opposed authorization for a proposed demonstration outside the residence of the Minister for Immigration. This

⁷⁹ Frank Brennan, *Too Much Order with Too Little Law* (Queensland University Press 1983) 78-80

⁸⁰ Public Order in Streets Act 1984, s 4(3)

⁸¹ The statute provides that this duty can be delegated to an “Authorized Officer”

⁸² Public Order in the Streets Act 1984, s 7(2)(a)

⁸³ Public Order in the Streets Act 1984, s 7(2)(b)

⁸⁴ Public Order in the Streets Act 1984, s 7(2)(c)

⁸⁵ Public Order in the Streets Act 1984, s 7(2)(d)

⁸⁶ A point reinforced by Douglas (n 1) 65

⁸⁷ *Commissioner of Police v Rintoul* [2003] NSWSC 662

opposition was based on intelligence that suggested the protest was to limit the minister's movement and might have involved an invasion of his house⁸⁸.

The relevant New South Wales legislation is to be found in Part 4 of the Summary Offences Act 1988. A public assembly is defined as an assembly held in a public place and *includes a procession so held*⁸⁹. The assembly will be authorized if the appropriate details⁹⁰ are sent to the Commissioner of Police⁹¹. If the Commissioner does not oppose the assembly then the organizer may apply to a Court for an order authorizing the holding of an assembly⁹². Authorization is not essential and lack of authorization does not make a protest unlawful. Such authorization only grants protection from what would have been 'obstruction offences'. If a spontaneous protest does not cause an obstruction then the protest would appear to be lawful⁹³.

The New South Wales Supreme Court in *Rintoul* refused to make a prohibition order. It was held, having regard to all the evidence, that there was no reason to anticipate a breach of the peace and that the combined interests of the Minister, and any motorists who may be inconvenienced, should be subordinated to

⁸⁸ Douglas (n 1) 67

⁸⁹ Summary Offences Act 1988 (NSW), s 22 (emphasis added)

⁹⁰ Summary Offences Act 1988, s 23 (1) states *inter alia*:

(c) *the notice contains the following particulars:*

- i. *the date on which it is proposed to hold the public assembly,*
- ii. *if the proposed public assembly is not a procession, a statement specifying the time and place at which it is intended that persons gather to participate in the proposed public assembly,*
- iii. *if the proposed public assembly is a procession, a statement specifying the time at which it is intended that the procession commence and the proposed route of the procession and, if it is intended that the procession should stop at places along that route for the purpose of enabling persons participating in the procession to be addressed or for any other purpose, a statement specifying those places,*
- iv. *The purpose for which the proposed public assembly is to be held,*
- v. *Such other particulars as may be prescribed, and*

(d) *The notice specifies the number of persons who are expected to be participants in the proposed public assembly.*

⁹¹ As defined in Summary Offences Act 1988, s 22

⁹² Summary Offences Act 1988, s 26

⁹³ Summary Offence Act 1988, s 24 states:

If an authorized public assembly is held substantially in accordance with the particulars furnished with respect to it under section 23 (1) (c) or, if those particulars are amended by agreement between the Commissioner and the organizer, in accordance with those particulars as amended and in accordance with any prescribed requirements, a person is not, by reason of any thing done or omitted to be done by the person for the purpose only of participating in that public assembly, guilty of any offence relating to participating in an unlawful assembly or the obstruction of any person, vehicle or vessel in a public place

freedom of expression and assembly⁹⁴. Simpson J pointed out that the authorization of the protest granted only limited protection and the immunity from prosecution would not apply where there was any violence or criminal damage⁹⁵.

In conclusion, the Australian regulatory experience is one of gradual evolution and to some degree built on a consensus surrounding the need for protest and demonstrations, despite the absence of a constitutionally guaranteed right. Where the States impose relatively onerous notification requirements (as in Tasmania), there is little case law to suggest that there are any problems with the practical application of this regulation⁹⁶. At the other end of the spectrum, the voluntary systems seem to function adequately, providing an equitable framework based around consultation with all of those who have an interest in peaceful protest⁹⁷.

When considering the four States employing modern permission systems, Douglas notes that these are generally regarded as operating well⁹⁸. This is in spite of the inherently cumbersome nature of regulatory systems, especially when faced with spontaneous protests. Yet, there is no case law to suggest any real difficulty. The acceptance of the English common law powers to deal with breach of the peace and powers to disperse a demonstration where serious disorder is threatened mean that there are provisions to deal with protestors short of arrest⁹⁹. The disharmony of the American experiences does not appear to be reflected in Australia despite the piecemeal and indeed often arbitrary nature of regulation.

Regulation in England: Part 2 of the Public Order Act 1986

The English legal system employs a hybrid mixture of statute and common law to provide the regulatory atmosphere in which protest and low-level public order co-exist. Whether one accepts that there was a stand alone right to protest before

⁹⁴ Douglas (n 1) 67

⁹⁵ Douglas (n 1) 67

⁹⁶ Douglas (n 1) 59-62

⁹⁷ Brennan (n 79) 78-80

⁹⁸ Douglas (n 1) 62

⁹⁹ *Forbutt v Blake* (1981) 51 FLR 465 see p 168 for details.

1998,¹⁰⁰ there is little doubt that the combination of Articles 10 and 11 of the ECHR as given further effect by the Human Rights Act 1998 means that “*there is now a fully fledged right to protest*” within English law¹⁰¹. This means that any low-level public order legislation needs not only to comply with the terms of Articles 10 and 11 but also the certainty requirements of Article 7 of the ECHR.

Although not necessarily recognized as a free standing right, there is a rich tradition of protest cases within English legal history¹⁰² as Denning LJ stated:

“(It is the) undoubted right of Englishmen to assemble together for the purpose of deliberating upon public grievances. Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern. As long as all is done peaceably and in good order, without threats or incitement to violence or obstruction to traffic, it is not prohibited.”¹⁰³

Processions and assemblies are seen as “important manifestations of free expression”¹⁰⁴. Prior to the enactment of Part 2 of the Public Order Act 1986, the power to control and regulate protest in England and Wales was governed by a series of disparate common law decisions. Indeed, Lord Bingham described the state of the English common law regulating protest as being “*hesitant and negative, permitting that which was not prohibited*”¹⁰⁵.

There are a number of key differences between the English regulatory approach and that of the other jurisdictions. Throughout the Twentieth Century, the English legal system was unencumbered by restrictive “*freedom of speech*” constitutional constraints. Therefore, the common law rules that evolved did so on a case-by-

¹⁰⁰ Mead (n 5) 4

¹⁰¹ Mead (n 5) 25

¹⁰² Thornton (n 16) 100

¹⁰³ *Hubbard v Pitt* [1976] QB 142

¹⁰⁴ Card (n 56) 209

¹⁰⁵ *R (on the application of Laporte) v Chief Constable of Gloucester Constabulary* [2007] 2 AC 105; in Thornton (n 16) 100

case basis¹⁰⁶. Bingham and Denning LJ separately indicated that a protest would only be lawful providing it did not infringe any other law¹⁰⁷.

It may appear somewhat extraneous to reflect upon the common law history of protest regulation whilst considering the impact of the ECHR. Nevertheless, the development of the common law heavily informed the current regulatory structure. The way in which the law relating to the regulation of protest evolved will be briefly examined. This will encompass developments under the common law and the administrative provisions found within Part 2 of the 1986 Act. This is a key area of significance as, although many of the offences for non-compliance are summary only (and therefore relatively minor in nature), the imposition of onerous conditions can reduce or neutralize a procession in the way that arresting those who behave in a disorderly fashion does not¹⁰⁸.

The current regulation of protest draws a distinction between a procession (a mobile demonstration) and an assembly (a static protest). To an extent this structure follows the historical track of the common law. The courts did not so much recognize the right to process; instead it was accepted that everyone had the right to pass and re-pass along the highway¹⁰⁹. If individuals chose to manifest that right with others, it would be lawful providing this did not lead to unlawful consequences such as an obstruction of the highway¹¹⁰ or breach of the peace¹¹¹.

The position of assemblies within the common law was a good deal less settled¹¹². In *Lowdens v Keaveney*¹¹³, it was held that there was a marked distinction between a moving crowd and a stationary assembly¹¹⁴. Perhaps because of the religious and ceremonial connections to processions, there were

¹⁰⁶ See for example *Duncan v Jones* [1936] 1 KB 218

¹⁰⁷ Thornton (n 16) 101

¹⁰⁸ Card (n 57) 209

¹⁰⁹ *Hickman v Maisey* [1900] 1 QB 752

¹¹⁰ Regulations prohibiting obstructions of the highway have long been a significant tool in policing of low-level public order for example s.52 Metropolitan Police Act 1839 empowers the commissioner of the police to make specific regulations regarding the route of processions to ensure that there is no obstruction of the highway.

¹¹¹ See p 254

¹¹² ATH Smith *Offences against Public Order* (Sweet & Maxwell, 1987) 197

¹¹³ [1903] 2 IR 82

¹¹⁴ Smith (n 112) 197 at fn 9

nationally applicable provisions empowering police to control potentially violent demonstrations included in the Public Order Act 1936. Assemblies were regulated on a more ad-hoc basis with local by-laws and regulations leading to much uncertainty in both the organization and policing¹¹⁵. With the coming into force of the Public Order Act, there was an attempt to consolidate the disparate and piecemeal common law provisions into a codified model. This would then encourage protesters and police to engage in constructive dialogue whereby disruption and violence would be minimized¹¹⁶.

Given the common law background, perhaps the natural expectation would be for the regulatory provisions of part 2 of the Public Order Act 1986 to be somewhat draconian in their scope. The drafting of the Public Order Act¹¹⁷, the coming into force of the Human Rights Act and the terrorist attacks of the early part of the Twenty First Century have coincided to create a turbulent and uncertain time for much of the English legal system. Yet despite this tumultuous background, the fundamental structure of Part 2 of the 1986 Act has remained largely accepted and unchallenged by the Courts.

Public Processions: An entrenched framework?

The first category of protests dealt with in Part 2 of the 1986 Act is that of public processions¹¹⁸. These are processions that take place on any highway and are at a place to which the public or section of the public has access, whether paid for or not paid for, as of right or by virtue of express or implied consent¹¹⁹. Paradoxically, there is no definition within the 1986 Act as to what actually constitutes a procession. The common law provides some assistance; in *Flockhart v Robinson*¹²⁰, it was held that:

¹¹⁵ Smith (n 112) 131

¹¹⁶ Smith (n 112) 131

¹¹⁷ For the details of the gestation period of the Public Order Act 1986 see "Review of Public Order Law" Cmnd 9510 (1985)

¹¹⁸ Public Order Act 1986, s 16 states that a "public procession" means a procession in a public place

¹¹⁹ Public Order Act 1986, s 16 "any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission."

¹²⁰ *Flockhart v Robinson* [1950] 2 KB 498

“A procession is not a mere body of persons; it is a body of persons moving along a route.”¹²¹

This was further developed in *Kent v Metropolitan Police Commissioner*,¹²² with Denning LJ stating that:

“A public procession is the act of a body of persons marching along in orderly succession – see the *Oxford English Dictionary*. All kinds of processions take place every day up and down the country – carnivals, weddings, funerals, processions to the Houses of Parliament, marches to Trafalgar Square and so forth.”¹²³

It can be inferred from this definition that a procession must have some sort of orderly route. Unlike the definition of an assembly, there is no statutory provision as to what will comprise a minimum number of persons on a procession. Nor is there any requirement for the procession to be on foot¹²⁴; hence the mass cycle ride known as *Critical Mass* falls within the definition of procession¹²⁵.

Although not defining the term “procession”, s.11 of the 1986 Act imposes a reporting condition, requiring the organizer of the procession to provide advanced written notice of most public processions¹²⁶. Both the English legal system and the German VslgG have this embedded as a national statutory requirement. Within English law, although the requirement is uniform, written notice must be submitted to the police authority exercising jurisdiction over the geographical area around the start of the procession¹²⁷. The written notice must be delivered by hand not less than 6 clear days before the date when the procession is due to start¹²⁸. If it is not reasonably practicable to deliver the notice 6 clear days before, then the notice must be delivered as soon as is reasonably practicable¹²⁹.

¹²¹ *ibid* [502] (per Goddard CJ)

¹²² *Kent v Metropolitan Police Commissioner* (1981) *The Times*, 15 May 1981, DC

¹²³ *ibid*

¹²⁴ Card (n 57) 212

¹²⁵ *Kay (FC) v Commissioner of the Police for the Metropolis* [2008] UKHL 69

¹²⁶ Public Order Act 1986, s 11(1)

¹²⁷ S 11(4)(a) Public Order Act 1986, s 11(4)(b) provides that where the protest starts in Scotland and will cross into England then the written notice must be given to the first police area in England on the proposed route

¹²⁸ Public Order Act 1986, s 11(5)

¹²⁹ Public Order Act 1986 s 11(6)

The notice requirement arises in three specific circumstances:

S. 11(1) Written notice shall be given in accordance with this section of any proposal to hold a public procession

To demonstrate support for or opposition to the views or actions of any person¹³⁰ or body of persons

To publicize a cause or campaign

To mark or commemorate an event.

Where the protest does not come within this list, then there is no need to give written notice. It was held in *Kay (FC) v Commissioner of the Police for the Metropolis*¹³¹ that s.11(1) applies only to public processions that are *intended* to demonstrate support for any of the above-mentioned reasons¹³². This will apply to such things as groups of school children walking with the teacher and tourist guides¹³³. Ramblers are also probably excluded unless – as Thornton points out – they are using the ramble to make a particular point¹³⁴.

S.11(2) does provide that certain types of procession can be exempt from the written notice requirement. Processions that are commonly or customarily held in the particular police area do not require written notice. Card states that the reason for this is that there is an expectation that the police will already know about the procession and the planned route and timing¹³⁵. Whilst this may be true, the White Paper prior to the 1986 Act¹³⁶ makes it clear that the framers of the legislation actually intended this to apply to a limited subset of processions such as Remembrance Day commemoration services and other religious parades¹³⁷.

¹³⁰ Person includes corporate body: s.5 & Sch 1 Interpretation Act 1978 quoted in Card (n 57) 215, fn 1

¹³¹ *Kay (FC) v Commissioner of the Police for the Metropolis* [2008] UKHL 69

¹³² Mead (n 5) 175

¹³³ Card (n 57) 214

¹³⁴ Thornton (n 16) 103

¹³⁵ Card (n 57) 215, Card goes on to make the point that, in spite of this, there is no guarantee that these matters will remain unchanged from year to year.

¹³⁶ White Paper, Review of Public Order, Cmnd 9510

¹³⁷ Thornton (n 16) 103

The early years of the Twenty First Century have seen an upsurge in large-scale protests against the decision of the British Government to enter the Iraq war¹³⁸. The wider concerns about globalization and capitalism have produced a broad range of protests, some of which have been held annually. It is clear from the decision in *Kay*¹³⁹ that whether a procession is commonly or customarily held will largely depend upon the facts of the individual case and the areas of commonality between the processions.

Failure to complete a written notice incurs criminal liability¹⁴⁰, although failure to comply with the notice requirement will not make the protest itself unlawful¹⁴¹. In contrast to certain Australian States, it should be noted that the case of *Abdul*¹⁴² held that the provision of notice does not legitimize the conduct of the protestors and provide immunity for offences of “*unexceptional behaviour*” and obstruction of the highway¹⁴³. The liability is imposed upon “*each of the persons organizing*” the public procession. By virtue of s.11(10) of the 1986 Act, failure to complete a notice is triable as a summary offence and therefore can be seen as a proactive but nonetheless distinctly identifiable low-level public order offence.

There are two distinct offences provided within s.11 which are:

S. 11(7) *Where a public procession is held, each of the persons organizing it is guilty of an offence if –*

*The requirements of this section as to notice have not been satisfied, or
The date when it is held, the time when it starts, or its route, differs from
the date, time or route specified in the notice.*¹⁴⁴

The *actus reus* of this offence is that the accused is an organizer of the public procession and in respect of that public procession either no notice has been

¹³⁸ Helen Fenwick “Marginalising human rights: breach of the peace, “kettling”, the Human Rights Act and public protest” [2009] PL 737

¹³⁹ *Kay (FC) v Commissioner of the Police for the Metropolis* [2008] UKHL 69

¹⁴⁰ Public Order Act 1986, s 11(7)

¹⁴¹ Card (n 57) 218

¹⁴² *Abdul v DPP* [2011] EWHC 247

¹⁴³ Thornton (n 16) 106

¹⁴⁴ Public Order Act 1986, s 11(7)

given or the procession differs from the notified route. The offence is unusual in two distinct respects. The first point to note is that “*no act or omission at the material time on the part of the accused need be proved*”¹⁴⁵. Therefore an administrative oversight, or an error on the part of someone to whom the responsibility for notification has been delegated will not provide a defence¹⁴⁶.

There are two defences available to a charge under s.11(7). The first requires the accused to prove either that he did not know of and neither suspected nor had reason to suspect that the notice requirements had not been satisfied or that the date differed from the notice¹⁴⁷. The alternate defence¹⁴⁸ is that the accused must prove that the differences in the actual date, time and route were either due to circumstances beyond his control or were done with the agreement or at the behest of the police. Both of these defences are reverse onus provisions¹⁴⁹ and there is no case law discussing their specific operation. Indeed it should be noted that there is no record of any prosecution occurring under s.11(7)¹⁵⁰.

Regulating Processions: Conditions and Prohibitions

In addition to the notification requirement, Part 2 of the 1986 Act codified some of the earlier statutory¹⁵¹ and common law¹⁵² powers regarding the imposition of conditions on a procession and, if circumstances warrant it, an outright prohibition of all processions within a geographical area. The power to impose conditions stems from s.12 of the 1986 Act and these conditions can be imposed by “*the senior police officer*”¹⁵³, which may mean the most senior officer present at the

¹⁴⁵ Card (n 57) 219

¹⁴⁶ For further exploration of the meaning of organizer, see *Flockhart v Robinson* [1950] 2 KB 498

¹⁴⁷ Public Order Act 1986, s 11(8)

¹⁴⁸ Public Order Act 1986, s 11(9)

¹⁴⁹ See p 127

¹⁵⁰ Card (n 57) 219. There was no prosecution in respect of Kay (FC), as this matter was litigated as a ‘friendly action’ see Thornton (n 16) 103

¹⁵¹ Public Order Act 1936, s 1(1)

¹⁵² *Humphries v Conner* (1864) 17 Ir C L R 1

¹⁵³ Public Order Act, s 12(1)

procession¹⁵⁴. If the conditions are being imposed before the procession then the duty is conferred on the chief officer of police¹⁵⁵.

The granting of conditions is dependent on the senior police officer reasonably believing that the procession may result in serious disorder, serious damage to property, serious disruption to the life of the community¹⁵⁶ or it is the purpose of the organizers to effect the intimidation of others with a view to compelling them to not do an act they have a right to do or not do one they have a right not to¹⁵⁷. The first condition is a relic of the previous Public Order Act¹⁵⁸ and the second condition is the logical corollary of the first.

The third condition of serious disruption has been the subject of significant academic criticism since the inception of the 1986 Act¹⁵⁹, and it remains an area of controversy¹⁶⁰. It has been argued that the third condition is vague and over-broad:

*“It extends the basis for imposing a condition beyond the demands of ‘public order’...it seems to be based on the preservation of an orderly society, which is a different thing.”*¹⁶¹

Therefore, by failing to provide any criteria by which serious disruption can be balanced against the rights of the protestors, the test is broadly drawn, as it requires that:

*“the senior police officer reasonably believes that “something” may result from the procession, “which will seriously disrupt the life of community where serious disruption is being judged according to the standard of a reasonable person.”*¹⁶²

¹⁵⁴ Public Order Act 1986, s 12(2)(a); for a very small procession this could be an officer of the rank of Constable.

¹⁵⁵ Public Order Act 1986, s 12(2)(b); this will be either a Chief Constable (or the Commissioner of the Metropolitan Police) or a delegate of his functions under s 15 of the 1986 Act. This will be either an Assistant Chief Constable or an Assistant Commissioner in the Metropolitan Police.

¹⁵⁶ Public Order Act 1986, s 12(1)(a)

¹⁵⁷ Public Order Act 1986, s 12(1)(b)

¹⁵⁸ Public Order Act 1936, s 1(1)

¹⁵⁹ Bonner & Stone “The Public Order Act 1986: Steps in the wrong direction?” [1987] PL 202

¹⁶⁰ Liberty’s response to the JCHR on ‘Policing and Protest’ (June 2008) quoted in Thornton (n 16)

107

¹⁶¹ Card (n 57) 224

The notion of “*serious disruption to the community*” is a concept that has a number of definitional black holes. The use of the word ‘community’ is especially ill defined:

*“How large is a community – if it is too large, we come dangerously close to majoritarianism – who comprises it and who decides? Is London a community? Is a borough? Is Oxford Street? ... Might it even mean those in the non-protesting community – a worrying conclusion surely?”*¹⁶³

The fourth criterion is that of intimidation and is designed to deal with those who have a malevolent intention behind the protest. Thornton gives the example of a Unite Against Fascism (UAF) counter-demonstration to a properly notified English Defence League (EDL) march. The UAF march is being held “*with a view to compelling them (EDL) not to do something they have a right to do (conduct a procession)*”¹⁶⁴. There must be a reasonable belief that the purpose of the organizers is to intimidate others with a view to compelling rather than to simply reasonably believe there may simply be some intimidation. This does provide something of a limitation on the occasions when conditions can be imposed, though the breadth of the third criteria might well over-ride this¹⁶⁵.

The Act does not limit the type of conditions that can be imposed once the chief officer has formed the reasonable belief that one of the situations under s.12(1) is likely to arise, providing they appear necessary to him to prevent such situations arising¹⁶⁶. The test is a subjective one based on the beliefs of the particular officer. The wording of s.12(1) implies that there must be some relationship between the imposed conditions and the anticipated disorder, damage, disruption or intimidation¹⁶⁷. It is apparent that the breadth of discretion afforded to the senior police officer is broader than merely re-routing the procession. They may

¹⁶² Card (n 57) 225

¹⁶³ Mead (n 5) 186

¹⁶⁴ Thornton (n 16) 108

¹⁶⁵ Card (n 57) 225

¹⁶⁶ Public Order Act 1986, s 12(1)

¹⁶⁷ S 12(1) of the 1986 Act states *inter alia* that a senior police officer may give directions imposing on the persons organizing or taking part in the procession such conditions as *appear to him* necessary to prevent such disorder, damage, disruption or intimidation

include such things as prohibiting the wearing of masks, alteration of the start and finish time and the provision of stewards and first aid¹⁶⁸. The coming in to force of the Human Rights Act 1998 means that the imposition of arbitrary and disproportionate conditions are likely to be challenged as over-burdensome restrictions on Articles 10 and 11 of the ECHR.

The Regulation of Procession: Low Level Preventative Offences

There are three offences that impose liability on participants. The organizer commits an offence if he organizes a procession and knowingly fails to comply with a condition¹⁶⁹. The *actus reus* for this offence is for the defendant to be (i) an organizer (ii) of a procession where conditions under s.12(1) have been imposed (iii) fails to comply with a condition. “*Knowingly*” doing this is the *mens rea* for the offence, which encompasses actual knowledge as well as wilful blindness¹⁷⁰. This is a summary offence punishable by up to three months imprisonment and/or a fine¹⁷¹. There is a similar offence for participating in a procession and knowingly fail to comply with a condition which, upon summary conviction, results in a fine¹⁷². The final offence is of inciting someone knowingly to participate in a procession in breach of a condition. Upon summary conviction, this is punishable with up to three months imprisonment and/or a fine¹⁷³. It will be a defence for the first two offences to prove that non-compliance with the condition arose from circumstances beyond the defendant’s control¹⁷⁴.

In extreme circumstances, where the chief officer of police reasonably believes the existing powers to impose conditions will not be sufficient to prevent serious disorder, s.13 Public Order Act 1986 imposes a duty on him to apply for an order banning all processions or a class of processions within a district or part of a

¹⁶⁸ Card (n 57) 226

¹⁶⁹ Public Order Act 1986, s 12(4)

¹⁷⁰ *Roper v Taylor’s Central Garages (Exeter) Ltd* [1951] 2 TLR 284, DC; in Card (n 57) 228

¹⁷¹ Public Order Act 1986, s 12(4)

¹⁷² Public Order Act 1986, s 12(9)

¹⁷³ Public Order Act 1986, s 12(10)

¹⁷⁴ Public Order Act 1986, ss 12(4) and 12(5)

district¹⁷⁵. The order is made by the local authority and is subject to the consent of the Home Secretary¹⁷⁶.

The requirement of serious disorder means that this regulatory provision falls outside of the ambit of this investigation. Nonetheless, the offences for organizing, participating and inciting others to participate in processions in contravention of conditions apply *mutatis mutandis* to processions that have been banned¹⁷⁷. The specific defences that exist for the offences under s.12 do not apply to offences under s.13. These offences have a penalty upon summary conviction of up to three months imprisonment and/or a fine¹⁷⁸. Any procession that occurs having been banned, may well involve the commission of serious public order offences. It is, therefore, unsurprising that there is no recorded evidence of any convictions under s.13 of the 1986 Act.

There is no power within English law to ban an individual procession. This is in keeping with the American position but at variance with the Australian and German regulatory framework. Conditions amounting to a ban (or indeed which are manifestly excessive) are liable to be challenged by Judicial Review¹⁷⁹. The imposition of over-burdensome conditions may, collaterally, lead to a defence to criminal proceedings to offences under s.12¹⁸⁰. Significantly, despite challenges to the nature of the conditions imposed there has not been any challenge to the underpinning framework of regulation of processions. The ECtHR has accepted that a blanket ban on *all* processions despite being “*ill-targeted in nature*” is compatible with the Convention rights to free expression and free assembly¹⁸¹. In *CARAF v UK*¹⁸², a ban on marches imposed to prevent a National Front procession also had the effect of prohibiting CARAF from marching. The European Court held that that this was a necessary measure to prevent

¹⁷⁵ See <http://www.guardian.co.uk/uk/2010/aug/20/english-defence-league-bradford-ban?INTCMP=SRCH> ‘March by English Defence League banned’ 20.08.2010 accessed on 03.05.2011

¹⁷⁶ Public Order Act 1986, s 13(2)

¹⁷⁷ Public Order Act 1986, ss 13(7)–(9)

¹⁷⁸ Public Order Act 1986, ss 13 (11)–(13)

¹⁷⁹ See Hadfield “Public Order, Police Powers and Judicial Review” [1993] Crim LR 915

¹⁸⁰ Where there is procedural *ultra vires* conditions may be impugned by way of a defence see *Boddington v British Transport Police* [1998] 2 All ER 203, HL

¹⁸¹ Mead (n 5) 170

¹⁸² *Christians Against Racism and Fascism (CARAF) v UK* (App 8440/78) (1980) DR 138

disorder¹⁸³. Similarly, the imposition of both a notification requirement¹⁸⁴ and the imposition of conditions¹⁸⁵ have been held to be compatible with Articles 10 & 11 of the ECHR.

Defining and Regulating Assemblies

The disparate laws relating to public order prior to the inception of the 1986 Act had no provision for dealing with public assemblies. As a result of “*major disorder associated with static assemblies*”,¹⁸⁶ s.14 of the Public Order Act contains provisions for the imposition of conditions as to the location, duration and number of attendees at the assembly with punitive punishment for those who do not conform to the conditions. There are significant differences between the regulation of processions and assemblies. There is no power within the statute to ban an assembly, although this may be obviated by the imposition of onerous conditions¹⁸⁷.

Another key difference is, unlike processions, there is no notification requirement for assemblies. The reason for this, as Card highlights, is that at the inception of the Act, it was decided, due to the large number of public meetings that “*the administrative burden would far outweigh the information gain*”¹⁸⁸. This approach to assemblies contrasts with the approach of the German jurisdiction¹⁸⁹ which, under §14 VslgG, requires the relevant authorities to be notified of processions *and* meetings 48 hours before their commencement¹⁹⁰. As can be seen from the American jurisprudence, the outright banning of an assembly, whilst theoretically

¹⁸³ In *Bukta v Hungary* (App 25691/04) decision of 17th July 2007 it was held by the ECtHR that there must be a serious danger to public disorder beyond the level of minor disturbance inevitably caused by an assembly in a public place

¹⁸⁴ *Ziliberberg v Moldova* (app 61821/00) decision of 24 May 2004

¹⁸⁵ *Heikkila v Finland* (app 25472/94) decision of 15 May 1996

¹⁸⁶ Thornton (n 16) 114

¹⁸⁷ The common law has permitted the banning of public meetings where a breach of the peace is likely to occur based on previous occurrences, *Duncan v Jones* [1936] 1 KB 218 although in the light of the influence of the Human Rights Act 1998 it is not certain whether this conclusion would have been reached were the case to be decided now.

¹⁸⁸ Review of Public Order Law (Cmnd 9510. 1985) para 5.4; in Card (n 57) 236

¹⁸⁹ For full details on the *Versammlungsgesetz* and the law regulating protest within Germany please see p 222

¹⁹⁰ See §14-15 VslgG

possible from a practical perspective, would almost certainly fail should any of the States seek to pursue such a course¹⁹¹.

S.16 of the 1986 does provide a definition of a public assembly. It is defined as an assembly of 2 or more persons¹⁹² in a public place, which is wholly or partly open to the air¹⁹³. The similarities between this and the German regulatory framework are striking and will be discussed below¹⁹⁴. There has been much speculation as to the limits of a public assembly. In *Roffey*¹⁹⁵, it was held that an assembly means no more than a gathering of persons and one that could be stationary or in motion. Therefore, a protest outside an embassy where a group walk round in circles would be an assembly¹⁹⁶. Thornton speculates that an assembly which takes place in a marquee with its sides up (but not down) is likely to be classed as a public assembly, whereas a hall with its doors open on a warm day would not be considered as being “at least partly open to the air”¹⁹⁷.

It is more likely that the status of the protest will be judged on a case-specific basis. It was conceded in *Austin* that:

*“There is room for uncertainty as to whether a group is at any given time a procession or an assembly, or perhaps both at once.”*¹⁹⁸

As stated above, there is no requirement for the organizer of an assembly to provide notice. The power to impose conditions on an assembly is bestowed upon “the senior police officer”¹⁹⁹. This officer can impose conditions if, having regard to all of the circumstances of the assembly, he reasonably believes that one of the following may result: serious public disorder, serious damage to property or serious disruption to the life of the community²⁰⁰ or the purpose of the organizers

¹⁹¹ *Carroll v Princess Anne*, 393 US 175 (1968) see above, p 196

¹⁹² Originally this number was 20 however this has since been amended by Anti-Social Behaviour Act 2003, s 57

¹⁹³ Public Order Act 1986, s 16

¹⁹⁴ See p 220 onwards

¹⁹⁵ *DPP v Roffey* [1959] Crim LR 283, DC

¹⁹⁶ Card (n 57) 237

¹⁹⁷ Thornton (n 16) 114

¹⁹⁸ *Austin v Commissioner of the Police of the Metropolis* [2009] UKHL 5; [2009] 1 A.C. 564 (HL)

¹⁹⁹ Public Order Act 1986, s 14(1)

²⁰⁰ Public Order Act 1986, s 14(1)(a)

is the intimidation of others with a view to compelling them to not do an act they have a right to do, or to do an act they have a right not to do²⁰¹. These very closely mirror the pre-requisites for imposing conditions under s.12 above.

The senior officer must be present at the scene²⁰² and this theoretically can mean a police constable can exercise the power. In reality, the officer will be part of the “*Gold*”, “*Silver*”, “*Bronze*” command structure used by police when dealing with public order events²⁰³. The power to impose conditions depends upon a public assembly *in fact* being held or intended. It is not sufficient for the senior officer present to reasonably suspect that an assembly is underway²⁰⁴.

Unlike the power under s.12, s.14 does not provide an unlimited scope for the police to impose conditions. In order to be compatible with the rights of those who assemble under the ECHR, the conditions must be both necessary for the prevention of one of the state of affairs outlined in s.14(1) or s.14(2). The conditions must also be “*proportionate to the legitimate aim of maintaining public order*”²⁰⁵. Conditions may not be so onerous as to amount to a *de facto* ban on the procession²⁰⁶.

The powers to deal with low-level public order during the assembly (and this is also true of processions) are not dependent upon the status of the assembly, or upon compliance with conditions. The offence of Disorderly Conduct is capable of being committed in either public or private²⁰⁷. Nonetheless, the status of the assembly does have a bearing on the regulatory violations. As with those under ss.11 and 12 of the 1986 Act, these offences are summary only and fall within the ambit of low-level public order offences²⁰⁸.

²⁰¹ Public Order Act 1986, s 14(1)(b)

²⁰² Public Order Act 1986, s 15

²⁰³ <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectione/chapter44> accessed on 2nd May 2011

²⁰⁴ Card (n 57) 259

²⁰⁵ *R (on the application of Louis Brehony) v Chief Constable of Greater Manchester* [2005] EWHC 640 (Admin); in Thornton (n 16) 117

²⁰⁶ Thornton (n 16) 118

²⁰⁷ See s.5(2) Public Order Act 1986 and the related defences in s.5(3)(a) and (b) of the 1986 Act

²⁰⁸ Public Order Act 1986, ss 14(8)–14(10)

The offences relating to the regulation of assemblies are focused upon failing to comply with the conditions imposed by police. The first offence arises whereby an organizer “*knowingly fails to comply with a condition*”²⁰⁹ and carries a maximum penalty of three months imprisonment. The legislation also provides for the offence of participating in an assembly²¹⁰ and knowingly failing to comply with a condition or inciting somebody knowingly to participate in an assembly in breach of a condition²¹¹.

As noted above, there appears to be a distinct difference between the structure, form and application of the regulatory offences found within Part 2 of the 1986 Act in comparison to those under Part 1 of the 1986 Act. The fact that the former offences are part of a narrowly drawn framework would appear to deter State action around these provisions, with the focus instead being on utilizing the more protean s.5 of the 1986 Act. The next part of the discussion will revisit the German ‘Assembly Law’, providing a contrast with all of the common law jurisdictions. The Assembly Law not only incorporates sanctions for non-compliance of the regulatory regime, but also criminal offences concerning misbehaviour during the protest. In seeking optimal pathways for dealing with low-level public order, it is suggested that such an approach has much to admire and is worthy of further consideration.

Versammlungsfreiheit, Brokdorf and German regulation

The existence of frameworks governing the regulation of protest in the three common law jurisdictions means that low-level public order provisions are regularly deployed to counter disorder on protest. This serves to broaden the ambit of the legislation and add greater uncertainty to both the policing of, and participation in, a protest. The German solution is to place all protest-related matters within a single law. That is not to say there are not local variations. When investigating the framework for protest within Germany, it is clear that there is

²⁰⁹ Public Order Act 1986, s 14(4)

²¹⁰ Public Order Act, s 14(5) with a maximum penalty on summary conviction of a level 3 fine provided by s 14(9)

²¹¹ Public Order Act, s 14(6) with a maximum penalty on summary conviction of 3 months imprisonment and/or a fine provided by s 14(10)

regulation on both a regional and national level. In respect of local protests, each city council has bespoke police regulations (*Polizeiverordnung*²¹²). These lay down a layer of regulation varying from an implied regulation through to an explicit requirement that anyone seeking to stage an event must seek permission from the police²¹³.

The basis of all regulation of protest is found in the *Grundgesetz*²¹⁴. When considering the operation of the GG, it should be noted that each Article of the GG offers a scope of protection (*Schutzbereich*), which establishes which persons and actions are to be protected by that right. State activity is then determined with reference to how much it has intruded onto a basic right²¹⁵. At this point, the constitutional justification for the State intrusion is assessed. In respect of protest, these justifications will be discussed below²¹⁶.

The specific *Grundrecht* relating to the right to protest is Article 8 I GG, which states that:

*“All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission. In the case of outdoor assemblies, this right may be restricted by or pursuant to a law.”*²¹⁷

This Article is intended to safeguard freedom of assembly (*Versammlungsfreiheit*) and as such is inherently linked to freedom of communication. Article 5 I 1 GG provides *inter alia* for freedom of speech and states:

*“Every person shall have the right to freely express and disseminate his opinions in speech, writing and pictures (recht der freien Meinungsäußerung).”*²¹⁸

²¹² These are actually *Polizeiliche Umweltschutz-Verordnung* (Police Environmental Regulations) passed under §10(1) Police Act 1992 see Chapter 2 for further details.

²¹³ For example *Polizeiverordnung der Stadt Wädenswi*, Article 15 states that ‘events’ such as parades, demonstrations and meetings which occur on public land require the approval of the police and indeed gives the Police Board the authority to prohibit events on private land if there is high probability of disturbance to public order

²¹⁴ The Basic Law, herein referred to by the abbreviation GG

²¹⁵ *Grundrechtseingriff*, or intrusion into a basic right, at its simplest will be the state directly interfering *and intending to interfere* with that right. Nigel Foster & Satish Sule, *German Legal System and Law* (4th edn OUP 2010) 232

²¹⁶ See below at p 231

²¹⁷ Art. 8(I) & (II) GG

This right applies to every person and covers both statements of fact and opinion²¹⁹. Where something is portrayed as a fact but is demonstrably false, such as holocaust denial, this will not enjoy protection under Article 5 I GG²²⁰. The protection is in line with the American model of speech protection and covers speech on banners, posters, and even mannequins and other such physical representations²²¹. Having established the individual right to free expression, Article 8 I GG redefines this for a collective or group demonstration²²².

This is not an unqualified right to protest and has two significant caveats. Accepting that an unchecked right to assemble for groups would pose a significant risk of public disorder, Article 8 I limits the scope to “*peaceful and unarmed assembly*”. This direct constitutional limitation²²³ means that any armed assembly or non-peaceful assembly will be automatically excluded from protection. The exact scope of this protection is discussed below with reference to the various legislative provisions that operate.

At this level of Basic Law, the German system does not differentiate between processions and assemblies²²⁴. German Basic Law does differentiate between a public and a private assembly. As can be seen from the terms of Art. 8 I, there can be no lawful regulation or notification requirement for private assemblies, whereas public assemblies can be “*restricted by or pursuant to a law*” This reflects the position under English law whereby it is only public processions²²⁵ that are subject to the notification requirements²²⁶.

²¹⁸ Art. 5(I) GG actually provides protection for seven different basic types of communication for further details

²¹⁹ Foster (n 215) 253

²²⁰ *ibid* 253

²²¹ Winfred Brugger, “The Treatment of Hate Speech in German Constitutional Law (Pt 1)” (2003)

4 GLJ 1, 4

²²² Foster (n 215) 258

²²³ *Verfassungsunmittelbare Schranken*

²²⁴ *cf* Public Order Act 1986, ss 11-14; It should be noted that the *Versammlungsgesetz* does however categorize protests as Assemblies and Processions, though this does not make a material difference

²²⁵ Public Processions are defined under Public Order Act, s 16

²²⁶ Public Order Act 1986, s 11(1)

Versammlungsgesetz: The Lawful Restriction of Public Protest

The mechanism by which German law seeks to regulate protest is the *Versammlungsgesetz*²²⁷. The relevant provisions can be found in the law of the Federal Assembly (VslgG). The law on assembly and protest was one of the areas affected by *Föderalismusreform*²²⁸. Some States have chosen to draft their own legislative provisions²²⁹, whilst others have not and continued to apply the law of the Federal Assembly. This discussion will concentrate upon the generally applicable VslgG unless it is stated otherwise²³⁰:

"In spite of its high rank, freedom of assembly is not guaranteed without reservation. Art 8 GG merely guarantees the right "to assemble peacefully and without weapons" and furthermore makes this right subject to the statutory reservation for events in the open air. The Constitution thereby takes into account the fact that for the exercise of freedom of assembly in the open air there exists, because of the contact with the outside world, a special need for regulation on the one hand to create the realistic prerequisites for exercise and on the other hand to preserve sufficiently the conflicting interests of others."²³¹

The above passage, taken from the seminal *Brokdorf* judgment, illustrates the tension inherent within public order law. The VslgG seeks to ensure compliance with Article 8 I GG balanced against the need to ensure effective policing of any potential public disorder. To that effect, §20 VslgG states that the fundamental right of Article 8 GG is to be limited by the provisions of this piece of legislation.

²²⁷ '*Versammlungsgesetz in der Fassung der Bekanntmachung vom 15. November 1978 (BGBl. I S. 1789), das zuletzt durch Artikel 2 des Gesetzes vom 8. Dezember 2008 (BGBl. I S. 2366) geändert worden ist*' translated as 'Assembly Act in the version published on 15 November 1978 (Federal Law Gazette I p. 1789), which was last amended by Article 2 of the Act of 8 December 2008 (Federal Law Gazette I p. 2366)'.
²²⁸ Literally translated as federalism reform. This was an amendment to the Constitution of Federal Republic of Germany that was designed to accelerate the passage of legislation. As a result of this, the states within the federation were granted their own powers to legislate on Assembly powers. For further details see Arthur B Gunlicks, "German Federalism and Recent Reform Efforts" (2003) 6 GLJ 1283

²²⁹ The Bavarian Assembly, Saxony-Anhalt, Saxony and Lower Saxony have all drafted their own regulations appertaining to Assembly and Processions.

²³⁰ It should be noted that the most controversial of these new State-based regulations, the Bavarian Assembly Act, has been made the subject of a judicial challenge (*Verfassungsbeschwerde*). This will be discussed in further detail below in context of §14 VslgG

²³¹ BVerfGE 69, 315 - Brokdorf Decision of the First Senate 1 BvR 233, 341/81 f Decision of 14 May 1985 at II 1

Nonetheless, §1 VslgG states that everyone has the right to hold and participate in public assemblies and processions.²³² This right does not extend to those who seek to abuse the freedoms laid down in Article 5 GG and Article 8 GG in order to combat the free, democratic, basic order²³³. Similarly, those who participate in or organize terrorism-related, extreme right wing or criminally motivated protest²³⁴ will not be covered by §1(1) above.

§14 VslgG imposes a requirement that notice of a public procession or assembly must be provided to the authorities. This notice should be given at least 48 hours before²³⁵. This is a notification process similar to that required under s.11 of the Public Order Act 1986. There is an additional requirement for every public assembly and procession to specify the name of an organizer²³⁶. This is a slight difference to the approach of s.11(7) of the 1986 Act, which imposes liability on any one who can be identified as an organizer²³⁷, whereas §14 seeks a named individual.

On 1st October 2008, the Bavarian Assembly Act (BayVersG) came into force²³⁸. Article 3(3), *inter alia*, imposed a reporting requirement similar to §14 VslgG but with a more onerous requirement of including the place, time, name of the organizer and the subject matter of the demonstration. The organizer of the protest was also made subject to a series of duties and obligations to provide significant personal information upon request from the authorities²³⁹. Additionally, it became the responsibility of the organizer to ensure that the meetings do not become violent and the organizer is held responsible for the peaceful conduct of the protest²⁴⁰. Perhaps of most significance is the authorization for police to collect and retain large amounts of information about protesters in line with Article 9 BayVersG.

²³² §1(1) VslgG

²³³ Art 18 GG

²³⁴ §1(2) VslgG

²³⁵ §14(1) VslgG

²³⁶ §14(2) VslgG

²³⁷ Using the test laid down in *Flockhart v Robinson* [1950] 2 KB 498 at 502

²³⁸ see the discussion on *Föderalismusreform* above at n. 361

²³⁹ Art 10 BayVersG

²⁴⁰ Art 4 BayVersG

Thirteen interested groups, including trades unions, political parties and other non-governmental organizations joined together to file a constitutional complaint with the Federal Constitutional Court (*Bundesverfassungsgericht* herein referred to as BVerfG)²⁴¹. In February 2009, the BVerfG found in favour of the applicants and an interim order suspended a number of provisions. The BVerfG was highly critical of the onerous requirements put on the organizer and also on the police collection of intelligence under Article 9 BayVersG²⁴². The swift response of the BVerfG was significant, illustrating that the Constitutional Court is prompt to intervene in respect of States that try to impose overbearing conditions on protest when Article 8 I GG issues are engaged. The protection afforded was clear and unambiguous, forcing the Bavarian State legislators to redraft the legislation²⁴³.

Exemptions, Conditions and Spontaneous Protest within VslgG

As with the English legislation, §17 VslgG provides what appears to be a closed list of processions and assemblies that do not need to provide notice. These include religious processions, pilgrimages, ordinary funerals, trains of wedding parties and traditional folk festivals. There is provision also within VslgG for the posting of police officers in the procession or assembly²⁴⁴. It is noticeable that tour guides and large numbers of schoolchildren²⁴⁵ are not mentioned on this list, although it is possible to speculate that those examples were not within the contemplation of the legislators. From an English perspective, s.11(1) of the 1986 Act specifies a list of criteria the satisfaction of which engages the reporting requirement. §14 VslgG has no such requirement: all public assemblies and processions are covered²⁴⁶.

As can be seen from the basic right in Article 8 GG I, the implication is that meetings that are open to the public yet held in private²⁴⁷ should be unfettered by

²⁴¹ 1 BvR 2492/08

²⁴² BVerfG Press Release No 17/2009 of 27 February 2009

²⁴³ See §3 ÄndG (Amendment Act) of 22. April 2010

²⁴⁴ §12 VslgG

²⁴⁵ §15 VslgG

²⁴⁶ §17 VslgG does detail some isolated examples of when a procession may not come within the terms of §14 but these are very specific and largely concern religious ceremonies.

²⁴⁷ The language used in §5 VslgG refers to 'Öffentliche Versammlungen in geschlossenen Räume' which translated directly into English is "Public Meetings in closed rooms"

any State requirements for prior notification and there should not be any need for the organizers to seek permission. §5 VslgG interferes with this right by prohibiting meetings that fall within the §1(2) exceptions outlined above²⁴⁸. Meetings are also prohibited where the organizer and participants are to carry weapons or have access to such weapons²⁴⁹. The English law has long recognized the right to hold public meetings²⁵⁰ although the Public Order Act 1986 provides no regulation of public meetings held indoors or in closed premises²⁵¹.

§5 VslgG refers to meetings that are in private, which is a unique category across the jurisdictions in respect of the regulation of protest. The provisions that allow for the setting of conditions in relations to a protest provide clear resonance with the approach adopted in other jurisdictions²⁵². It seems to be uniformly accepted across the legal systems under consideration that conditions²⁵³, which are designed to protect both the protestors and the general public, are wholly compatible with principles of free speech. §15 VslgG permits the imposition of conditions in order to ensure public safety or ensuring that the protest does not disturb public order²⁵⁴. There are no conditions listed within §15, though it has been recognized by the BVerfG that any conditions and special measures must be consistent with the threat posed to public disorder²⁵⁵. Although outside the scope of low-level disorder, the range of measures can include the deployment of water canons²⁵⁶ in areas of widespread disorder, something that has been rejected by the British government as having the potential to erode the face-to-face engagement necessary for policing protests²⁵⁷.

§15 does not only permit conditions to be imposed; it does – in certain circumstances – endow the local authorities with the power to actually prohibit the assembly prior to it taking place or disperse it once it is underway. This prohibition

²⁴⁸ §5 (1)(1) VslgG

²⁴⁹ §5 (1)(2) VslgG

²⁵⁰ *Ex parte Lewis* (1888) 21 QBD 191, 196

²⁵¹ Thornton (n 16) 119

²⁵² See Public Order Act 1986, s 12

²⁵³ See for example the conditions imposed by authorities on the demonstrators in *Snyder v Phelps*. See p 250 for details

²⁵⁴ §15(1) VslgG

²⁵⁵ BVerfG, *Wasserwerfereinsatz*, 7.12.98 (NVwZ 1999, 290)

²⁵⁶ So called 'distance weapons' see Thornton (n 16) 273

²⁵⁷ Home Affairs Committee Report, June 2009, 22; 30

or dispersal of an assembly will only be lawful if a number of conditions have been met²⁵⁸. The principal consideration will be if there is imminent danger to public safety directly attributable to the procession or assembly that is due to take place²⁵⁹. Given the sensitivity of the German legal system to neo-Nazi groups²⁶⁰, the BVerfG will only accept the banning of such processions where concrete threats of criminal offences have been shown to exist. This decision illustrates the harmony between the BVerfG, GG and the ECHR, as can be seen in the judgment of the ECtHR in *CARAF v UK*²⁶¹ where it was held:

*“A general ban on demonstrations can only be justified if there is a real danger of their resulting disorder which cannot be prevented by less stringent measures.”*²⁶²

There is no mention within the VslgG of spontaneous protests²⁶³, but this was to change as a result of the *Brokdorf* judgment of the BVerfG. In February 1981, citizens' action groups in the Brokdorf region called for demonstrations on 28th February against the expansion of nuclear power and the building of an atomic power station. The police had intelligence that 50,000 demonstrators were expected and that some would use force, including violently occupying and potentially damaging the construction site. The local authority issued a general ban on all protests within 210km of the site. When the organizers came to notify the authorities of the intended protest, they were informed of the general ban on protests within the area²⁶⁴.

The organizers filed a constitutional complaint with the BVerfG arguing *inter alia* that the blanket ban was unconstitutional. The subsequent judgment of the BVerfG in this case was far reaching in terms of the right to protest within Germany and indeed defines the scope of Article 8 I GG.²⁶⁵ The court held that

²⁵⁸ §15(1) VslgG states that a competent authority may prohibit the assembly or procession or make them subject to conditions if, at there is an immediate risk, based on all of the available circumstances, to public safety and order.

²⁵⁹ BVerfG decision of 2.12.2005 1 BvQ 35/056 'Rastatt protest case

²⁶⁰ BVerfG, 1 BvR 2793/04, 19.12.2007 known as the 'Stop the Synagogue' case

²⁶¹ *Christians against Racism & Fascism v UK* (1980) 21 DR 138

²⁶² *ibid* [para 4]

²⁶³ Although these are covered by the terms of the Public Order Act 1986, s 11(2) in England

²⁶⁴ BVerfGE 69, 315 - Brokdorf Decision of the First Senate 1 BvR 233, 341/81 f Decision of 14 May 1985 at A.1

²⁶⁵ Brugger, (n 221) 4 at fn 12

the fundamental right to protest is granted by the constitution through the terms of Article 8 I GG and not through the overly restrictive Assembly Act. It was held that the right to spontaneous protest was essential to the manifestation of Article 8 I GG.²⁶⁶ The BVerfG held that there would be occasions where current events demand an instantaneous demonstration. Prohibiting or dispersing an active protest would place an unnecessary burden on the freedom outlined in Article 8 I GG.

Despite exercising great vigilance in the oversight of such bans, the BVerfG has not yet overturned §5 VslgG or §15 VslgG. The reasoning behind this is that the legislation impinges upon meetings and procession *only* when the purpose of these meetings conflict with other aspects of the GG²⁶⁷. In respect of dealing with disorder, it would appear that the focus of the German system regulation protest has little to do with the impact of the events of September 11th 2001 and much more to do with the events of 1945. In that sense it is unique amongst the jurisdictions considered within this inquiry.

Removing Section 5 from the sphere of Protest

This findings of the research contained within this chapter illustrates that there are alternatives to the broad ranging activity prosecuted under s.5 of the 1986 Act. This is achieved by means of a conceptual analysis of the way in which each jurisdiction constructs the legal framework regulating protest. The notion of content-neutrality forming the basis of regulation was highlighted, with the First Amendment in America being the focal point. Such a concept is, however, by no means unique to that jurisdiction. The majority of the VslgG is content-neutral, as is Part 2 of the Public Order Act 1986 in England and the various permission systems within Australia. None of the jurisdictions draw a distinction between the various types of groupings who process and assemble.

²⁶⁶ BVerfGE 69, 315 - Brokdorf Decision of the First Senate 1 BvR 233, 341/81 f Decision of 14 May 1985

²⁶⁷ Foster (n 215) 258

It is recognized within the English, American and Australian jurisdictions that no specific powers to deal with low-level disorder *on a protest* exists. The English solution is to utilize the general powers to deal with public disorder enumerated within Part 1 of the 1986 Act. As has been established in the previous chapters, and indeed is implicit within the research hypothesis underpinning this thesis, s.5 of the 1986 Act is an inherently content-based provision. When considered alongside the model of the “public order theatre” elucidated at the start of the chapter, the use of s.5 of the 1986 Act within a protest confers a significant influence upon the “audience” of the message. If an individual is threatened, abused or insulted by the speech (or placard) of a protestor and as a result feels harassment alarm or distress, then the offence under s.5 is complete.

Australia and America similarly tend to utilize the various disorderly conduct provisions to counter low-level disorder within a protest. In America, the disorderly conduct provisions are subordinate to the constitutional requirement of the First Amendment and the courts will not uphold any arrest, which is made in regard of the content of the message. Germany meanwhile has the provisions of the VslgG, a statute that deals with all aspects of protests, from regulation through to prohibition. As detailed in the previous chapter, this includes bespoke, low-level disorder provisions designed to deal with disorder at protests. The offence of violence on a protest as defined in §21 VslgG provides an example of how a bespoke public disorder protest-based offence might operate²⁶⁸.

Protecting Protestors: Adapting the German Assembly Act

The regulatory offences contained within ss. 11-14A of the 1986 Act are similar in nature to those found in Part 4 of the VslgG in Germany²⁶⁹. They are also broadly comparable to offences relating to the modern permission systems and permit regulatory systems within Australian States. There is a paucity of case law relating to these offences, and this indicates that either no procession organizer has ever defied a police imposed condition (which is implausible) or that once the conditions are broken, police tend to prosecute using alternative (and more

²⁶⁸ See Chapter Five at pp 179-184

²⁶⁹ See p 222

flexible) public order legislation. Unfortunately, there is no evidence to confirm or disprove this hypothesis

The regulation of protest within England under Part 2 of the 1986 Act can be juxtaposed against the broadly drafted offences to be found in Part 1. In *Kay*²⁷⁰, Sedley LJ stated that it was erroneous to talk about unlawful processions or assemblies. Instead, the low-level offences under s.11-13 provide criminal sanctions for *individuals* refusing to comply with the regulatory regime laid down in Part 2 of the 1986 Act²⁷¹. Where persons on the procession or at the assembly behave in an 'unlawful' manner, the police will resort to the more ambiguous provisions found in either s.5 of the 1986 Act or the utilization of the common law powers to deal with breach of the peace.

The regulatory provisions under Part 2 of the 1986 Act serve to provide additional low-level powers for the police. Unlike s.5 and s.4A of the 1986 Act, however, the low-level offences have a narrow focus and can be genuinely described as preventative in nature. As with the offence under s.11, it is instructive that, unlike s.5, there is no evidence of their widespread use. The regulation of processions and assemblies is not unique within the four jurisdictions. Germany has adopted this distinction within the *VsIlgG*²⁷², although unlike England, there is no practical difference in the manner in which the law treats processions and assemblies.

Protestors in England could be protected from the excessive broadness of s.5 of the 1986 Act in the following ways. The creation of an offence along the lines of §21 OWiG would create a content-neutral way of dealing with those who threatened to or actually did bring violence or the threat of violence to a protest. S. 11 of the 1986 Act could then be amended to provide for immunity from s.5 for all protests for which notification had been received. This immunity would not stretch

²⁷⁰ Sedley's comments were made in the High Court decision of *Kay (FC) v Commissioner of the Police for the Metropolis* [2006] EWHC 1536 Admin

²⁷¹ Mead (n 5) 182

²⁷² For details of the operation and codification of protest law by means of the *Versammlungsgesetz* see p 217-225

to those offences that have an aggravated factor under the Crime and Disorder Act 1998²⁷³. This echoes the approach of the New South Wales legislature²⁷⁴.

Conclusion

The frameworks examined within this chapter have provided a “*closed system*” inside which the various low-level public order provisions can be deployed. The importance of these frameworks to the various jurisdictions is clear: a proactive mechanism for managing protest means that disorder will be kept to a minimum and the deployment of low-level public order offences will be similarly reduced. Such an approach would provide the alternative to criminality suggested by Simester and Sullivan in the original research hypothesis²⁷⁵.

The regulation of protest in Australia is one of a gradual evolution of consensus. The English framework for managing protest remains unaltered despite the “further effect” granted to the ECHR following the passing of the Human Rights Act 1998. The approach of the English and Australian courts in terms of balancing the competing rights of different actors within the public order arena contrasts starkly with the robust defence of free speech within the American jurisdiction. Within America, all legislation operates in the shadow of the First Amendment. This cultural and legal attitude would be difficult to transplant into a different legal system not attenuated to the specific constitutional tradition of the United States. It is suggested, however, that the German Assembly law, VslgG is a model worthy of emulation with relatively little constitutional calibration necessary. The structure of the VslgG has elements of commonality with Part 2 of the 1986 Act within England. A key difference between the two regimes is that the VslgG covers the behaviour of all protestors, whereas the English provision provides criminal sanctions against organizers, preferring instead to deploy the regular criminal law together with the general offences under Part 1 of the 1986 Act.

²⁷³ Crime and Disorder Act 1998, s 28

²⁷⁴ Summary Offences Act 1998 (NSW), s 24

²⁷⁵ See p 3

Chapter Seven:

Public Order, Political Protest and The War on Terror

Introduction to Chapter Seven

It was stated at the start of Chapter Two¹ that a number of societal drivers had informed the current framework of low-level public order within the four jurisdictions under consideration. The terrorist attacks on September 11th 2001 in the US² and the subsequent War on Terror³ has had a “*profound impact upon civil liberties and civil rights*”⁴, specifically within England and Wales and the US. Any recommendations for change to the low-level public order arrangements within England and Wales will need to take such a significant impact into account. This chapter will examine the developments within the low-level public order law since the attacks of September 11th 2001 and ascertain whether any causal nexus can be established between these events and any transformation of either the framework for protest or the actual low-level public order offences themselves.

¹ See p 31

² It should also be noted that there was terrorist attack on London on July 7th 2005; however this was part of the ongoing state of affairs, hence the starting point for the investigation being 9/11

³ The scope of the *War on Terror* was made explicit in the speech made by President George W. Bush on 1st May 2003 delivered from the deck of the USS Abraham Lincoln in which he 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 11th 2001, and still goes on.” Quoted in Gus Martin, *Understanding Terrorism*, (2nd Edn, Sage 2006) 25; It was reported that the Obama Administration would not continue to use the phrase, (Guardian, 25/03/2009 available at <http://www.guardian.co.uk/world/2009/mar/25/obama-war-terror-overseas-contingency-operations>) 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.

⁴ Christopher Dunn, “Balancing the Right to Protest in the aftermath of September 11.” (2005) 40 Harv CR-CL L Rev 327, 327

Countering Low-Level disorder: Broadening the Focus

It is axiomatic to suggest that the principal focus of the changes within each of the jurisdictions will be in the area of counter-terrorism law as opposed to that of low-level public order. Nonetheless, as has been established, societal drivers do have an impact upon low-level public order. This discussion will both highlight and conceptualize those changes in respect of the jurisdictions under consideration. It may be that in one or more of the jurisdictions there is no palpable change, while other legal systems will have undergone significant transmutation.

From an English perspective, there will be some broadening out of the meaning of low-level public order. This will necessitate evaluation of the common law powers to deal with breach of the peace⁵. Additional offences, involving the regulation of protest around Parliament⁶, will also be considered when building up a conceptual model of the contemporary operation of low-level public order within England and Wales. This 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 Terror⁷.

The English jurisdictional approach is heavily rooted in the criminal law, but despite the appearance of codification⁸, there is, in fact a hydra of multifarious provisions. The analysis will look at the various legislative and common law provisions utilized by police during a protest to deal with low-level disorder. It will attempt to evaluate the approach of the courts to these low-level provisions and examine how they have affected protest against the war on terror.

Addressing the underlying hypothesis: Reform in Context

Such an investigation will encompass the themes explored in the previous chapter relating to the application of public order law by the police when dealing with

⁵ Existing as one of the oldest common law provisions within the English legal systems, Breach of the Peace was codified in the case of *R v Howell* QB 416; [1981] 3 WLR 501; [1981] 3 All ER 383; (1981) 73 Cr App R 31; [1981] Crim LR 697; (1981) 125 SJ 462 see p 258

⁶ Serious Organized Crime and Police Act 2005, s 132-138

⁷ For the latest discussion of the issue of the perils of normalization see PAJ Waddington, “Slippery Slopes and Civil Libertarian Pessimism” (2005) 15 Policing and Society 353

⁸ By virtue of the Public Order Act 1986

protest⁹. Such an examination of wider low-level powers, whilst retaining the focus upon the flaws within s.5 of the 1986 Act, is essential to any assessment of the state of low-level public order in England. Within a broader context, such a development will facilitate further comparative insight into case law of all provisions that fall within the ambit of low-level public order. The research hypothesis, that s.5 is flawed, is further underpinned by the attitude of the courts within England and Wales in the years following the terrorist attacks. They state that they are eager to promote the rights of protestors¹⁰, but this is rarely at the expense of challenging public order legislation¹¹. As 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, the attitude of the courts to cases relating to protest on these matters will be examined.

As has been established, The Human Rights Act 1998 puts in place a specific duty¹² 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 society¹³. In England, there has been something of an attitudinal shift amongst the judiciary. The traditional orthodoxy was that judges were unwilling to interfere (and in some cases even enquire) where national security issues are raised by the state¹⁴. 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 issues¹⁵.

⁹ See Chapters Two and Three for the application of low-level public order outside of protest

¹⁰ See particularly the judgment of Lord Carswell in *R (Laporte) v CC Gloucester Constabulary* [2007] 2 AC 105 whereby he stated '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' [para 92]

¹¹ See the decision in *Laporte* and contrast with the decision in *Austin v Commissioner of the Police of the Metropolis* [2009] UKHL 5; [2009] 1 A.C. 564 (HL)

¹² Human Rights Act 1998, s 6

¹³ Article 10(2) and Article 11(2) respectively

¹⁴ See for example *R v SSHD ex parte Hosenball* [1977] 3 All ER 452

¹⁵ Perhaps the apogee of this intervention can be seen in the decision of the House of Lords in *A & Others v SSHD* [2004] UKHL 56

Terrorist threat and low-level disorder in the USA

When considering the four jurisdictions, any assessment of contemporary low-level public order law will necessarily require an examination of the situation within the US. Protest is viewed as a fundamental part of the political process with the First Amendment reflecting a “*profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open*”¹⁶. Balanced against this, however, is the undeniably profound impact that the terrorist attacks have had upon civil liberties in the US¹⁷. This inquiry will look at the way in which the relationship between public order and protest with the US has evolved as a result of the terrorist threat.

Of specific interest will be the small, but notorious, protests that have occurred at the funerals of US servicemen. 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 “*Post 9/11*” phenomenon but also that, due to the extreme content of the protestors message at a funeral, “it is difficult to imagine more outrageous and provocative speech”¹⁸. This particular form of protest will test the outer limits of State regulation in light of the First Amendment. The thesis will then extrapolate from the facts of this specific example and assess how these facts would compare to the position in England, Australia and Germany. The mechanisms of executive interference in protest (such as proscribing the route and altering the time) will be set alongside the judicial checks on such activity¹⁹.

The right of an individual to protest and freely express their opinions has been well protected by the Supreme Court²⁰. 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. It has been stated that the terrorist attacks

¹⁶ *New York Times Co v. Sullivan*, 376 US 254, 270 (1964)

¹⁷ Dunn (n 4) 327

¹⁸ S R McAllister, “Funeral Picketing Laws and Free Speech” (2007) 55 U Kan L Rev 575, 575

¹⁹ Nick Suplina, “Crowd Control: The troubling mix of First Amendment Law, Political Demonstrations and Terrorism.” (2005) 73 Geo Wash L Rev 395, 397

²⁰ See Chapter Five p 172

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 States²¹. It has been asserted that the fear of a terrorist attack provides a potent counter-interest to that of the right to protest. There will be an examination as to 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 convictions²².

Germany and Australia: A Controlled Response

It is, perhaps, inevitable that the English and American issues will overshadow those within the other two jurisdictions under consideration. Where relevant, both legislative approaches and case law examples from all jurisdictions will be imported to provide a counterpoint to the English position. For example, co-operation between Germany and the other jurisdictions in respect of counter terrorism matters has been extensive²³. Although there has not been a successful terrorist attack within Germany, there have been numerous German victims of terrorist violence. The United States has hailed Germany as being a key partner in the War on Terror²⁴.

It is also true that September 11th 2001 may not provide a pertinent lodestar from which to navigate changes in the law from the German perspective. It is argued that the shock to the German legal system was felt much earlier, specifically in the years 1932 to 1945²⁵. Additionally, with the *Baader Meinhof* group and other such groups being fully active during the 1970s, Germany is no stranger to the threat of terrorism. Taking this into account means that the German position becomes a useful analogue to England and America. Of particular importance is the way in which the law regulating protests and the *Grundgesetz* manages to harmonize the position within Germany and whether this can provide any instruction for the common law jurisdictions.

²¹ Suplina (n 19) 396

²² Suplina (n 19) 397

²³ Francis T Miko and Christian Froehlich, *Germany's Role in Fighting Terrorism: Implications for U.S. policy* (Congressional Research Service, Library of Congress, 2004), 1

²⁴ *ibid* 2

²⁵ See p 57 for details of how this has impacted upon the German Legal System

Germany has a limited but significant role within the War on Terror²⁶, and, in that respect, echoes the Australian position. Like Australia, Germany also has a long tradition of anti-war protest²⁷ and there have been significant protests concerning German military activity. In January 2011, anti-war protestors demonstrated in Berlin, protesting about German involvement in the International Security Assistance Force in Afghanistan²⁸. Indeed, since 9/11 there have been numerous anti-war demonstrations focusing, though not exclusively²⁹, on the War on Terror³⁰.

Although not a direct focus for terrorist atrocities, Australian nationals have not been immune to targeting. The attacks on the Indonesian island of Bali saw 88 Australians killed³¹ and many others injured. The warning of the FBI Executive Assistant Director of Counter Terrorism in 2004³² was close to being realized in 2009 when members of a group affiliated with Al Qaeda were arrested after planning to carry out a suicide attack on an Australian military base³³. With these additional societal and political perspectives on the War on Terror, Australia can provide an additional element of criticality on the anti-terrorism, protest and low-level public order nexus³⁴.

²⁶ See Miko & Froelich (n 24)

²⁷ Thomas Adam, *Germany and America: Culture, Politics and History* (ABC-CLIO, Santa Barbara, California, 2005) at p. 1099 discussing the Vietnam War and West German student protests.

²⁸ <http://www.presstv.ir/detail/161473.html> 'Anti-War Demos held in Germany' Sun 23 Jan 2011 accessed on 27/04/2011

²⁹ http://news.bbc.co.uk/1/hi/in_depth/business/2009/g20/7969706.stm "G20 protests held in Germany" 28/03/2009 accessed on 27/04/2011

³⁰ http://news.bbc.co.uk/1/hi/world/middle_east/2898031.stm "No let up in Anti-War protests" 29/03/2003 accessed on 27/04/2011 detailing the 2003 protests across Germany where "at least 40,000 protestors were involved in a human chain in Germany, between the northern cities of Munster and Osnabrueck, 55 kms (35 miles) apart" and "About 23,000 took part in marches in Berlin, culminating in a rally in the Tiergarten park, and more Germans held protests in Stuttgart and Frankfurt, where 25 people were arrested as they tried to block the entrance to a US air base"

³¹ Christian Henderson "The Bush doctrine: from theory to practice." [2004] JC & SL 3, 10

³² <http://www.smh.com.au/news/Anti-Terror-Watch/Terrorist-attack-on-Australia-inevitable-warns-FBI-expert/2004/03/16/1079199194943.html> accessed on 09/04/2011 at 17:14 BST

³³ http://www.msnbc.msn.com/id/32276371/ns/world_news-asia-pacific/ accessed on 09/04/2011 at 17:16 BST

³⁴ For details on Australian offences see Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (3rd Edn, Thomson 2010) ch 15

Proscription and Encouragement Offences: Narrowing the focus

The area of terrorism and free expression covers a wide range of legislation and academic debate, encompassing both political and criminological discourse³⁵. This inquiry seeks to focus on the legislation countering terrorism within the four jurisdictions as it interacts with low-level public order. It is acknowledged that there are considerable areas of overlap and mutual inclusivity between anti-terror legislation and the resultant tension with freedom of expression. Indeed, when one looks at the elements of some of the statutory provisions, the potential for the low-level to bleed into higher-level, more serious offences is clear.

Each of the jurisdictions under consideration has legislative provisions that prohibit membership of terrorist groups. These have not been deemed to offend³⁶ against the provisions of Article 11 of the ECHR³⁷. In England the process is known as “*proscription*” and the appropriate legislation is to be found in the Part 2 of the Terrorism Act 2000³⁸. In America, the Secretary of State is given the power to designate a group as being a “*terrorist group*”³⁹. Australian law provides for the power to proscribe “*terrorist organizations*” and the related membership offence incorporated into the Federal Criminal Code 1995⁴⁰. Finally, within Germany, the Criminal Code (StGB) Special Part (*Besonderer Teil*) contains the offences of forming a criminal organization⁴¹ and forming a Terrorist Organization⁴² with a related offence of membership of these organizations⁴³.

³⁵ Russell Hogg, “Criminology, Crime and Politics Before and After 9/11” (2007) 40 *Australian and New Zealand Journal of Criminology* 83. See also Jon Moran & Mark Phythian (eds), *Intelligence, Security and Policing Post-9/11: The UK’s response to the ‘War on Terror’* (Palgrave Macmillan 2008)

³⁶ *Refah Partisi (Welfare Party) v Turkey* (41340/98) (No.2) (2003) 37 EHRR 1; 14 BHRC.1; ECHR (Grand Chamber) and in an English context *SSHD v Lord Alton of Liverpool* [2008] EWCA Civ 443; [2008] 1 WLR. 2341; [2008] 2 Cr App R 31; (2008) 152(21) SJLB. 30; Times, May 13, 2008

³⁷ Freedom of association, for full discussion on the interaction of this within the context of protest, see p 159 onwards

³⁸ Terrorism Act 2000, s 3 details the procedure by which the Secretary of State may either add or remove an organisation he believes commits, participates, prepares, promotes or is otherwise concerned in terrorism

³⁹ Immigration and Nationality Act 1996 states that a group may be designated by the Secretary of State if it is group of two or more individuals, whether related or not, which engages in terrorist-related activities (this includes providing material support to terrorists or soliciting funds for terrorist organisations).

⁴⁰ See *Criminal Code* divs 101 (‘Terrorism’), 102 (‘Terrorist Organisations’). The *Criminal Code* is contained in the Schedule to the *Criminal Code Act 1995* (Cth)

⁴¹ §129 StGB

In addition to the proscription offences, much controversy was aroused within England and Wales in the area of free speech with the enactment of offences penalizing the making of statements which are seen to act as either directly or indirectly encouraging or inducing people to engage in the commission, preparation or instigation of acts of terrorism⁴⁴. Unsurprisingly, numerous commentators have raised grave concerns regarding the potentially chilling effect upon free speech that such a provision might have⁴⁵. One commentator has stated that the offences under the 2006 Act criminalize certain types of expression⁴⁶. It has also been highlighted that the Joint Committee on Human Rights have criticized the breadth of the offence as being too vague for a speech based offence⁴⁷.

Possibly mindful of the restrictions upon the content of a person's speech, it is perhaps unsurprising that the US has no such "*glorification*" provision within its body of anti-terrorism legislation. It has been postulated that while the US Supreme Court may uphold such a statute, it is unlikely that any such statute would be promulgated, as it would be contrary to the legislative and jurisprudential culture within the United States⁴⁸.

From an Australian standpoint, in order to assuage concerns regarding compatibility with the constitutionally implied freedom of political communication⁴⁹, the Australian Law Review Commission did not propose the adoption of a

⁴² §129(1) StGB

⁴³ §129a(1) StGB

⁴⁴ Terrorism Act 2006, s1(1) & s 1(2)

⁴⁵ Michael C Shaughnessy, "Praising the Enemy: Could the United States criminalize the glorification of terror under an act similar to the UK Terrorism Act 2006" [2009] 113 Penn St L Rev 923, 926: For an English critique see the observations by Clive Walker, *Blackstone's Guide to the Anti Terrorism Legislation* (2nd Edn OUP 2009) 57

⁴⁶ David McKeever, "The Human Rights Act and anti-terrorism in the UK: one great leap forward by Parliament, but are the courts able to slow the steady retreat that has followed?" [2010] PL 110, 128

⁴⁷ "House of Lords/House of Commons Joint Committee of Human Rights: "Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters", Third Report of Session 2005-06, November 2005, para 27; At the time it was also suggested that these provisions would criminalize those who 'glorified' the armed opposition to the Apartheid regime in South Africa and, indeed, would criminalize comments made by the wife of the then UK Prime Minister regarding Palestine (see discussion in Clive Walker, "Clamping Down on Terrorism in the United Kingdom" (2006) 4 *Journal of International Criminal Justice* 1137)" quoted in McKeever, (n 48) 129

⁴⁸ Shaughnessy (n 45) 981

⁴⁹ See p 153

glorification offence⁵⁰. The reaction to the introduction of the offence of “*urging the overthrow of the Constitution or Government by force or violence*”⁵¹ in Australia was every bit as critical as the English response had been to the encouragement offences⁵². As part of this debate, concerns have again been expressed that exceptional, emergency legislation to counter terrorism is being ‘normalized’ into the regular body of the criminal law⁵³, echoing concerns similar to those that have been voiced in respect of the English law⁵⁴.

The German Criminal Code contains various offences of incitement⁵⁵, not only as they relate to terrorism, but also to general criminality. The relevant parts of the StGB, that might be applicable to terrorism expression, provide for the offence of incitement to hatred⁵⁶ and dissemination of depictions of violence⁵⁷. The case law surrounding both of these offences demark them as being reserved for extreme speech. In respect of §130 StGB the case law is almost exclusively dominated by holocaust denial and glorification of National Socialism⁵⁸. The case law in relation to §131 StGB deals with extreme pornography⁵⁹ and the infamous “*Cannibal of Rothenberg*” case⁶⁰, both of which operate at the extreme end of the free speech debate⁶¹.

These offences, when viewed across all of the jurisdictions under consideration, clearly impose a significant limitation on the individual right to free expression. They also provide an example of how legislators, certainly within England and Australia during the War on Terror, have tried to criminalize what might be viewed as legitimate expression. Should the individual, in a public order scenario, be seen to glorify terrorism or profess membership of a terrorist organization, the likelihood

⁵⁰ Simon Bronitt & James Stellios “Sedition, Security and Human Rights: ‘Unbalanced’ Law Reform in the ‘War on Terror’” [2006] MULR 29 at fn 9

⁵¹ Criminal Code, s 80.2

⁵² Bronitt & Stellios, (n 50) at fn 5

⁵³ Bronitt & Stellios, (n 50) at fn 206

⁵⁴ Waddington (n 7)

⁵⁵ See for example §111 StGB, §126

⁵⁶ §130 StGB

⁵⁷ §131 StGB.

⁵⁸ BGH, Judgment of 15.12.2005 – 4 StR 283/05

⁵⁹ BGH, Judgment of 15.12.1999 – 2 StR 365/99

⁶⁰ BGH, Judgment of 22.04.2005 – 2 StR 310/05

⁶¹ For further discussion on this highly controversial area within an English perspective see Clare McGlynn, and Erica Rackley, “Criminalizing extreme pornography: a lost opportunity.” [2009] Crim LR 245

is that they may well attract liability for the more serious terrorism offences, certainly within the Australian and English jurisdictions⁶².

As regards the relevance to this investigation, all of these offences, within the respective jurisdictions, provide for sizable terms of imprisonment upon conviction⁶³. They can hardly be considered alongside the low-level offences mentioned in the previous chapters. What they do illustrate, however, is the scope of the upper limits of expressive offences, and the relative ease of travel between the low-level offences and their more serious counterparts. Having eliminated these from the scope of this enquiry, the next stage of the analysis is to examine the lower level protest offences, how they interact with low-level public order and how they have developed since the start of the War on Terror.

The English Parliament, Protest and The War on Terror

The fundamental framework for dealing with protests is to be found in Part 2 of the Public Order Act 1986 and has been analyzed in the previous chapter. One of the more disquieting developments following the terrorist attacks has been the creation of “*place specific restrictions*” upon protest, a phrase used by Mead⁶⁴ 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 s.137 Highways Act 1980, is committing a place specific protest offence. *Arrowsmith v Jenkins*⁶⁵ 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 ECtHR held, in the case of *Patyi v Hungary*⁶⁶, that where a static protest does not cause an obstruction⁶⁷ then such a protest should be permitted.

⁶² For a discussion on the criminalization of homophobic speech within *Hammond* see p xx and for a discussion on the various low-level provisions relating to hate speech see p xx

⁶³ §129(1) StGB provides for a term of imprisonment between one and ten years, Criminal Code s 102.3 provides for a term of imprisonment for up to 10 years for membership of a terrorist organization. In England, s. 11(3) of the Terrorism Act 2000 provides that membership of proscribed organization is triable either way with a maximum term of imprisonment upon conviction on indictment of 10 years.

⁶⁴ David Mead, *The New Law of Peaceful Protest* (Hart 2010) 138

⁶⁵ *Arrowsmith v Jenkins* [1963] 2 QB 561 (DC)

⁶⁶ *Patyi v Hungary* (App 5529/05) judgment of 7th October 2008

⁶⁷ In this case a gap of 5m allowed pedestrian access

One particular static protest that has become a very public demonstration of opposition to the War on Terror was the campaign of Brian Haw⁶⁸ who 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 countering terrorism. Attempts to remove Haw by Westminster City Council were unsuccessful⁶⁹. The coming into force of ss.132-138 of the Serious Organized Crime and Police Act 2005, “*significantly curtails the right to protest within a one kilometre radius of Parliament*”⁷⁰. Specifically, s.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 so⁷¹. 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 removed⁷².

The statute means that the Commissioner of Police⁷³ may impose conditions⁷⁴ that he feels are necessary to prevent hindrance to the operation of Parliament⁷⁵ or to prevent serious disorder⁷⁶. These requirements resonate with the terms of the Public Order Act 1986 in relation to the general statutory 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

⁶⁸ Brian Haw died on the 19th June 2011 of lung cancer, the attempts to evict him from Parliament Square having been unsuccessful to the end of his life. The future of the “Peace Camp” and the legislation governing protest around Parliament is still uncertain. The provisions of the Serious Organized Crime and Police Act remain in force at the time of completing final corrections to this thesis (19th September 2011).

⁶⁹ *Westminster CC v Haw* [2002] EWHC 2073 (QB)

⁷⁰ Jon Robbins, *Right to Protest: Protest too much?* (2007) LS Gaz, 18 Jan, 22

⁷¹ Serious Organized Crime and Police Act (SOCPA) 2005, s 133(1)

⁷² SOCPA 2005, s 132(1)

⁷³ SOCPA 2005, s 134(2)

⁷⁴ SOCPA 2005, s 134(3)

⁷⁵ This includes hindering any person wishing to enter or leave Parliament.

⁷⁶ SOCPA 2005, s 134(3) specifies 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.

statutory instrument⁷⁷ was promulgated to amend the provisions of s.132(1) to include continuing demonstrations as well as new demonstrations.

It was contended in *R (Haw) v SSHD*⁷⁸ that his demonstration had started before the 2005 Act had come 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 Appeal⁷⁹ 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.⁸⁰ 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 curtailed⁸¹, Brian Haw's protest remained, subject to new conditions imposed by the police⁸².

In *Tucker v DPP*⁸³, Haw's co-campaigner, Barbara Tucker, was convicted under s.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 4 of the 2005 Act were not incompatible with the provisions of Article 10 and 11 of the ECHR. The decision to prosecute Haw under s.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*⁸⁴. It was held that the conditions imposed were

⁷⁷ Article 4(2) Serious Organized Crime and Police Act 2005 (Commencement No 1, Transitional and Transitory Provisions) Order (SI 2005 No. 1521 C66).

⁷⁸ *R(on the application of Brian Haw) v Secretary of State for the Home Department, Commissioner for the Metropolitan Police Service* [2005] EWHC (2061)

⁷⁹ *R(on the application of Haw) v Secretary of State for the Home Department* (CA (Civ Div)) Court of Appeal (Civil Division) [2006] EWCA Civ 532

⁸⁰ Section 132 (6) SOCPA 2005

⁸¹ Peter Thornton, *The Law of Public Order and Protest*, (OUP 2010) 132

⁸² The scale of the camp was reduced to 3sqm in size and many of the posters and placards were removed

⁸³ *Tucker v DPP* [2007] EWHC 3019 (Admin)

⁸⁴ *DPP v Haw* [2007] EWHC 1931 (Admin)

demonstrated to be unworkable⁸⁵ 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"⁸⁶.

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*⁸⁷, 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 ss.132-138 of the 2005 Act. Police deployed this provision 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 LJ that:

*"the demonstrations were peaceful and good-humoured...The demonstrations were as much as anything a demonstration against the requirement that authorization should have been required to demonstrate in Parliament Square and/or in Whitehall."*⁸⁸

The four protestors sought to argue, at first instance, that s.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 s.3 of the 1998 Act and read down s.132 of the 2005 Act.

⁸⁵ The conditions stipulated 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."

⁸⁶ *DPP v Haw* [2007] EWHC 1931 (Admin) [para 45]

⁸⁷ [2006] EWHC 3209 (Admin)

⁸⁸ *Ibid* [9]

It was also argued that under s.6(1) of the 1998 Act, it would be unlawful for the court to convict the appellants. 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. 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 humoured.

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 conduct⁸⁹. Similarly, Parliament must be entitled to impose sanctions for not seeking authorization otherwise the finding that the sections are compatible is illusory⁹⁰.

The adoption of place-specific restrictions is not unique to the English legal system. §15 para 2 VslgG prohibits protest on or around the Memorial to the Murdered Jews of Europe in Berlin. Such a restriction is in place due to the historic importance of the memorial and a fear that it may become a rallying point for pro-Nazi right wing groups or indeed be a locus for disrespect by the aforementioned extreme right wing groups.

Protest within the UK and The War on Terror

The findings of the research within this thesis emphasize that it is within the realm of public order law that the principal legislative tools engaged by the state to deal with undesirable expression are to be found. Implicit in the research hypothesis

⁸⁹ The European Court in *Ziliberg v Moldova* (Application no. 61821/00) held that States do have a right to require authorization for demonstrations to ensure effective policing

⁹⁰ *Blum v Director of Public Prosecutions and other appeals* [2006] EWHC 3209 (Admin) [at para 29]

was recognition that s.5 of the 1986 Act, although a relatively minor offence⁹¹, could have a significant chilling effect on protest and expression⁹². Underpinning the research questions was the related hypothesis that s.5 of the 1986 Act was originally intended to counter behaviour such as groups of youths persistently shouting abuse or obscenities⁹³ and low-level football hooliganism⁹⁴ and should not be deployed to deal with disorder on protests.

Even before the events of September 11th 2001, it was within the terms of the legislation for a police officer to decide that an essentially peaceful protest falls within the ambit of s.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 ended⁹⁵. The breadth of interpretation available to the courts in relation to these terms provides for a broad range of behaviour that may be prohibited under s.5.

When considering the considerable spectrum of opinion and the depth of feeling that exists surrounding the War on Terror, this can potentially render an individual liable to arrest for promulgating his or her own deeply held expressions, beliefs and opinions⁹⁶. The dilemma caused by individual dissenters is not the primary mischief that s.5 of the 1986 Act was designed to counter. It just happens that a particularly vocal dissenter is able to fall within the general area of anti-social behaviour⁹⁷. 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 distresses⁹⁸. Sedley LJ crystallized this issue when he stated:

⁹¹ According to Public Order Act 1986, s 5(6), the offence is punishable summarily with a fine not exceeding level 3.

⁹² ATH Smith, *Offences against Public Order* (Sweet & Maxwell 1987) 124

⁹³ Crime and Disorder Act 1998, s 31 provides for racially aggravated public order offences. See p 91 for further details.

⁹⁴ Mark James, *Sports Law* (Palgrave Macmillan, 2010) Chapter 10, 'Crowd Disorder and Football Hooliganism'

⁹⁵ Smith (n 92) 116

⁹⁶ *Hammond v DPP* [2005] EWHC 69 (Admin) Crim. L.R. [2004] 851

⁹⁷ Andrew Geddis, "Free speech martyrs or unreasonable threats to social peace? - "Insulting" expression and section 5 of the Public Order Act 1986" [2004] PL 853, 873

⁹⁸ Barry McDonald, "Speech and Distrust: Rethinking the Content Approach to protecting the Freedom of Expression" (2006) 81 *Notre Dame L Rev* 1347 states that this is the reason why First Amendment protection is so strong in the USA, to promote rigorous debate

“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.”⁹⁹

It is true to say that such concerns are not limited to the protests regarding the war on terror and related military commitments¹⁰⁰. When looking at the view taken by the English courts in matters relating to the rights of protest, the case law before the September 11th attacks seemed to suggest that political protest would enjoy the protection of the courts. In *Percy v DPP*¹⁰¹, the group being insulted was comprised of American citizens working on a US Air Force Base, and the individual was protesting against the Star Wars Missile Defence programme. 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 case¹⁰².

The previously discussed¹⁰³ decisions in *Norwood v DPP*¹⁰⁴, and also *Abdul v DPP*¹⁰⁵, showed that, after the terrorist attacks, the English judiciary was prepared to delineate between political opinion and speech that they felt crossed the boundaries of legitimate protest. In many ways these protestors, although diametrically opposed, were illustrative of the intolerance of the courts to those who sought to promulgate extreme positions in respect of the war on terror. In *Norwood*, the appellant was convicted of racially aggravated disorderly conduct¹⁰⁶ for displaying posters showing the Twin Towers in flames with the words “*Islam Out*”¹⁰⁷ and protesting about the threat of Islamic fundamentalism. In *Abdul*¹⁰⁸, the

⁹⁹ *Redmond-Bate v DPP* [2000] HRLR 249

¹⁰⁰ Geddis (n 97) 853-874

¹⁰¹ [2001] EWHC Admin 1125

¹⁰² 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 LR 835, 835-837

¹⁰³ See p 163-171

¹⁰⁴ [2003] EWHC 1564 (Admin)

¹⁰⁵ [2011] EWHC 247

¹⁰⁶ Section 31 (1) (c) of the 1998 Act creates a new racially aggravated public order offence which relies on the commission of the basic offence contrary to section 5 of the 1986 Act together with a racially aggravated element

¹⁰⁷ See p 163 for details

protestors were objecting to the UK military presence in Iraq and Afghanistan and, despite complying with police directions, were arrested and convicted of disorderly conduct whilst shouting, "*British soldiers burn in hell*", and carrying signs calling the soldiers "*murderers, rapists and baby-killers*"¹⁰⁹. Norwood's defence was that his conduct was reasonable. Auld LJ found that it was not and that, on the facts of the case, s.5 was itself a statute that could protect the rights of others and/or to prevent crime and disorder, specifically the rights of the Muslim community not to be vilified¹¹⁰. In *Abdul*, the Court held that compliance with the police was not enough to provide legitimacy for words that fell within the ambit of s.5¹¹¹.

Individual protest cases, such as *Norwood* and *Percy*, demonstrate that within England and Wales, it is also the regular low-level public order offences which threaten to dissipate the rights of those who seek to offer contrary opinions "*post 9/11*". One of the fundamental challenges facing the English legal system emanates from the utilization, by the state, of existing legislation to suppress speech and opinions. 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 government¹¹².

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 LJ in *Redmond-Bate*¹¹³. This poses a particular challenge for the policing of such protest. Police officers are imbued with the same legislative guardianship role on Convention rights as the judiciary¹¹⁴. Yet, they are required to make decisions regarding 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.

¹⁰⁸ see p 159 for further discussion of this case in the context of Article 10 ECHR

¹⁰⁹ *Abdul v DPP* [2011] EWHC 247, [paras 13-17]

¹¹⁰ *Norwood v DPP* [2003] EWHC 1564 (Admin)

¹¹¹ *Abdul v DPP* [2011] EWHC 247 [para 33]

¹¹² See for example *Dehal v CPS* [2005] EWHC 2154 as examples of some of the issues faced by the courts when dealing with balancing an individual's right to free expression against another individual right not to be caused harassment, alarm or distress.

¹¹³ *Redmond-Bate v DPP* [2000] HRLR. 249

¹¹⁴ Human Rights Act 1998, s 6(1)

This dilemma is not unique to the English legal system. In relation to the protection of protest in the US, 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.”*¹¹⁵

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 all four 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 unattainable¹¹⁶.

Funeral Protests in the USA: “Post 9/11” Paradigm Shift

The two English cases of *Norwood* and *Abdul* provide an illuminating comparator to a form of protest which has emerged in the United States, and in particular, with the recent decision in the case of *Snyder v Phelps*¹¹⁷. This case, which has attracted considerable notoriety on both a national and international level¹¹⁸, concerned the activities of the Westboro Baptist Church and the “*fire and brimstone*” preaching of First Minister, Fred W. Phelps. 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*”, “*Fags Doom Nations*” and “*You’re Going to Hell*”¹¹⁹.

¹¹⁵ Dunn (n 4) 328-9

¹¹⁶ 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.

¹¹⁷ *Snyder v Phelps* 562 US __ (2011)

¹¹⁸ See for example <http://www.bbc.co.uk/news/entertainment-arts-12924568> ‘Louis Theroux returns to America’s most hated family’ 01/04/2011

¹¹⁹ McAllister (n 18) 575

The protest conformed to local ordinances in respect of protests at funerals¹²⁰, and the family of Snyder confirmed that 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*”, and “*taught him that God was a liar*”¹²¹.

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 one¹²² 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 member¹²³. Roberts CJ 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.”*¹²⁴

It is, perhaps, unsurprising that a majority of State legislatures have chosen to enact statutory provisions that “*mute and conceal from mourners’ sight the protestors and their provocative messages*”¹²⁵. Many of these are so called “time, place and manner” restrictions, which create a buffer zone around the locations of the funeral service¹²⁶. Some States, however, such as Florida have chosen instead to enact specific criminal sanctions, whereby it will be a crime for a

¹²⁰ Amicus Brief filed by American Civil Liberties Union in support of the respondents, No 09-751 at p 3 which states “*The 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. (VIII App 2282-85) Respondents stood where the police directed them.*”

¹²¹ Amicus Brief (n 120) 4

¹²² *Roberts CJ delivered the opinion of the Court with Scalia, Kennedy, Thomas, Ginsberg, Breyer, Sotomayor and Kagan, JJ also affirming; Alito J dissenting*

¹²³ *Snyder v Phelps 562 US __ (2011), [13] (per Roberts CJ)*

¹²⁴ *ibid* [13] (per Roberts CJ)

¹²⁵ *McAllister* (n 18) 576 states that some 40 states together with the Federal government have now ‘funeral picketing’ statutes.

¹²⁶ 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.

defendant to wilfully 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 States¹²⁷. The State of Virginia goes one step further and incorporates “*disrupting any funeral, memorial service... if the disruption prevents or interferes with the orderly conduct of the funeral*”, into the general disorderly conduct provision¹²⁸.

Despite these criminal statutes, the decision in *Snyder* 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 *Snyder*, the protestors clearly complied with the pre-emptive 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 *Snyder* would have escaped criminal prosecution under s.5 of the 1986 Act. In considering the prohibited *actus reus* elements required for an offence under s.5, and following the finding of the court in *Hammond*¹²⁹, the words and visible representations used within the protest may well have been viewed by the court as being threatening, abusive or insulting¹³⁰. Unless the protest had

¹²⁷ Fla Stat §871.01

¹²⁸ Va Code Ann. §18.2-415 Disorderly conduct in 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... B. Willfully or being intoxicated, whether willfully 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

¹²⁹ *Hammond v DPP* [2004] EWHC 69 (Admin)

¹³⁰ See chapter three, the notes there apply equally here as regards the elements of prohibited behaviour under s.5(1) of the 1986 Act; there need be only one of the three elements (eg the

gone completely unnoticed then the behaviour of the protestors, although away from the main funeral protest, was still within the presence of someone who is liable to be caused harassment, alarm or distress¹³¹. The case of *S v DPP*¹³² shows that English courts are quite willing to prosecute using s.4A and s.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 s.4A, all that would need to be demonstrated was the Mr. Snyder Senior had been caused harassment, alarm or distress for the offence to be complete¹³³.

Undoubtedly, the defendants in *Snyder* would have tried to invoke the specific defence under s.5(3)(c) of the 1986 Act and claim that their behaviour was reasonable, probably with reference to the rights of freedom of thought, conscience and religion under Article 9 of the ECHR¹³⁴ and the freedom of expression under Article 10 of the ECHR¹³⁵. 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 be¹³⁶. 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

behaviour need only be threatening, abusive or insulting); in terms of the interpretation of the meaning of these phrases, see earlier discussion on the test laid down in *Brutus v Cozens* [1972] 2 All ER 1297, HL

¹³¹ *Holloway v DPP* [2004] All ER (D) 278 (Oct); [2004] EWHC 2621

¹³² [2008] EWHC 438 (Admin)

¹³³ No evidence of violence or threat of violence is necessary under s.4A or s.5 merely the requirement that the behaviour causes harassment, alarm or distress.

¹³⁴ Article 9 states 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.

¹³⁵ See p 159

¹³⁶ Geddis (n 97) 873

but instead highlight the reasonableness of the *conduct* in delivering the message. This uncertainty, considered at length in Chapter Four¹³⁷, serves only to underpin the central research hypothesis once again; that low-level public order provisions (especially s.5) in England grants capricious power to the decision makers. 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 requisite certainty that is essential for criminal liability¹³⁸.

When considering the case of *Snyder* from a German perspective, there is provision within the StGB in Chapter Eleven, the offences related to religion and ideology, to deal with such difficulties. The specific offence is to be found in §167a StGB and states:

*“Whosoever intentionally or knowingly disturbs a funeral shall be liable to imprisonment of not more than three years or a fine.”*¹³⁹

The elements of this deceptively simple offence would appear to fit in with the activities of the Westbro Baptist Church. When the facts of *Snyder* are set against this bespoke legislation, it becomes clear that liability will hinge around whether or not Phelps and his associates could be argued to have *disturbed* the funeral of Snyder. The facts of the case would suggest that this would not have been the case; given the Snyder family only became aware of the protest some time afterwards.

By comparison, the various criminal codes of the Australian States¹⁴⁰ have no substantive provision dealing with the regulation of funeral services other than the regular provisions to control demonstrations. This situation is in tune with the English approach. The various pieces of public order legislation in Australia¹⁴¹ are based on anti-vagrancy legislation and tend to require either an immediacy of conduct or require that the contested behaviour interfere with the peaceful

¹³⁷ See Chapter Four

¹³⁸ See chapter three for the discussion on the requirements of certainty.

¹³⁹ §167a StGB Disturbing a Funeral

¹⁴⁰ See pp 48-51 for further details of these provisions

¹⁴¹ See pp 153-159 for a discussion on the utility of the Australian offences.

passage through, or enjoyment of a public place by a member of the public¹⁴². Again, on the facts of *Snyder*, given the temporal distance between the activities of the Westboro Baptists and the family discovering and becoming distressed, a conviction would appear unlikely.

Free Speech Zones: Content Neutral Controversy

The importance of the case of *Snyder* 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 defence in *Snyder* was that the protest had complied with the pre-emptive ordinances that governed protest at funerals¹⁴³. 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 conduct¹⁴⁴. 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 11th 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 Terror¹⁴⁵.

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-

¹⁴² For example Summary Offences 2005 (Qld), s 6

¹⁴³ *Snyder v Phelps* 562 US __ (2011), [13] (per Roberts CJ)

¹⁴⁴ See *Freedom under Fire: Dissent in Post 9/11 America* compiled by the ACLU/cpreirect/17281

¹⁴⁵ Joseph D Herrold “Capturing the Dialogue: Free Speech Zones and the ‘Caging’ of First Amendment Rights” (2006) 54 Drake L Rev 949

based phenomenon¹⁴⁶. The case law is, however, relatively recent, 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 US Code¹⁴⁷, which gives the Secret Service the authority to create restricted access zones preceding presidential visits¹⁴⁸. 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 year¹⁴⁹. 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 analysis¹⁵⁰ and this inquiry will now examine these issues within the context of free speech zones and why they are proving so controversial. 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 opportunities¹⁵¹. 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*¹⁵², 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 protestors¹⁵³.

Therefore, while the provisions of §1752 have not been found to be unconstitutional *per se*, there have been significant limits places by the Courts as to the nature of the zoning that the Secret Service can impose. In *Stauber v City of New York*¹⁵⁴, 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: “*Cages are a means of punishment, not a means to*

¹⁴⁶ Herrold (n 145) 956

¹⁴⁷ 18 USC §1752(a)(1)(ii)

¹⁴⁸ Elizabeth Craig, “Protecting the President from Protest: Using the Secret Service’s zone of protection to prosecute protestors.” (2006) 9 J Gender Race & Just. 665, 666

¹⁴⁹ 18 USC §3056(d) (2004)

¹⁵⁰ See above p 192

¹⁵¹ Craig (above n 148) 670

¹⁵² *Service Employee International Union Local 660 v City of Los Angeles*, 114 F. Supp. 2d 966, 970-972 (C.D. Cal. 2000), [971]

¹⁵³ Dunn (n 4) 350

¹⁵⁴ 3 Civ 9162, 9163, 9164, (2004) WL 1593870

*regulate the public discourse of a democratic society*¹⁵⁵. This case involved a wheelchair bound demonstrator not being allowed to leave a four-sided enclosed pen for protestors, despite complaining of illness and needing to use the toilet¹⁵⁶.

Although the physical limitations are significant, they tie in 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 threat¹⁵⁷. Sitting alongside this are concerns that, despite appearing to be a content-neutral, time, place and manner restriction, free speech zones that are so far removed from the appearance of the President serves, effectively, to silence the communication of protestors¹⁵⁸.

An example where the use of protest zones was not upheld is to be found in the case of *Goldhamer v Nagode*¹⁵⁹. 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.

Despite this example of judicial activism in respect of over-burdensome 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

¹⁵⁵ *ibid* 351

¹⁵⁶ *Stauber v City of New York*, 3 Civ 9162, 9163, 9164, (2004) WL 1593870; in *Dunn* (n 4) 351

¹⁵⁷ Michael J Hampson, “Protesting the President: Free Speech Zones and the First Amendment” (2006) 58 (1) Rutgers L Rev 245, 253

¹⁵⁸ *Dunn* (n 4) 355

¹⁵⁹ *Goldhamer v Nagode* ___ F3d ___ (7th Cir Sept 2, 2010)(No 09-2332)

*SSHD v Lord Alton of Liverpool*¹⁶⁰, 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 state¹⁶¹. However, as one commentator has pointed out in respect of America,

*“Persistent 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.”*¹⁶²

Given the instability of the law regarding low-level public order in England, this difficulty is clearly common to both jurisdictions, although the protection afforded to speech by the First Amendment clearly shields protestors in the US 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.

Breach of the Peace: A “Sui Generis” Public Order Phenomenon

The thesis has, thus far, examined the low-level ‘pro-active’ offences designed to ensure that processions and assemblies can be managed so as to prevent both serious and low-levels of public disorder. The previous chapters have examined the basic, disorderly conduct offences under s.4A and s.5 of the 1986 Act. 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. In order to gain a full picture of low-level public order law, it is also necessary to examine the provisions found within common law.

¹⁶⁰ *SSHD v Lord Alton of Liverpool* [2008] EWCA Civ 443; [2008] 1 WLR 2341; [2008] 2 Cr App R 31; (2008) 152(21) SJLB. 30; Times, May 13, 2008

¹⁶¹ Suplina (n 19) 427

¹⁶² Suplina (n 19) 428

According to A.T.H Smith, ‘at the very centre of our public order law sits the *sui generis* phenomenon of “the breach of the peace”¹⁶³. Lord Bingham in *Laporte* 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.”*¹⁶⁴

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 criminality¹⁶⁵. It must be emphasized that this provision is by no means limited to dealing 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 s.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 judiciary¹⁶⁶ 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 ECHR¹⁶⁷. 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 English¹⁶⁸.

In *Laporte*, the House of Lords concluded that the essence of breach of the peace was to be found in violence or threatened violence¹⁶⁹. An arrest to prevent a

¹⁶³ ATH Smith, “Protecting Protest – a constitutional shift. Case comment on *R (on the application of Laporte) v CC of Gloucestershire*” (2007) 66 CLJ 253, 253

¹⁶⁴ *R (on the application of Laporte) v CC of Gloucestershire Constabulary* [2007] 2 AC 105, HL, [para 29] (per Bingham LJ)

¹⁶⁵ Justice of the Peace Act 1361 for example is an ancient manifestation of this principle

¹⁶⁶ See for example *R (on the application of Laporte) v CC of Gloucestershire Constabulary* [2007] 2 AC 105, HL, *R v Howell* [1982] QB 416, *Percy v DPP* [1995] 1 WLR 1382, DC

¹⁶⁷ *Steel v United Kingdom* (1999) 28 EHRR 603 [paras 25-29]

¹⁶⁸ *Forbutt v Blake* (1981) 51 FLR 465

¹⁶⁹ Thornton (n 81) 255

breach of the peace is not, of itself, an arrest for a criminal offence¹⁷⁰, 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 LJ 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.”*¹⁷¹

Thornton, extrapolating generic principles from the judgment of Carswell LJ in *Laporte*, has identified three distinct categories of event where the power to use breach of the peace would be appropriate¹⁷². The first occasion would be where an individual is committing or about to commit a breach of the peace¹⁷³. The next set of circumstances would be where individuals are engaged in lawful activities but are likely to provoke others into committing a breach of the peace¹⁷⁴.

It is the third of Carswell LJ’s categories that is most relevant to the regulation of protest. These are occasions where there is a ‘confluence of demonstrations’¹⁷⁵, that is where 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*¹⁷⁶ clarified that action may be taken to prevent a breach, when a breach is occurring and when a breach has occurred and there is likely to be a renewal¹⁷⁷. The power to act when there is a renewal is limited to those occasions where the officer making the decision to detain an individual has an honest held belief that it is

¹⁷⁰ Smith *Protecting Protest* (n 163) 253

¹⁷¹ *R v Howell* [1982] QB 416; [1981] 3 All ER 383; [1981] 3 WLR 501, CA, [427]

¹⁷² Thornton (n 81) 256

¹⁷³ *Moss v McLachlan* (1985) 149 JP 167, DC a case involving striking miners being stopped from travelling to confront working miners

¹⁷⁴ *Humphries v Connor* (1864) 17 ICRL 1 whereby the wearing of sectarian emblems whilst on a lawful parade through a Catholic area of Belfast was liable to provoke a violent response.

¹⁷⁵ *R (on the application of Laporte) v CC of Gloucestershire Constabulary* [2007] 2 AC 105, HL, [para 98]

¹⁷⁶ *R v Howell* [1982] QB 416; [1981] 3 All ER 383; [1981] 3 WLR 501, CA, [427]

¹⁷⁷ *Albert v Lavin* [1982] AC 546

necessary to prevent a breach of the peace and there is objective, reasonable grounds for that belief¹⁷⁸.

In *Albert v Lavin*,¹⁷⁹ Diplock LJ identified that there was a wide range of action available to police and citizens to deal with a breach or potential breach of the peace. This might include removing an inflammatory emblem or icon that a person was wearing¹⁸⁰, or detaining a queue jumper whose activities would provoke a violent response from others waiting in the queue¹⁸¹. This type of activity is exactly the type of low-level public order disturbance that may escalate into a violent response. Without the appropriate lawful authority, the actions outlined would constitute common assault and battery contrary to s.39 of the Criminal Justice Act 1988¹⁸². The existence of a pre-emptory power, falling short of an actual arrest, to prevent an escalation would seem to be a core requirement of any low-level public order framework. It is the very flexibility of the common law that makes this an attractive tool for police when dealing with actual or apprehended public disorder¹⁸³.

It is the power of arrest, however, which gives the breach of the peace provision its real potency as a tool for dealing with low-level disorder. Again, the codification in *Howell*¹⁸⁴ can still be regarded as representing the current state of the law:

“There is a power to arrest for breach of the peace where (1) a breach of the peace is committed in the presence of the person making the arrest, or (2) the arrestor reasonably believes that such a breach will be committed in the immediate future by the person arrested although he has not yet committed any

¹⁷⁸ *Chief Constable of Cleveland Police v McGrogan* [2002] 1 FLR 707, CA

¹⁷⁹ *Albert v Lavin* [1982] AC 546

¹⁸⁰ *Humphries v Connor* (1864) 17 ICRL 1

¹⁸¹ As was the case in *Albert v Lavin* [1982] AC 546

¹⁸² The *Actus Reus* for common assault and battery, although statutorily prohibited is actually found in *DPP v Little* [1991] Crim LR 900 and is occasioned 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. The actual infliction of the force is the battery. For further information see David Ormerod, *Smith & Hogan Criminal Law* (12th edn OUP 2008) 581-589

¹⁸³ Richard Card, *Public Order Law* (Jordans 2000) 21

¹⁸⁴ *R(on the application of Laporte) v CC of Gloucestershire Constabulary* [2007] 2 AC 105, HL, [para 74] (per Lord Rodger)

*breach, or (3) where a breach has been committed and it is reasonably believed that a renewal of it is threatened.”*¹⁸⁵

Thornton states that the police have the authority to arrest to prevent a breach of the peace but that arrest should be the last resort when there is no other way of averting a breach of the peace. Beldam LJ in *Foulkes v Chief Constable of Merseyside Police*¹⁸⁶ asserted that:

*“There must be a sufficiently serious or imminent threat to the peace to justify the extreme step of depriving of his liberty a citizen who is not at the time acting unlawfully.”*¹⁸⁷

Laporte: Action short of arrest revisited

It is germane at this point to discuss the impact of the *Laporte* case upon the ambit of the preventative aspect of breach of the peace. The case is especially relevant to this thesis as it was a protest that was born of the War on Terror but developed as part of the wider campaign against government policy.

Laporte was a protestor on a coach travelling to an airforce base to protest about military action in Iraq. 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. Additionally, there was police intelligence that members of an anarchist group called the WOMBLES¹⁸⁸ were travelling with the group and seeking to radicalize the demonstration. The police concluded that a breach of the peace would occur when the protestors arrived at the RAF base. 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. Neither Laporte nor her fellow passengers were permitted to leave the coach until it arrived in London.

A judicial review was sought regarding the legality of the police action. In stopping the vehicle, the police had taken action short of arrest. They did not draw on any

¹⁸⁵ *R v Howell* [1982] QB 416, [427] (per Watkins LJ)

¹⁸⁶ *Foulkes v Chief Constable of Merseyside Police* [1998] 3 All ER 705, [711]

¹⁸⁷ Thornton (n 81) 262

¹⁸⁸ The acronym WOMBLES stands for “White Overall Movement Building Libertarian Effective Struggles”

statutory provisions for this; instead they relied upon the common law authorities which accepted that a police officer can take reasonable steps to restrain an imminent breach of the peace¹⁸⁹. In light of this, the Court of Appeal¹⁹⁰ held that the police had acted lawfully in preventing the passengers reaching the airfield where they had apprehended a breach of the peace. They determined that, as the breach was no longer imminent, the police had acted unlawfully by escorting the coaches back to London.

The subsequent appeal to the House of Lords in *Laporte* was of major significance in respect of both low-level public order and the policing of protest. That the police action was a direct interference by the state upon the rights of the individual under Articles 10 and 11 of the ECHR was not contested by either of the parties. The House of Lords found that all of the police action was unlawful; with Lord Mance describing the police action as being neither “*reasonable nor proportionate*”¹⁹¹. Instead his Lordship found that police action had been “*general and indiscriminate*”¹⁹². The police had not focused upon the potential anarchists who may have sought to disrupt the protest. Instead, by treating every protestor as a potential threat to public order, they had interfered with the right to protest of those individuals who had acted lawfully by seeking to take part in a peaceful assembly.

In pursuing their course of action, the police believed they had sufficient legal powers to deal with any trouble that might have arisen¹⁹³. Instead of dealing with those who might have caused the trouble, the police took action that suppressed the entire protest and infringed on the Article 10 and 11 rights of the demonstrators. Ironically, the court recognized that it would have been possible for the police to apply for a banning order under s.13 of the 1986 Act, which would have been equally as indiscriminate in suppressing the peaceful protest¹⁹⁴.

¹⁸⁹ See p 254 and *Albert v Levin* [1982] AC 546

¹⁹⁰ *R (on the application of Laporte) v Chief Constable of Gloucestershire* [2004] EWCA Civ 1639

¹⁹¹ *R (Laporte) v CC Gloucester Constabulary* [2007] 2 AC 105, [para 152] (per Lord Mance)

¹⁹² *Ibid* [para 153] (per Lord Mance)

¹⁹³ Alan Davenport, “Apprehended Breach of the Peace: Lawfulness and Proportionality of Preventative Action” (2007) 71 J Crim L 214, 214

¹⁹⁴ *R (Laporte) v CC Gloucester Constabulary* [2007] 2 AC 105 [130] (per Lord Brown)

The judgments of their Lordships in *Laporte* placed a limit on the action short of arrest that the police may take. Lord Bingham stated that there is:

*“Nothing in domestic authority to support the proposition that action short of arrest may be taken when a breach of the peace is not so imminent as would be necessary to justify an arrest.”*¹⁹⁵

The test of when the police (or indeed any citizen) may intervene is at the point when the anticipatory breach is reasonably proximate in time to the point of intervention¹⁹⁶.

Low-Level Lessons from The War on Terror

This chapter has analyzed the changes amongst the four jurisdictions to low-level public order following the 9/11 terrorist attacks. More specifically, the investigation sought to establish the existence of a causal relationship between the changes to low-level provisions and frameworks and the proliferation of measures relating to national security. Such an inquiry necessarily included a broadening out of the term “low-level public order” to encompass those low-level offences that had been enacted after the terrorist attacks of September 11th 2001. In respect of Germany and Australia, there is no evidence to suggest that either of these jurisdictions has significantly altered the regulation of protest or, indeed any aspect of dealing with low-level public order in response to the subsequent War on Terror.

In respect of the English judicial approach to defending free expression and popular protest, any evaluation would classify the position as being indeterminate. At first sight, the cases of *Laporte* and *Moos* provide “*a rare cause for celebration for civil libertarians*”¹⁹⁷. Indeed, this should be doubly so because it was accepted by all parties in *Laporte* that there was sufficient legislation in place for the authorities to have simply banned the demonstration at Fairford. Yet the police tried to work within the existing public order framework to facilitate the protest.

¹⁹⁵ Helen Fenwick “Marginalizing human rights: breach of the peace, “kettling”, the Human Rights Act and public protest” [2009] PL 737, 742

¹⁹⁶ Fenwick (n 195) 743

¹⁹⁷ *ibid*

This optimism should be set against the concerns raised in *Abdul*. The assertion made by Lord Hoffmann¹⁹⁸ - in another notable protest case, that of *Jones*¹⁹⁹ - that it is a mark of a civilized community to accommodate protest and civil disobedience seems somewhat dissonant when balanced against cases such as *Haw, Blum and Tucker*.

In seeking to establish a conceptual post 9/11 framework to the regulation of protest and low-level public order, it can be said that the main locus of change will centre around the English and American jurisdictions. It is tempting to view the respective government's legislative attempts to deal with anti-war demonstrations in the early years of the 21st century as an attempt to politicize the policing of protests. It is in no way novel to accuse a government of using the police to enforce an unpopular political agenda and, in England, there has been a constant criticism of the Public Order Act²⁰⁰. The concern is of an insidious challenge to political protests. The principal concern, highlighted throughout this thesis, is the utilization of seemingly innocuous, low-level public legislation to suppress legitimate protest.

England and USA: Systemic Incompatibility

In advocating more robust defence of free expression, the research is almost irresistibly drawn to the protection afforded to speech within the US by virtue of the First Amendment. Every chapter has indicated how the US constitution provides an effective shield from the worst excesses of overly vague legislation. Unfortunately, however desirable it might be to attempt to transplant First Amendment jurisprudence into the English legal system there are fundamental differences in approach between the two jurisdictions. There was no criminal prosecution in *Snyder*, instead the court was asked to decide on whether to award damages to the party. The whole thrust of the inquiry was, therefore, different to that of a criminal investigation. It is possible to speculate that a prosecution in an

¹⁹⁸ *R v Jones & Others* [2006] 1 AC 136 [para 89] (per Lord Hoffmann)

¹⁹⁹ The case of *R v Jones & Others* [2006] 1 AC 136, was another key case of low-level public order law being deployed against protestors. In this case the law was Criminal Trespass contrary to Criminal Justice and Public Order Act 1994, s 68 and the protestors were arguing that the UK and USA were guilty of the crime of aggression, therefore their actions were justified under Criminal Law Act 1967, s 3. For further details see Thornton (n 81) 326

²⁰⁰ See for further information on this area see Robert Reiner, *The Politics of the Police*, (3rd Edn, OUP 2000)

English court, with similar facts to the case of *Snyder*, would likely result in conviction on that grounds that the activity of funeral disruption strays beyond legitimate protest²⁰¹.

Yet, despite the powerful protection afforded to speech within the US Constitution, it is settled law that the First Amendment does not grant a protestor 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.²⁰² The American solution is to utilize disorderly conduct provisions where appropriate, whilst the ‘victims’ of extreme protest seek redress through the civil courts.²⁰³

Breach of the Peace: A Non-Criminal alternative

The fourth research question was directed towards exploring non-criminal alternative methods of managing disorder in order to displace the criminal hegemony within low-level public order law. Intriguingly, one of the key findings of this chapter 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. As has already been highlighted, 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.”²⁰⁴

Within England and Wales, the common law breach of the peace powers²⁰⁵ have been demonstrated to provide police with a range of options²⁰⁶, up to and including arrest. The scope of these powers may have been both restricted²⁰⁷ and expanded²⁰⁸ in equal measure. Nonetheless this common law provision has been

²⁰¹ As the court did, for example, in the case of *Abdul v DPP* [2011] EWHC 247

²⁰² *Dunn* (n 4) 355

²⁰³ *Snyder v Phelps* 562 US __ (2011)

²⁰⁴ Anderw Simester A P, Sullivan J R, Spencer and Graham Virgo, *Criminal Law: Theory and Doctrine* (4th Edn, Hart 2010) 652

²⁰⁵ *R v Howell* [1981] QB 416; [1981] 3 WLR 501

²⁰⁶ p 254

²⁰⁷ See the judgment of Lord Bingham in *R (on the application of Laporte) v CC of Gloucestershire Constabulary* [2007] 2 AC 105, HL

²⁰⁸ See *Austin v Commissioner of the Police of the Metropolis* [2009] UKHL 5; [2009] 1 A.C. 564 (HL)

accepted²⁰⁹ as satisfying the certainty requirements of Article 7 of the ECHR and still remains “*at the heart of English public order law*”²¹⁰. 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 occur²¹¹, would achieve the same practical ends as those often sought by employing s.5 but without the attendant stigma of criminality attached. If the hypothesis, that s.5 is flawed and not fit for purpose then the corollary of that statement is that it needs to be either repealed or radically reshaped. The powers available to any citizen, up to and including arrest, to prevent a breach of the peace means that a non-criminal alternative for disorder management is readily available, with the advantage of significant case law support including, approval by the ECtHR.

Conclusion

Examining the impact of 9/11 on the various jurisdictions reveals that there are, unsurprisingly, varying degrees to which the War on Terror has impacted upon low-level public order. In the case of Germany and Australia, the answer is very little. The War on Terror also happened to coincide with the coming into force of the provisions of the Human Rights Act 1998. Amongst other changes, it enabled superior courts to make declarations of incompatibility if that court feels that the legislation offends against any of the rights enshrined in the ECHR²¹². Whilst the judiciary do have a guardianship role in relation to Convention rights²¹³, they appear presently to be acting merely as overseers in respect of the laws that have been passed²¹⁴. It is to the legislature and the executive in the Post-September 11th world that one must look for the promulgation of such laws.

²⁰⁹ *Steel and Others v UK* (1998) 28 EHRR 603

²¹⁰ Smith (n 163) 253

²¹¹ *Albert v Lavin* [1982] AC 546

²¹² Human Rights Act 1998, s 4

²¹³ Human Rights Act 1998, s 6 makes it unlawful for a public authority to act in a way that is incompatible with a Convention right. s 6(3)(a) of the 1998 Act holds that a court will be considered to be a public authority. Furthermore, s 3 of the 1998 Act means that legislation should be read and given effect in a way that is compatible with Convention rights.

²¹⁴ The impact of the expanded role of the judiciary in the post-Human Rights Act legal landscape is one of which there has been much discussion. See for example: Keir Starmer, “Setting the record straight: human rights in an era of international terrorism” [2007] EHRLR 123, 123-132

It has been a constant theme of this inquiry that provisions to deal with low-level disorder, within England and Wales, tend to give very broad powers to the police which in turn can be used to suppress what may be legitimate protest concerning the War on Terror²¹⁵. The findings of this chapter have helped to illustrate that the regulatory paradigm 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 s.5 to regulate low-level disorder given that the lowest level activity, which threatens to lead to violence, can be dealt with by the application of the equally versatile, but non-criminal, common law power to deal with a breach of the peace.

²¹⁵ Robbins (n 70) 23

Chapter Eight:

Conclusions

Introduction

The purpose of this research has been to examine the hypothesis that the current method of dealing with low-level public order within the English legal system, specifically, the offence under s.5 of the Public Order Act 1986 is flawed and in need of reform¹. It has been illustrated that s.5 is a blunt legislative instrument that is drafted too widely and bestows too much interpretive responsibility to those charged with investigating, prosecuting and judging the offence in question. In order to test this hypothesis, a number of research questions were posed. These questions viewed low-level public order law through a comparative lens and highlighted the standardizations and areas of commonality in respect of the approach within each of the legal systems.

Exploring the role of s.5 as a tool of protest management has been fundamental to understanding the extreme scope of s.5. The use of s.5 in criminalizing conduct which occurs as part of a protest exceeds the ambit of other, comparable legislative provisions from the other jurisdictions and further emphasizes the need for reform of this provision². The impact of the Human Rights Act, far from acting as a check upon the arbitrary excesses of injudicious policing, has served to muddy the waters of low-level public order law, and forcing the police, prosecutors and courts to indulge in an “ad-hoc” balancing of rights that serves to make the actual boundaries of criminality more rather than less opaque.

¹ See p 3 for details of the hypothesis

² See Chapter Five

The research conducted within this thesis supports the hypothesis that s.5 criminalizes too broad a range of conduct and does this without requiring a victim for that conduct. Furthermore, it does not satisfy the requirements for certainty within any of the jurisdictions under consideration. It will be argued that s.5 should be repealed in its base form, requiring the police to either arrest and prosecute an individual for a specific criminal offence³ or to utilize common law powers short of arrest to manage the disorder. In relation to the specific issue of protest and low level public order, the regulation of protest in the German jurisdiction provides the template for the regulation of minor disorder fashion where the emphasis is on the management of low-level public order rather than criminalizing a vast, ill-defined and amorphous range of conduct.

The Undiscovered Country: The Fault Lines of Section 5

The first research question sought to identify how low-level public order was managed across the four jurisdictions. The findings of this investigation lead to the conclusion that the offence under s.5 of the 1986 Act does indeed have the widest scope of behaviour of the four jurisdictions. One of the key concerns with the offence under s.5 of the 1986 Act is the requirement that behaviour that is threatening, abusive, insulting and also disorderly⁴. Not only do these terms lack the public aspect of behaviour required within the other jurisdictions, the lower end of the terms (insulting and disorderly) criminalize conduct that ought not to be criminalized.

The first research question confirmed that the English, Australian and US jurisdictions deal with low-level public order under the main criminal law, but to varying degrees. The Australian legislation tends to focus upon behaviour that has the potential to annoy the reasonable person⁵. There is also an inherently public context within the legislation that would exclude the offensive and

³ Such as Drunk and Disorderly contrary to s 91(1) Criminal Justice Act 1967

⁴ In *Chambers & Edwards v DPP* [1995] Crim LR 896 DC, Keene J stated that the word disorderly does not require any special interpretation beyond the ordinary meaning and that it was, ultimately, a question of fact for the trial court to determine

⁵ *Spence v Loguch* (unreported NSWSC, Scully J, 12/11/1991) at 6-10 as quoted in Roger Douglas *Dealing With Demonstrations* (Federation 2004) 88

disorderly conduct offence being used to combat stalking and Internet bullying⁶, (although it was established that bespoke legislation exists in all jurisdictions with regards to stalking). Therefore, the Australian disorderly conduct provisions are moderated by the location requirements that clearly place a “public” aspect to the requisite conduct. The Australian legislation⁷ provides for a public nuisance offence if a person behaves in a disorderly, offensive or violent manner, (terms that are employed within s.5 of the 1986 Act in England) and could be classed as being potentially overbroad. The result the offence requires to arise from that conduct⁸, however, limits the scope of criminality, by concentrating on behaviour only where it interferes with, or is likely to interfere with, activities in a public place.

Within the US, responsibility for low-level public order lies with the individual states. The states utilize a wide variety of statutory provisions, although a number of the states base their provisions around those outlined in §250.2 of the MPC. Some states, such as Texas and Illinois, have incorporated detailed enumerated lists of prohibited conduct within the statute, whereas others, such as New York, employ more broadly drawn provisions. From a comparative perspective, no US, low-level public order provision is as wide ranging in the scope of proscribed activity as s.5 of the 1986 Act or the §118 OWiG German provision. The incorporation of the definition of “public” within MPC §250.2 (1) means that US disorderly conduct provisions are similarly focused upon the maintenance of “public order”⁹, though not to the same degree as the Australian provisions¹⁰.

The English Patient: German lessons for Non Criminal Regulation

The research undertaken to support this thesis supports the theory that such low-level misconduct can be managed without the need for recourse to the criminal law. The German solution to dealing with the lowest-level public order is to treat such activity as an administrative infraction both by means of §118 OWiG (and

⁶ See for example the prosecutions within England and Wales of *Chappell v DPP* (1989) 89 Cr App R 82; [1989] COD 259; and also *S v DPP* [2008] EWHC 438 (Admin)

⁷ Summary Offences Act 2005 (Qld) s 6

⁸ “...whereby that behaviour interferes, or is likely to interfere with the peaceful passage through, or enjoyment of a public place by a member of the public”

⁹ §250.2(1) provides that “Public” means affecting or likely to affect persons in a place to which the public or a substantial group has access. It goes on to state that among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighbourhood

¹⁰ See p 46-49

the various city-based police ordinances based around this provision). This is an administrative offence, which state that anyone who engages in a “*grossly improper activity*”, which results in the endangerment of or disruption to the general public or interferes with public order, shall commit an OWiG offence. Whilst permitting a broad range of conduct to fall within §118 OWiG and allowing such activity to be regulated, the German system falls short of criminalizing the activity, instead empowering local officials to issue a fine.

It has been illustrated that the English provisions under ss.4, 4A and 5 of the 1986 Act have been subjected to significant case law analysis, but despite appeals to individual convictions, the fundamental structure for dealing with low-level public order offences remains unchallenged. It is not clear why this is the case (and there is no evidence pointing to a particular reason) although it is possible to speculate that legal advisers adopt a pragmatic approach when advising their clients and are reluctant to challenge a regime as deeply embedded as that of s.5, preferring instead to take their chances with the individual eccentricities of the case. Nonetheless, concerns remain about the breadth of activity punishable, under s.5. Amongst the jurisdictions under consideration, s.5 represents the most broadly drafted and lowest level provision that gives rise to a criminal conviction.

Uncertain & Vague: Section 5 through a Comparative Prism

The second research question sought to examine the various physical elements of the provisions within respective jurisdictions to establish whether the breadth of activity covered by s.5 was representative. The range of behaviour proscribed under the lower reaches of the Public Order Act was explored, with the offences under s.5 spanning a considerable gamut of activity. The German provision was also drafted to cover a wide range of low-level anti social behaviour. The English disorderly conduct provision¹¹, whilst originally intending to do this has far exceeded the scope of §118 OWiG and is no longer directly comparable to that provision. The infractions dealt with under the German administrative provision were limited to minor elements of anti social behaviour such as urinating in the

¹¹ Public Order Act 1986, s 5

street and minor examples of graffiti. S.5 of the 1986 Act does encompass these elements, but also has been used to deal with brawling, homophobic behaviour and, perhaps of most concern, individuals who are protesting.

Section 5 and the Protest Paradigm: HRA Compliance and Ad hoc decisions

Whilst the breadth of activity potentially criminalized by s.5 is a cause for concern, arguably the most contentious conduct covered by English low-level public order law is conduct that may occur within the context of a protest. When accused of an offence under s.5 (or indeed s.4A), such a protestor would claim that his conduct was reasonable and aver his rights to freedom of expression and assembly under Articles 10 and 11 of the ECHR, invoking the judicial duty to read legislation in a way compatible with his convention rights¹². Such an approach is problematic when the protestor is, as in the cases of *Hammond*¹³ and *Abdul*¹⁴, promulgating beliefs that conflict with the Convention Rights of others. The conduct of individual protestors is not the primary mischief that s.5 is aimed at regulating. Yet the breadth of s.5 means that the conduct of vitriolic dissenters has been assimilated within this provision¹⁵. The difficulties regarding certainty and the operation of the defence of reasonable excuse are amplified when the intricate balancing of rights as required by the Human Rights Act 1998 is considered. Given the uncertainty outlined previously¹⁶, the operation of s.5 within the English legal system in respect of the individual dissenter appears ever more *ad hoc* and arbitrary.

In both *Hammond* and *Abdul*, as discussed within this thesis¹⁷, the protestors were eliciting a violent reaction from the audience by the content of their words. In the case of *Abdul*, the protestors had tried to engage with the police to ensure their protest was lawful. In both cases the so-called “Heckler’s Veto” (otherwise known as a hostile audience) rendered their protest unlawful. The common law

¹² Human Rights Act 1998, s 3

¹³ *Hammond v DPP* [2004] EWHC 69 (Admin)

¹⁴ *Abdul v DPP* [2011] EWHC 247 (Admin)

¹⁵ Andrew Geddis, “Free speech martyrs or unreasonable threats to social peace? – “Insulting” expression and section 5 of the Public Order Act 1986” [2004] PL 853, 873

¹⁶ Specifically was the conduct “threatening”, “abusive” or “insulting” and was it likely to cause “harassment”, “alarm” or “distress”? As discussed above on pp 74-82 this will be determined by the finder of fact at trial.

¹⁷ See Chapters Five and Seven

provides only peripheral assistance as to which protagonist the law should penalize, with conflicting judgments supporting both the protestor¹⁸ and the removal of the protestor for causing violence¹⁹. The current orthodoxy errs on the side of preventing violence rather than an outright defence of free speech. The courts are acknowledging the existence of Articles 10 and 11 of the ECHR yet maintaining a line of judicial reasoning that can be traced back through the English common law to *Duncan v Jones*²⁰.

The US Response: Robust Judicial Guardianship

In The US, the behaviour element concentrates on countering low-level violence and disorder. The adoption by most states of the MPC provision for disorderly conduct means that the *actus reus* of US disorderly conduct provisions deals with offences such as fighting, “environmentally unfriendly behaviour” such as letting off stink bombs, and “strewing garbage”²¹. The US provisions do not limit the conduct to violence, but there is a restriction on the words that can be prohibited by virtue of the First Amendment. The use of abusive words has been sanctioned, although the Courts have held that “*mere speech*” is unlikely to constitute disorderly conduct²². Barendt states that the courts in the United States give particularly strong protection to political speech²³ due to their role as guarantors of the First Amendment.

The US legal tradition ensures both constitutional and judicial vigilance against state and federal laws that impinge on free speech, even at the expense of civility²⁴. US Courts are more restrictive of the protection when that speech threatens violence, but only to the point where violence is threatened. The First Amendment provides significant protection for the passionate protestor and whereas the attitude of the English courts is one of tolerance for protest only so far as it does not infringe the statute, the US jurisdiction tolerates the statute only as far as it does not infringe the protest. Therein lies a key difficulty with importing

¹⁸ *Beatty v Gilbanks* [1882] 9 QBD 308, (1882) 15 Cox CC 138

¹⁹ *Duncan v Jones* [1936] 1 KB 218

²⁰ *Duncan v Jones* [1936] 1 KB 218

²¹ Joel Samaha, *Criminal Law* (8th edn Thomson 2005) 427

²² *W L v State*, 769 So. 2d 1132 (Fla. Dist. Ct. App. 3d Dist. 2000)

²³ Eric Barendt, *Freedom of Speech* (2nd Edn, Oxford University Press 2008) 155

²⁴ *Goldhamer v Nagode* ___ F.3d ___ (7th Cir Sept 2, 2010)(No 09-2332)

solutions from the United States: any attempt to model solutions to s.5 around the US model will carry with it a requirement for social and cultural attenuation to the First Amendment. Such attenuation will be required to such an extent that would make any projected solution impractical without a tectonic shift in the English legal system's approach to protest.

As the police employ the low-level provisions in a wide variety of circumstances they can be characterized as "dragnet offence(s) designed to catch all types of low-level anti-social behaviour."²⁵ Yet Australia, Germany and The US limit the application of these offences to situations where there is an overtly public dimension to the behaviour, together with robust judicial activity to defend constitutional guarantees in respect of freedom of expression. The findings of the research within this thesis indicate that it is extremely unlikely that the cases of *Hammond* and *Abdul* would ever be prosecuted in an American or German court and if they ever were, it is extremely unlikely that a prosecution would result in conviction.

Uncertainty, Section 5 and Convention Rights

One of the key areas of the hypothesis underpinning the thesis, and one of the central defects with s.5 as a statutory provision is the apparent lack of certainty:

*"Offence definitions should not be unduly vague. A citizen is not given fair warning of the criminality of his actions if, using the standard procedures for discovering the law (such as the canons of statutory interpretation) a reasonably intelligent person would be left unsure as to whether the relevant conduct was proscribed or not."*²⁶

There are three key areas that make s.5 problematic in respect of the above requirement which have been highlighted. The first area of uncertainty for a defendant is whether his conduct will be likely to be viewed as threatening, abusive or insulting. As stated above, this will be determined by the finder of fact

²⁵ Peter Thornton, *The Law of Public Order and Protest*, (OUP 2010) 37

²⁶ William Wilson, *Criminal Law* (4th Edn, Pearson Education) 21

with reference to the test outlined in *Brutus v Cozens*²⁷. The finder of fact at trial is similarly left to determine whether the outcome of the behaviour is likely to cause harassment, alarm or distress²⁸. The cumulative effect of this is that all of the key behavioural elements of the offence under s.5 are established at the trial. Indeed, the accusation that s.5 is uncertain is not a novel one. Mead has stated that:

*“We might well question whether (disorderly conduct) - with its connotations of what right thinking, properly conducted people would (not) do – sets out with sufficient clarity to allow protestors (and in fact anyone) to know what is and what is not permitted. If so, charges and prosecutions of protestors would then fall foul of the ‘prescribed by law’ test in Article 11(2)”*²⁹

The US disorderly conduct statutes, in order to avoid falling foul of the void for vagueness doctrine based on the MPC will contain a list of proscribed conduct, further limiting arbitrary and capricious prosecutions. The German legal system accepts that within regulatory provisions, such as §118 OWiG, there can be a degree of broadness providing the statutory provision has a consistent body of jurisprudence³⁰. This approach further re-emphasizes the strength of adopting non-criminal approaches to managing low-level disorder instead of retaining a statutory provision that *“gives little warning to citizens about the type of conduct that may be prohibited with the threat of criminal conviction”*³¹.

Despite s.5 of the 1986 Act appearing to raise concerns in respect of certainty, the case law from the English legal system indicates that there have been no challenges solely on the grounds of Article 7 of the ECHR The "trilogy" of protest cases³² that were considered in Chapter Four, those of Percy³³, Norwood³⁴ and

²⁷ *Brutus v Cozens* [1972] 2 All ER 1297, HL

²⁸ *Chambers v DPP* [1995] Crim LR 896 DC

²⁹ David Mead, *The New Law of Peaceful Protests* (Hart 2010) 219

³⁰ BGH 3 StR 506/95 - Decision of 15 March 1996 (OLG Dusseldorf)

³¹ Andrew Ashworth, *Principles of Criminal Law* (6th edn Oxford University Press 2009) 66

³² A phrase coined by David Mead, (n 29) 224

³³ *Percy v DPP* [2001] EWHC Admin 1125

³⁴ *Norwood v DPP* [2002] EWHC 1564 (Admin)

Hammond³⁵ show s.5 arriving at different results, for different reasons, despite the defendants engaging in broadly the same actions³⁶.

The third key area of concern, which sees the ambiguities of s.5 amplified even further, is when the defence of reasonableness is introduced³⁷. This defence provides for acquittal if the accused can show that his actions were reasonable. With the term itself not defined within the statute, it has fallen to the courts to decide whether the conduct of the defendant was reasonable, based on all of the circumstances. The inevitable corollary of this is that the courts make an ad-hoc determination of what constitutes an acceptable excuse³⁸. With the physical elements of the offence also determined as a question of fact, this further adds to the uncertainty surrounding the offence of s.5.

In the other jurisdictions under consideration it has been shown that the reasonableness of conduct is a central element of the offence rather than a separate defence that has to be proved by the accused. It is hard to argue that, in actuality, this is also not the case also under s.5(3)(c). In both circumstances, a finding of reasonableness by the court means that there is no criminal sanction attached to the conduct³⁹. If the reasonableness of the behaviour, therefore, is determinative of conviction and the reasonableness of the conduct is a central element of the offence, Thornton has speculated that this may well place it beyond the boundaries of ECHR compliance in relation to the reverse onus nature of the defence⁴⁰. He goes on to suggest that an objective assessment of reasonableness is not within the defendant's knowledge, and that it would be more logical to have the prosecution prove unreasonableness beyond reasonable doubt in all of the circumstances⁴¹. This would be a welcome step towards adding certainty, although it does not address the underlying difficulties of certainty inherent in the *actus reus* element *per se*.

³⁵ *Hammond v DPP* [2004] EWHC 69 (Admin)

³⁶ For full details of the facts of these cases and the subsequent decisions of the court see pp 242-246

³⁷ Public Order Act 1986 s 5(3)(c)

³⁸ For discussion on the notion of ad hoc balancing in an international context see; Adrienne Stone, "The Limits of Constitutional Text and Structure" (1999) 23 MULR 668

³⁹ Thornton (n 25) 42

⁴⁰ *Sheldrake* [2005] 1 AC 264

⁴¹ Thornton (n 25) 42

Low-Level Public Order and the need for a victim

The above findings highlight the manifold problems that exist with s.5 of the 1986 Act. The unparalleled breadth of activity covered, the illusory nature of compliance with the ECHR resulting in the devolution of the balancing of key convention rights to both the courts (and more worryingly) the police. The absence of the “public place” limitation that is present in each of the other jurisdictions is similarly egregious. These problems are further compounded by the anomalous lack of a tangible, identifiable victim within the terms of s.5. Such a problem goes to the heart of criminal jurisprudence as to the limits of criminalization as identified at the outset of this study.⁴² Wilson states;

“(Using Anti Social Behaviour Orders) has been criticized for its tendency to suck into the apparatus of state coercion those, particularly the young, who are rowdy, loud and disruptive without, however, harming in any defined and substantial fashion the interests of others.”⁴³

The conceptual analyses of the requisite behavioural elements for the disorderly conduct offences suggest areas of cohesion amongst the jurisdictions. With the exception of s.5⁴⁴, there appears to be a generally accepted requirement that the proscribed conduct has some impact on another person. Simester and Sullivan highlight racial insults as being paradigm of this class of case: *“they tend to both cause affront in the audience and to do so by communicating contempt for that audience”⁴⁵*. It is, therefore, unsurprising that an additional area of consensus is the establishment of sanctions for low-level behaviour aggravated by a racial element⁴⁶.

⁴² See pp 3-7

⁴³ Wilson (n 26) 35

⁴⁴ In the case of s.5 the conduct merely has to have the *likely* effect of causing “harassment”, “alarm” or “distress”

⁴⁵ Andrew Simester, Robert Sullivan, John Spencer and Graham Virgo, *Criminal Law: Theory and Doctrine* (4th Edn, Hart 2010) 646

⁴⁶ See p 90

Simester and Sullivan state that even if one accepts the need to criminalize low level, expressive actions⁴⁷ such cases should be criminalized sparingly because of the importance of free expression⁴⁸. This assertion has particular resonance with the approach adopted by the judiciary within the US legal system where the First Amendment is deeply engrained within both the constitutional framework and also the cultural fabric of the US legal system. Writing in respect of the relationship between s.5 and protest, Geddis states that:

*“Applying s.5 to the individual dissenter...forces us to confront the extent to which the general public should be required to tolerate the “harm” of being offended in the name of free expression. There is, of course no magical algorithm available to determine this matter; the decision depends heavily on the matrix of political and social variables that dominate a given society.”*⁴⁹

It is contended that an essential part of the political and social make-up of England and Wales is the personal and cultural diversity that needs diverse and inconsistent forms of public expression⁵⁰. In stifling this, s.5 is seeking to prevent nebulous harm that is *likely* (not actually) to be suffered by someone who *witnesses* threatening, abusive or insulting behaviour and this is discordant with the approach of the other jurisdictions. The lack of a victim is not terminal to the survival of s.5 as a statutory provision. There are numerous crimes that seek to prevent remote harms by criminalizing harmless acts, such as the buying of a handgun⁵¹. There are also crimes seeking to prevent conduct that is offensive, such as engaging in sexual intercourse in a public place⁵². The lack of the victim becomes significant when examining the offence of s.5 holistically. It criminalizes activity on an arbitrary basis to be decided upon by the agents of the state based largely on their individual distaste for the conduct yet this conduct need not *actually* cause harm to anyone. This combines with the other issues, outlined above, means that s.5 is not fit for purpose and not only does it not act as a

⁴⁷ “In so far as offensive conduct is something that communicates to V, the person experiencing the conduct, a lack of respect and consideration, it is characteristically a form of expressive action.” Simester (n 45) 647

⁴⁸ *ibid*

⁴⁹ Andrew Geddis, “Free speech martyrs or unreasonable threats to social peace? – “Insulting” expression and section 5 of the Public Order Act 1986” [2004] PL 853, 872

⁵⁰ Simester (n 45) 647

⁵¹ *ibid* 643

⁵² *ibid* 645

deterrent, it can be used in a more sinister fashion to impose the norms of the individual state agent upon citizens who are engaged upon an otherwise entirely lawful activity.

Public Order Management: Alternatives to Criminalization

At the outset of the study it was identified that a presumption underpinned the research hypothesis. The operating premise was that all of the jurisdictions under consideration would have some form of criminal framework for dealing with low-level public order akin to the role played by s.5 in England and Wales. The research demonstrated that this presumption was correct. Each of the four legal systems recognizes the need for *some* state intervention in respect of low-level disorder. It was established that the three common law jurisdictions employ predominantly criminal sanctions.

American Constitutionalism: The Immovable Object

When dealing with low-level public order legislation, the US jurisdiction requires a list of enumerated behaviour detailing the prohibited conduct in order for the statute to be constitutional. It has been stated that the watchful role played by the US courts in respect of unconstitutionally vague laws extends to low-level public order statutes. This oversight role would appear to be an optimal way of ensuring certainty within low-level public order, especially when “judicial resolution of residual uncertainty in the meaning of penal statutes be biased in favor (sic) of the accused”.⁵³

The research conducted within the thesis illustrates that the English framework for managing protest under Part 2 of the 1986 Act⁵⁴ remains unaltered despite the further effect granted to the ECHR following the passing of the Human Rights Act 1998. Yet whilst the regulatory framework remains unaltered, the problems posed by the extreme protestor linger. The approach of the English and Australian courts

⁵³ John Calvin Jeffries Jr, “Legality, Vagueness and the Construction of Penal Statutes” 71 Va L Rev 189 (1985) 189

⁵⁴ Public Order Act 1986 ss10-16

in terms of the *ad-hoc* balancing of competing rights of different actors within the public order arena contrasts starkly with the robust defence of free speech within the US jurisdiction. Within the US, all legislation operates in the shadow of the First Amendment. This cultural and legal attitude would be difficult to transplant into a different legal system not attenuated to the specific constitutional tradition of the United States.

The requirements of the First Amendment, while providing significant protection to protest and protestors, are as much embedded within the US culture as it is within the legal system⁵⁵. To suggest transplanting such an idea into an alien environment such as the English legal system is unrealistic and indeed unrealizable. Instead, it is the perspectives of the German legal system upon which recommendations for change have been modelled. Whilst the legal tradition may differ, the German legislative approach represents a logical and portable solution to the difficulties outlined in respect of England and Wales as well as Australia. It is suggested, however, that the German Assembly law, VslgG is a model worthy of emulation with relatively little constitutional calibration necessary.

Towards a German Model: Regulation not Criminalization

The German solution provides that disorderly conduct is not a criminal offence. Instead an administrative, regulatory approach was favoured with low-level disorder attracting non-criminal disposals and dealing with it by means of a “regulatory mechanism”⁵⁶. This approach, although unusual in its widespread application, is not unique to the German jurisdiction⁵⁷. The German legal system accepts that within regulatory provisions, such as §118 OWiG, there can be a degree of broadness providing the statutory provision has a consistent body of jurisprudence⁵⁸. Finally, although, to a lesser degree than Australia, offences under §118 have a distinctly “public” requirement – even if the behaviour occurs in a place that may private. This contrasts with the requirement of s.5 of the 1986

⁵⁵ For details of the difficulty associated with introducing American solutions without the necessary constitutional culture see Ian Loveland (ed), *Importing the First Amendment* (Hart 1998)

⁵⁶ An approach endorsed by Simester (n 45) 652

⁵⁷ Some US states, whereby the lowest level disorderly conduct offence is considered to be a violation, has adopted this more regulatory approach.

⁵⁸ BGH 3 StR 506/95 - Decision of 15 March 1996 (OLG Dusseldorf)

Act whereby, providing the conduct is not in a dwelling⁵⁹ and there is a witness⁶⁰, there does not need to be any additional public element.

As highlighted above, the offence itself prohibits “grossly improper activity” resulting in the endangerment of or disruption to the general public or interferes with public order. By treating such activity and conduct as an administrative infraction by means of the low level, §118 OWiG⁶¹, endows police with a widely drafted “catch all” provision but not impose criminal liability. Furthermore, and notwithstanding the broad circumstances that may be captured by the term “*grossly improper activity*”, it should be noted that political speech and protest would not fall within the ambit of §118. The crime of “insult” under §185 StGB may encompass some political activity, but the courts are careful to read §185 in concert with the defence of fair comment under §193 as well as being mindful of the requirements of free expression⁶² and freedom to demonstrate⁶³ under the Basic Law.

Reforming Low-Level Public Order in England and Wales

The most broadly drawn and lowest entry point for criminality amongst the jurisdictions can be found within the English legal system by virtue of s.5 of the 1986 Act. As it currently stands, the term “insulting” is too subjective to provide any effective guidance as to the entire scope of the behaviour that is prohibited. The Joint Committee on Human Rights in 2009 recommended removing the word insulting from s.5 of the 1986 Act to lessen the chilling effect on free expression⁶⁴. Such a recommendation, however, illustrates the problem with an exclusively rights-based analysis of s.5. While removing insulting may *lessen* (not eliminate) the chilling effect on expression, it may not be sufficient to remove the inherent

⁵⁹ Public Order Act 1986 s 5 (3) (b) provides a defence if the accused can prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling.

⁶⁰ Public Order Act 1986 s 5 (3) (a) requires a person who is likely to be caused harassment, alarm or distress to be present otherwise the accused has a potential defence to prosecution.

⁶¹ Also including the various city-based police ordinances

⁶² Art 5 I GG

⁶³ Art 8 I GG

⁶⁴ Joint Committee on Human Rights, *Demonstrating Respect for Rights?* (2008-9, HL 141, HC 522) 54

ambiguity from within the core of the offence. The word abusive is, ultimately, defined in relation to insulting. Consequently, removal of insulting from s.5 may alleviate the liability in some circumstances, but it may be that definitional difficulties are simply transferred from insulting to abusive. Removal of both terms, leaving the offence of “*threatening or disorderly behaviour*”, still does not overcome the difficulties in respect of the vagueness of harassment, alarm or distress, nor the confusion as to the operation of the defence of reasonable excuse under s.5 (3)(c) of the 1986 Act.

There is sufficient legislation passed by Parliament to suggest that when it is perceived necessary to prohibit a certain type of speech or activity, the lawmakers will intervene and proscribe it. In the jurisdictional ambit of England and Wales there is legislation prohibiting speech that is offensively racially motivated,⁶⁵ stirs up racial and religious hatred;⁶⁶ that contains official secrets;⁶⁷ and obscene expression.⁶⁸ There is nothing to suggest that Parliament has any reluctance to proscribe expression that it does not believe to be in the best interests of society. Had the terms of the Crime and Disorder Act 1998 covered homophobia, the defendant in *Hammond* would have been left in little doubt that his actions would be viewed as criminal. Low-level public order legislation, as well as acting as a “catch all” provision, is also operating as a palliative in cases where the speech or expression is undesirable but not yet proscribed⁶⁹.

Repeal of the base offence under s.5 and reform of s.4A

The analysis of the scope of the activity covered in both regular criminal law and within the context of protest, illustrates that the best way to remove the ambiguities is to repeal the base offence under s.5 of the 1986 Act. The offence of racially aggravated harassment, alarm or distress, together with an augmented provision to deal with aggravation on the grounds of sexual orientation should be

⁶⁵ Crime & Disorder Act 1998, s 28

⁶⁶ Serious Organized Crime and Police Act 2005

⁶⁷ Official Secrets Act 1911 & 1989

⁶⁸ Obscene Publications Act 1959

⁶⁹ In this case, the decisions of the court in *Hammond* and *Abdul* as opposed to *Dehal v DPP* [2005] All ER (D) 152

retained, on the ground articulated by Simester and Sullivan that racially aggravated insults cause affront to the wider audience of society⁷⁰.

The provision of Intentional harassment, alarm or distress or disorderly conduct, under s.4A of the 1986 Act would remain part of the low-level public order legislative arsenal and become the lowest level public order offence. S. 6 (4) of the 1986 Act, would be amended to provide coverage for s.4A in relation to the formation of *mens rea* when intoxicated. The offence under s.4A requires the accused to intend to cause harassment, alarm or distress and for the conduct to subsequently result in a person being so affected. This requirement will provide a tangible victim who can attest to the negative consequences of the conduct.

The defences under s.5(3) (a) and (b) would remain. The defence under s.5 (3) (c) would be removed. Instead the *actus reus* of the remaining provisions of s.5 (i.e. those aggravated by race and sexual orientation) together with s.4A would be altered *mutates mutandis* to state:

A person is guilty of an offence if he –

*uses threatening, abusive or insulting words or behaviour or disorderly behaviour
which is unreasonable with regard to all of the circumstances or*

*displays any writing, sign or other visible representation which is threatening,
abusive or insulting **and is unreasonable with regard to all of the
circumstances***

This would address the concerns previously highlighted by Thornton in respect of the difficulty of the accused providing an objective assessment of reasonableness. This augmented provision requires that the prosecution prove unreasonableness beyond reasonable doubt in all of the circumstances.⁷¹

⁷⁰ Simester (n 45) 646

⁷¹ Thornton (n 25) 42

Filling the Void: The ECHR Compliance of Breach of the Peace

The common law powers to deal with breach of the peace will provide sufficient coverage to deal with elements of anti social behaviour not encompassed by the offence under s.4A of the 1986 Act. It has been shown that breach of the peace powers are used in a wide variety of circumstances and are every bit as flexible as s.5. The key difference between breach of the peace powers and those under s.5 is that powers to deal with a breach of the peace are not criminal sanctions, and while broad in scope, are merely preventative tools for the police and not the entry point to criminality. It is accepted that the repeal of s.5 may result in the displacement of prosecutions to other offences which may also be regarded as vague or have other deficiencies. Such a consideration should not interfere with the need to repeal this offence that employs a flawed matrix of uncertainty, over-breadth and locational flexibility without the need for the behaviour to affect any victim.

The repeal of s.5 and the use of preventative powers would bring the English legal system into closer harmony with the prevailing attitude to public order in the other jurisdictions, reflecting the non-criminal nature of §118 OWiG and the more public/violence based scope of the US and Australian approaches. The retention of the augmented powers under s.28 Crime and Disorder Act, together with the intentional offence under s.4A of the 1986 Act, maintains protection for the particular individual to whom abusive speech is directed. These align with the provisions found in both §185 StGB and also the use of offensive speech under the “obscene” language provision found in §250.2 of the MPC.

Protest and Public Order: Towards Management rather than Criminalization

The law regulating protest in England is currently a mixture of statutory regulation combined with the application of common law provisions and excessively broad low-level public order legislation. Although freedom of expression is recognized within the English legal system (by virtue of Article 10 of the ECHR) it is culturally

and constitutionally problematic to embed values such as those upheld by the US courts in relation to the First Amendment.

Mead, writing solely in respect of the English legal system, has talked of the need for a “Protest Act” and has outlined some of the general principles such an Act might embrace including a statutory right to protest⁷². It is contended that the German approach of treating protest holistically, by virtue of the VslgG, rather than using piecemeal provisions of the general criminal law represents an optimal solution to this dilemma.

It is recommended that Part 2 of the Public Order Act 1986 should be repealed and replaced by a unified law on Assembly modeled extensively on the German VslgG. Rather than housing the regulation of protest within the Public Order Act, the requisite public order provisions should be drafted within the broader context of facilitating protest. As with §1 VslgG, the first provision of the Assembly statute should be a statement that everyone has the right to protest⁷³. This right may need qualifying⁷⁴ but the existence of such an explicit provision within the statute will emphasize a shift in focus, away from merely tolerating protest to actively enabling it.

Use or Threat of Violence at a Notified Protest

The first ‘new’ offence proposed is modelled directly on the provisions found in §21 VslgG:

An offence will occur if a person commits or threatens acts of violence with the intention of preventing or of disrupting protests, of which the police have received full notification⁷⁵.

Such an offence would deal with the problem posed by the so-called “Heckler’s Veto” and encourage those organizing a protest to notify the police and thereby

⁷² Mead (n 29) 415-419

⁷³ For a new definition of protest see p 283

⁷⁴ For example, a demonstration expressing support for groups proscribed under Terrorism Act 2000, s 3 may well not be permitted to exercise this right.

⁷⁵ Full notification would, in this provision refer to a notification period as currently provided for by Public Order Act, s 11

prevent violence. Had this been in force at the time of the *Hammond* case, Hammond's protest would only be protected from the hostile crowd if the police had received the appropriate notification. Upon receiving notification, the police may well have imposed a condition preventing the disturbance that ensued. The problem of the vituperative and vitriolic protestor leading to violence could be countered by the creation of an additional offence:

An offence will be committed whereby any person, present as part of a protest, threatens any another person, or causes disorder by:

Damaging or threatening to damage Property or

Failing to comply with a reasonable instruction from a police officer in relation to that protest.

It would be for the prosecution to prove that the person was present as part of a protest (whether the defendant maintained he was or not). It would, crucially, be for the prosecution to show that the instruction from the police officer was reasonable. This would re-emphasize the duty of the police to act in a way that is compliant with the right to freedom of expression and association and require any such interference to be proportionate and necessary.

Redefining Protest

The definition of the term protest would be modelled on that found within s. 11 of the 1986 Act:

Protest shall include processions and meetings or other gathering of one or more persons, in a place to which the public have access, to demonstrate support for or opposition to the views or actions of any person, body of persons, company or government, to publicize a cause or campaign or to mark or commemorate an event.

The case of *Norwood* presents something of a dilemma. The above definition of protest means that displaying something in a window, whilst visible to the public is not a procession, meeting or other such gathering. Yet *Norwood* undoubtedly would classify himself as a protestor and the placing of posters in the window of

houses is a long established method of political campaigning. Although Norwood would not have been liable for prosecution under the proposed Assembly law, the actions still may come within the provisions of racially aggravated s.5 of the 1986 Act. The proposed change to the *actus reus* of racially aggravated s.5 would provide greater protection to free expression, and a clearer focus for the court by placing the reasonableness of the activity within the central elements of the defence rather than a provision for the defendant to disprove.

Acting in congruence, these provisions would create a content-neutral⁷⁶ way of dealing with those who threatened to or actually did bring violence or the threat of violence to a protest. It would also ensure that the activity of protestors, such as in *Hammond* and *Abdul*, would not be dealt with under legislation designed to counter low-level anti social behaviour. Instead, they would be considered alongside all other protestors and their protest could be regulated and effectively policed. In the case of *Hammond*, a reasonable instruction from a police officer might have been to relocate his protest to a different area. In the case of *Abdul*, such a law would possibly have given them protection from prosecution and placed the onus on the police to ensure that the demonstration, of which they were fully aware, did not result in violence.

Concluding Remarks

This thesis has sought to address the deficiencies of the approach to low-level public order law within the English legal system by exploring and critiquing the boundaries of disorder punishable across four distinct legal systems. This has resulted in the constructing of a conceptual edifice from the elements of the individual low-level offences. The analysis and critique has highlighted the standardizations within the jurisdictions and exposed weaknesses on a systemic level, finally suggesting proposed reforms to the low-level public order regime, specifically the repeal of s.5 of the Public Order Act 1986 and the creation of a “Protest Act” to deal with some of the low-level disorder that may arise from protest.

⁷⁶ See p 192 for discussion on content neutrality. See also, Ivan Hare, “Method and Objectivity in free speech adjudication: lessons from America” (2005) 54 ICLQ 49

Although the recommendations have tended to focus upon the problems identified within the English Legal System, these recommendations are also offered as optimal pathways for dealing with protest within the Australian jurisdiction should the structural integrity of the state-based scheme be affected by events in the future. Certainly, within England and Wales, the existence of a protest law, with a free standing right to protest and protection for demonstrators at its core, should contribute to a much needed attitudinal shift in those enforcing and interpreting the law towards encouraging protest.

The benefit of conducting this comparative study of low-level public order as it applies in general is clear. It has been shown, across all jurisdictions, that some vagueness is inherent in provisions designed to deal with low-level disorder. That ambiguity should not, however, provide legislators with an excuse to deploy broadly drafted, uncertain laws in the hope of catching a wide range of hitherto unconsidered activities. The detailed critique of the different statutory provisions has demonstrated that there are optimal solutions and that the entry point to criminality does not need to be as fluid and uncertain as Justice Stewart's famous aphorism "I know it when I see it"⁷⁷. Instead, as Aristotle stated, "Law is order, good law is good order"⁷⁸, and it is folly to neglect fundamental principles of criminal doctrine in search of pragmatism however low level the offence might be. The proposals arising from this thesis will ensure that order is achieved by virtue of the law and not at the expense of it.

⁷⁷ *Jacobellis v Ohio* 378 US 184 (1964)

⁷⁸ Aristotle, *The Works of Aristotle* (Clarendon Press, 1910), Vol VII.1326a29,

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