

**FREEDOM OF EXPRESSION FROM THE 'AGE OF EXTREMES' TO THE
'AGE OF TERROR': REFLECTIONS ON PUBLIC ORDER LAW AND THE
LEGAL RESPONSES TO POLITICAL AND RELIGIOUS EXTREMISM IN
1930s BRITAIN AND THE POST 9/11 ERA**

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Abstract

This paper highlights some of the legal responses to political extremism in the 1930s and the modern challenge of international terrorism and extreme right-wing activism. In particular, it focuses on restrictions to freedom of expression, the tactics and responses employed by the police and the subsequent judgments of the judiciary. During the interwar years, the activities of extremist political parties caused major disruption to public order. Public meetings, marches and demonstrations organised by the British Union of Fascists (BUF), the Communist Party of Great Britain (CPGB) and anti-fascist protestors created new challenges for the authorities. Despite fears that new legislation would restrict fundamental liberties, the recurrent conflict prompted the passing of the Public Order Act 1936. Similarly, today's threat to national security, posed by international terrorism, has triggered a series of counter-terrorism measures that have also affected civil liberties and human rights. This paper considers how freedom of expression has been restricted in these eras and how the official responses to extreme elements in society have also affected citizen's rights more generally. This comparison will demonstrate that although modern repressive measures appear to have been extended since the 1930s, the application of the Human Rights Act 1998 and the influence of the European Convention of Human Rights (ECHR) inspire the potential to halt this dangerous progression.

Keywords: public order, breach of the peace, fascism, counter terrorism, political and religious extremism, human rights, police tactics

Introduction

In December 1936, during the Commons debate of the Public Order Bill, Independent Labour Party MP James Maxton stated, 'Sometimes in this House when we attempt to evade the evils of dictatorship we are just in danger of imposing upon ourselves all the essential evils of dictatorship.'² This sentiment was repeated in 2004, when a committee of nine Law Lords reviewed the Anti-terrorism, Crime and Security Act 2001. Lord Hoffmann declared that, 'the real threat to the life of the nation... comes not from terrorism but from laws such as these.'³ These comments made by Maxton and Hoffmann, over 70 years apart, reveal the danger of introducing repressive legislation in order to protect public security. Striking the appropriate balance

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² *HC Deb* 07 Dec 1936 vol.318 col.1764

³ *The Guardian*, 19 Jan 2009

between liberty and security was a fundamental aspect of the public order debates of the 1930s and is a vital component of the modern debate on counter-terrorism legislation. This paper addresses the issue of sacrificing individual liberty in order to protect collective security, and assesses the effect of police tactics and legal responses on the preservation of public order and human rights. This is achieved by comparing and contrasting the inter-war period, and the threat posed by the extreme political doctrines of fascism and communism, with the modern threat to security that is presented by extreme Islamist factions and modern right wing groups, such as the English Defence League (EDL). In both eras, the UK Government, in dealing with the threat of violence and disorder, responded by curtailing civil liberties through legislative action with the intention of maintaining public safety. More controversially though, the extension of breach of the peace powers, that are not authorised by statute, have given the police greater discretionary powers which have affected liberties related to freedom of expression, such as freedom of assembly and the right to protest and demonstrate. This paper will focus on how legislative action and Common Law judgments have changed the nature of freedom of expression today.

1 The Challenge of Political Extremism in 1930s Britain

The political extremism that developed in the UK during the interwar years caused serious public disorder, but it is important to note that Parliamentary stability was never seriously threatened. Left and right wing extremist groups, most notable among them, the British Union of Fascists (BUF) and the Communist Party of Great Britain (CPGB), enjoyed relatively little support and membership.⁴ The BUF was founded by former Conservative and Labour MP, Sir Oswald Mosley in 1932 and were commonly known as the Blackshirts due to their distinctive uniform. . Despite being a well organised movement with a highly developed political agenda and economic policy, the BUF only ever contested three Parliamentary seats. All three of the BUF candidates stood in by-elections held in 1940, all of which resulted in a forfeited deposit.⁵ The CPGB was founded in 1920 and was the British arm of the Communist International. William Gallacher was a prominent figure in the CPGB and

⁴ BUF membership reached an estimated peak of 50,000 in 1934, see R. Thurlow, *Fascism in Britain: From Oswald Mosley's Blackshirts to the National Front* (I B Tauris, 2009) p.91. The active membership was estimated by the secret service to have only been 10,000. See Christopher Andrew, *The Defence of the Realm: The Authorised History of MI5* (Allen Lane, 2009) p.191. By 1935, the dues-paying membership of the CPGB had reached 7,700 while Saturday sales of their newspaper, the *Daily worker*, had risen to 70,000. See N. Branson, *History of the Communist Party of Great Britain 1927-1941* (Lawrence and Wishart 1985) p.130.

⁵ F. W. S. Craig, *Minor Parties at British Parliamentary Elections 1885-1974* (The Macmillan Press LTD 1975) p.12.

defeated Labour opposition in the 1935 General Election to be elected as MP for East Fife. His electoral success followed that of John Newbold and Shapurji Saklatvala in the 1920s. The threat posed by these competing movements was the frequent violence that became associated with their meetings and demonstrations. The typical trend was for communist and anti-fascist factions to disrupt BUF activities with organised heckling or protests, which often led to fights between the two groups or between the protesters and the police.

The inconsistent use of police action against the political extremists of the left and the right ultimately led to accusations of police partiality in favour of the fascists, and is a debate that continues amongst historians today. Central to this debate is the use of wide discretionary breach of the peace powers and loosely defined legislation. Stevenson characterises the Metropolitan Police in this era as 'anti-left' rather than 'pro-fascist'⁶, while Ewing and Gearty argue more emphatically the case of a partisan police force. They counter Stevenson's deduction by highlighting that the protestors on the receiving end of police militancy would have seen little difference between 'anti-left' or 'pro-fascist' policing.⁷ Thurlow's argument adds a more moderate approach which highlights that while the police at the highest level were not in favour of fascism, there were problems of interpreting the law at street level that led to inconsistent treatment of fascists and anti-fascists, but he stops short of advocating that there was a political motivation for this.⁸ As will be discussed, police inconsistency is caused by loosely defined legislation and the resulting use of wide discretionary powers, which is a problem that traverses both eras. If the police were politically motivated, this would have undoubtedly had serious consequences on freedom of expression, yet it is only within the scope of this paper to assess a cross section of selected incidents on their own individual factors and the resulting implications these have on restricting freedom of expression.

At indoor fascist political meetings, organised interruption prompted the ruthless responses of Mosley's Blackshirt stewards to violently beat and eject hecklers; the most famous demonstration of such Blackshirt brutality was at the 1934 Olympia meeting in London which attracted an audience of approximately 12,000. There were

⁶ J. Stevenson, 'The BUF, The Metropolitan Police and Public Order' in K. Lunn and R. C. Thurlow (eds) *British Fascism: Essays on the Radical Right in Inter-War Britain* (Croon Helm London, 1980) p.147.

⁷ K. D. Ewing and C. A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (Oxford University Press, 2004) p.296 n.113.

⁸ R. Thurlow, *Fascism in Britain: From Oswald Mosley's Blackshirts to the National Front* (IB Taurus, 2009) p.84.

also frequent confrontations between anti-fascists and the police. A common tactic of the anti-fascist groups was to hold rival protest meetings adjacent to fascist meetings which also often ended in violence. Anti-fascist disruption of BUF marches is highlighted by the Battle of Cable Street when 100,000 protesters took to the streets to block a provocative fascist march through Jewish communities in East London, and resulted in large confrontations between the police and anti-fascists. The priority of dealing with the extreme political movements from a public order perspective, rather than a potential threat to the democratic stability of the nation, was summarised by the Prime Minister Stanley Baldwin who alluded to the fascists and communists when introducing the Public Order Bill to Parliament by stating that they are 'elements unimportant in themselves in this country but provocative of serious disorder.'⁹ While the Public Order Act 1936 was primarily enacted to reduce the threat of disorder associated with political extremism, the contemporary uncertainty about the potentially dangerous growth of either the fascist or communist movements was also a concern of both the Home Office and the Metropolitan Police Force. By late 1936, BUF membership was on the decline, and although it did not reach the same level of support as it did in 1934, during the era in which the Blackshirts enjoyed the support of Lord Rothermere and his newspaper empire which included the *Daily Mail*, the increase in political activity, anti-Semitism and violence prompted enough official concern for legislative action. Metropolitan Police Commissioner Sir Philip Game highlighted the new trend of tactics and recruitment in a letter to the Secretary of State following the Battle of Cable Street which recommended new legislation emphasizing that the increased use of anti-Semitism was attracting new members to the BUF whilst simultaneously prompting many Jews to join communist groups. He believed that unless firm action was taken, there would be grave disorders in the future as both groups were growing and becoming increasingly violent.¹⁰

Mosley's fascist creed, which was first associated with Italian fascist dictator Mussolini and then with Hitler and German Nazism, had generated a hostile response from groups of individuals which aimed to disrupt and discredit the BUF movement. The organised disruption highlighted an important contrast between the conflicting and competing freedoms of expression practised by the fascists and the anti-fascists, yet these freedoms were not protected by law.

⁹ *HC Deb* 03 November 1936 vol.317 c.14.

¹⁰ TNA, MEPO 3/2940 Fascist and communist activities: measures to deal with disturbances.

2 Mosley's Curious Claim to the 'Right' of Free Speech

BUF propaganda frequently referred to the 'established British right of free speech.'¹¹ This terminology was used to justify the necessity of the Fascist Defence Force, yet in the 1930s, freedom of speech was not a legal 'right'. It only existed as an absolute 'right' and privilege in Parliament guaranteed by the Bill of Rights 1689, which gave MPs unconditional freedom of expression. Outside of Parliament, freedoms were protected by the Common Law through the concept of residual freedom, whereby people were free to say what they liked except where the substantive law made it unlawful. Mosley's own interpretation of the concept of freedom of speech was formulated in an article published in *Action* in 1936. His article was a scathing attack on the 'failing' democratic system that, instead of dealing with the assailants of free speech, the Government instead used the law against the defenders of free speech. Mosley recorded, 'bricks were still whistling freely through the air, and round us, on the ground, were unconscious Blackshirts, savagely mauled by a highly organised Red mob because they had ventured to maintain an "Englishman's right of Free Speech" at their own meeting.'¹² Mosley's reference to free speech as an 'Englishman's right' was an effective propaganda tool, used to justify the use of Blackshirt violence, and to discredit communism as an alien threat to English values. Mosley still referred to free speech as a 'right' in his 1968 autobiography, *My Life*. He mentioned the organised minority who attempted to deny the right of free speech to the people and even claimed of his Blackshirts that, 'These devoted young men saved free speech in Britain.'¹³

Countering Mosley's definition of freedom of speech, the Metropolitan Police Commissioner at the time, Lord Trenchard, stated that free speech did not mean that people could express their views without interruption from political opponents, but that people were free to air their views without *official* interference from the Government, or the police acting on their behalf.¹⁴ However, as free speech was not a legal right, protected by a constitution, the police did have the power at Common Law to prevent people from addressing a crowd if it was anticipated that the speech would be seditious or likely to result in a breach of the peace. In *Justice of the Peace and Local Government Review*, the concept of English 'rights' was addressed in relation to public meetings in public places. It stated that such a right did not exist in

¹¹ *The Blackshirt*, 15 June 1934, issue 60, p.2.

¹² *Action*, 24 Oct 1936, number 36, p.9.

¹³ O. Mosley, *My Life*, (Friends of Oswald Mosley, 2006) p.245, downloaded from <http://www.oswaldmosley.com/downloads/My%20Life.pdf> on 15 April 2010.

¹⁴ TNA CAB/24/250 'Memorandum by the Commissioner of Police of the Metropolis', p.1.

legal terms, but it existed as a 'quasi-constitutional right' based on 'practice of very long standing [that was] not lightly to be interfered with'. The right to public meetings in public places was 'only subject to the overriding right of His Majesty's subjects to move freely about the highways... and to the duty of the police to prevent breaches of the peace'.¹⁵ This demonstrates that such freedoms had meaning and importance to the people and the state in principle, but as unwritten rights, they had no legal protection.

3 A New Claim to the 'Right' of Free Speech?

Following the Human Rights Act 1998, and the incorporation of the ECHR, certain rights have been given legal protection including Article 10, freedom of expression, and Article 11, freedom of assembly and association. But, can these liberties now be claimed as 'rights', bearing in mind they are not absolute and can be restricted on such grounds as national security and public safety. In the 1930s, legislation already existed that curtailed freedom of speech. S54(13) Metropolitan Police Act 1839 made it an offence to 'use any threatening, abusive, or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned.' Similar powers were enforced in other regions by local by-laws. In the era of the BUF, s5 Public Order Act 1936 amended this law which gave this breach of the peace power uniformity throughout the United Kingdom.¹⁶ This establishes that English law has developed a tradition of restricting freedom of expression in order to preserve the peace. The POA 1936 has since been amended by the Public Order Act 1986, in which it is not necessary to prove that any violence or threat of violence was present, which in effect criminalises pure speech.¹⁷ In addition, s4(1)b) also creates a new offence of displaying any writing, sign or other visible representation which is threatening, abusive or insulting. With such loosely defined legislation on the restrictions of freedom of speech, there is an inevitable risk that such wide discretionary powers will lead to inconsistent police action.

In January 2010, Islam4UK revealed plans to march 500 coffins through Wootton Bassett to highlight the plight of Muslims in Afghanistan. The location of this proposed demonstration was particularly provocative as Wootton Bassett, a small market town near RAF Lyneham, has become synonymous with the repatriation of

¹⁵ *Justice of the Peace and Local Government Review*, vol. XCIX, no.44, 2 Nov 1935, p.703.

¹⁶ Excluding Northern Ireland.

¹⁷ The original s.5 POA 1936 which prohibited offensive conduct where threatening, abusive or insulting words are used with intent to provoke a breach of the peace or whereby a breach of the peace was likely to be occasioned was consolidated in the new s.4 POA 1986.

British soldiers killed in action overseas since April 2007. By July 2009, over 70 repatriation ceremonies had taken place in Wootton Bassett, with as many as 5,000 people lining the streets and paying their respects.¹⁸ Islam4UK, which was headed by Anjem Choudary, was an offshoot of the radical Islamist movement al-Muhajiroun, a group that gained notoriety for referring to the 9/11 attackers as the 'magnificent 19' and also glorified the Madrid train bombings in 2004. Then Prime Minister Gordon Brown condemned Islam4UK's proposed demonstration as 'abhorrent and offensive'.¹⁹ On 10 January 2010, Choudary announced that the march had been cancelled, but he had still gained extensive national publicity for his movement. Four days later, the Home Secretary made Islam4UK a proscribed organisation under the Terrorism Act 2000.

Despite the fears centred on the BUF in the 1930s, the organisation was only proscribed as an emergency provision in July 1940 when it was considered that the members of the BUF could represent a Nazi-manipulated British 'fifth-column'.²⁰ The state preferred to monitor and keep surveillance on the BUF rather than force the fascists to operate underground.²¹ The danger of banning extremist groups has since been highlighted again after the proscription of Islam4UK. Its former leader Choudary declared that the proscription of Islam4UK would 'push young Muslims "underground" where they might turn to violence'.²² He also used the ban to criticise the Government by stating that, 'what the people will see is if you don't agree with the Government and you want to expose their foreign policy, then freedom quickly dissipates and turns into dictatorship'.²³ The proscription of Islam4UK demonstrates the scope of s3(5) Terrorism Act 2000 which authorises the Home Secretary to proscribe an organisation if it 'commits or participates in acts of terrorism, prepares for, promotes or encourages terrorism or is otherwise concerned in terrorism'.

¹⁸ *The Telegraph*, 7 July 2009.

¹⁹ *The Guardian*, 4 Jan 2010.

²⁰ The term 'fifth column' originates from the Spanish Civil War when the nationalist General Emilio Mola marched on Madrid with four columns of troops and claimed that another column of persons were hiding in the city ready to help with the invasion. Incidentally, Richard Thurlow argues that a Nazi-manipulated British fifth column was a non-existent threat and the provisions taken served more as a means to justify the existence, growth and importance of MI5. See R. Thurlow, 'The Evolution of the Mythical British Fifth Column, 1939-46' *Twentieth Century British History*, 10(4) (1999) 477-498.

²¹ For a detailed account of state surveillance on the BUF see, Andrew, *Defence*, pp.186-21.

²² *The Independent*, 13 Jan 2010.

²³ *Ibid.*

The English Defence League (EDL), which was formed in March 2009, has also benefited from national media attention. They claim to be a peaceful, non-racist organisation that is only opposed to "militant Islam".²⁴ However, EDL marches and protests have targeted areas with high Muslim populations, such as Luton, Birmingham and Leeds, and members have frequently provoked violence and disorderly confrontations with both the police and anti-fascist groups. Many protests have also involved incidents of racism and Islamophobia.²⁵ Public order law has been invoked to check some of the EDL's proposed actions with a view to limit any anticipated damage. In August 2010, the Home Secretary, Teresa May, authorised a blanket ban on processions in the city of Bradford over the bank holiday weekend under s13 POA 1986 to prevent an EDL march. The march was planned for 28 August 2010 and despite the ban, a static demonstration was still lawfully permitted and a reported 700 EDL activists took part in the protest near Bradford city centre. Following clashes with the police, 14 men were detained, two of which were charged with public order violations.

Another controversy that challenged the modern right to freedom of expression occurred in Shropshire in 2002. British National Party member, Mark Norwood, was arrested and charged after he visibly displayed a poster in his window bearing the words, 'Islam out of Britain'. In his appeal Norwood claimed that he was entitled to display the poster and any conviction would infringe Article 10 of the ECHR. His appeal was dismissed partly due to his unreasonable behaviour in displaying the poster because the High Court took into consideration the proportionality of the conviction. Therefore his freedom of expression was curtailed in order to protect the public interest. *Norwood v DPP*²⁶ demonstrates the limitations on the right to freedom of speech that have continued irrespective of the Human Rights Act 1998. It also reveals the vagueness of the public order legislation that confines it. S5 Public Order Act 1986 provides that,

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

In the case of *Norwood v DPP*, ss.28 and 31 Crime and Disorder Act 1998, which adds 'racially or religiously aggravated' motivation to s5 of the 1986 Act, were also

²⁴ *The Guardian*, 28 Aug 2010.

²⁵ *The Guardian*, 23 Sept 2010.

²⁶ *Norwood v DPP* [2003] EWHC 1564.

applied to reject his appeal. Norwood's appeal claimed that free speech also included, 'the irritating, contentious, eccentric, heretical, unwelcome and provocative, provided that it does not tend to provoke violence.'²⁷ However, the European Court of Human Rights ruled that the appellant could not enjoy the protection of Article 10 as his action had contradicted Article 17, the abuse of rights, in effect ruling that his application was inadmissible from the beginning. Article 17 is a provision that aims to 'prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention.'²⁸

The actions of Norwood, as well as those of the EDL and Islam4UK mentioned above, would all be regarded as offensive and provocative. All have been the subject of state interference and invoked legislation that has prohibited these actions. But has the offence and provocation caused warranted such restrictive actions? To what extent should the 'right' to free speech be less constrained? Should we demonstrate vigilance as a community to ensure the controversial rights of others? Or, can preventative measures that prohibit the controversial opinions of others be justified from a human rights perspective as they aim to protect people from discrimination and maintain public order? In order to identify the progression of restrictions on freedom of expression that exist today, examples of police responses to the politically extreme movements of the 1930s can be analysed and compared to modern events.

4 Anticipating a Breach of the Peace at Public Meetings

The breach of the peace doctrine empowers the police to make an arrest without warrant when such a breach is committed in their presence or is reasonably anticipated. Under this ill-defined doctrine, the police have a duty to preserve the peace and are sanctioned with an arrest power which can be used when no substantive criminal offence has taken place. In the use of this power as preventative measure, the police must demonstrate to the court that their actions were justified in the facts as well as in theory. As the nature of the breach of the peace doctrine is broad and largely subjective, the discretion of the police officer and the interpretation of the judge do not necessarily harmonize. David Williams has scrutinized the basic foundation of the doctrine with the questions, "what, for instance, is a 'breach of the peace', or what is meant by 'in their presence', or what grounds are sufficient to

²⁷ *Norwood v UK* [2005] 40 EHRR SE11

²⁸ *Ibid.*

justify an arrest in anticipation of a breach?"²⁹ The standard definition that is frequently referred to in case law today was composed by Watkins LJ in *R v Howell*³⁰.

We are emboldened to say that 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. It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a constable, or anyone else, may arrest an offender without warrant.³¹

In the 1930s, fascists and communists were both subject to police interference with regard to the speeches they made. Members of the BUF were known to be subject to police action for displays of anti-Semitism, while left-wing agitators had been intermittently prevented from addressing their audience by the police, usually under the anticipation that a breach of the peace or seditious speeches may occur. The authoritarian and preventative police tactics highlighted by *Thomas v Sawkins*³² and *Duncan v Jones*³³ were also upheld by the judiciary which have subsequently strengthened the breach of the peace powers utilized by the police. Police action was also taken against left-wing or anti-fascist hecklers at the public meetings of the BUF. As noted above, legislation regarding offensive speech such as s54(13) Metropolitan Police Act 1839, and from 1 January 1937, s5 Public Order Act 1936, were loosely termed relying on police discretion which ultimately led to inconsistent police practice. A short examination of cases will highlight the underlying problems regarding police discretion and freedom of speech.

Firstly, at fascist meetings there was the issue of fascist speakers making anti-Semitic remarks that could either provoke or encourage violence and the freedom of audience members to heckle and show their contempt for fascism verbally. At an outdoor BUF meeting at the Plymouth Market in February 1934, the *Western Morning News* reported that the BUF area propaganda officer, Cann, was subject to 'constant interruption, and many unpolite and unprintable remarks'. The meeting was well attended by the police, and despite the disruption and the local newspaper's claim that the 'hecklers became so persistent that a clash between the Socialist element and the Blackshirt guard which surrounded the lorry seemed imminent' the police did

²⁹ David Williams, *Keeping the Peace: The Police and Public Order* (Hutchinson & Co Ltd 1967) p. 116.

³⁰ *R v Howell* [1982] QB 416.

³¹ *R v Howell* [1982] QB 427.

³² *Thomas v Sawkins* [1935] 2 KB 249.

³³ *Duncan v Jones* [1936] 1 KB 218.

not interfere with the verbal disturbance of the meeting.³⁴ This is arguably an example of good police practice as although angry words were exchanged, physical hostility did not materialise and order was kept.

The exact nature of the heckling at the Plymouth meeting was not reported, and the reader is left to reflect on what the 'unprintable remarks' in fact were. However, in *The Times* an incident at Leytonstone, Greater London, was reported in more detail. Joseph Bennett a bookshop manager shouted 'Go back to Germany and eat German sausage' and 'Fascism means hunger and war' at a BUF meeting.³⁵ In the opinion of the Metropolitan Police, this was likely to cause a breach of the peace and the heckler was arrested and marched to the police station. At Stratford Police Court, the defendant denied that he intended to break up the meeting but simply wished to express his disapproval of fascist principles, which he declared he was entitled to do. If it was found that his intention was to break up the meeting then he could have been fined a maximum of £5 or up to one month imprisonment under the Public Meetings Act 1908. Bennett was charged with using insulting words contrary to s54 Metropolitan Police Act 1839 and was subsequently fined 40 shillings with an additional £2 and two shillings costs.

The question that separates these two examples is, at what point should the police act to prevent a breach of the peace? The quote from Trenchard has already established that it was not the role of the police to protect speakers in public places from interruption that was caused by their political opponents. However, the police did have a duty to act when order was threatened or when threatening, abusive or insulting words or behaviour were used with the intent to provoke a breach of the peace or where a breach of the peace may be occasioned. The act of anticipating a breach of the peace is a highly discretionary police power that can undoubtedly lead to the law being inconsistently applied. Even when political motivation is absent, crime prevention by its very nature relies, somewhat tentatively, on the uncertain and risky process of prediction and intervention, leaving the preventative nature of the breach of the peace doctrine to be extremely questionable. Gillling emphasizes that the path from prediction to intervention is filled by the 'very human process of implementation', demonstrating that the two constituent elements of prevention create a 'rough terrain'

³⁴ *Western Morning News*, 9 Feb 1934.

³⁵ *The Times*, 22 Oct 1934.

that in practice the police ultimately traverse.³⁶ This human element of prevention, and the differing actions applied by the police in similar scenarios, demonstrates the obvious difficulties of prediction and whether the correct mode of intervention was used, or was indeed effective. Within the objective of preserving public order, judgments on police intervention need to be addressed not only on the lines of whether order was preserved, but also whether individual or collective liberty was upheld. Balancing this difficult equation of order and liberty under the principle of discretion ultimately leads to inconsistency in police action and a loss of public confidence in the police.

The conflicting police actions in the 1930s led to accusations that the police were politically motivated or demonstrated bias towards the fascists. Although the situation at the BUF meeting in Plymouth was highly flammable, and the police could have justified an action of dispersing the crowd or arresting hecklers under the anticipation that a breach of the peace may occur, the meeting ended without incident demonstrating that some meetings, despite hostile opposition, do not require direct police interference. The police tactics of monitoring and surveillance employed at Plymouth ensured that freedom of expression was maintained and the police presence, rather than police action, was enough to ensure that public safety was preserved.

The arrest of Joseph Bennett for the comments made during the BUF meeting at Leytonstone was inconsistent in comparison to the Plymouth meeting and it also needs to be questioned whether police action was appropriate and proportionate. Bennett believed that he was 'entitled' to demonstrate his disapproval of the speaker's principles.³⁷ Although heckling was usually tolerated at outdoor meetings, police discretion was used to take action when it was anticipated that the words or actions of a heckler or public speaker were thought to result in a breach of the peace. These discretionary powers were even employed to prevent meetings from taking place which further restricted freedom of expression.

³⁶ Daniel Gilling, *Crime Prevention: Theory, Policy and Politics* (UCL Press Limited, 1997) pp.2-3.

³⁷ *The Times*, 22 Oct 1934.

5 Preventative Police Powers as Political Censorship?

Katherine Duncan, a member of the National Unemployed Workers' Movement, attempted to hold a meeting outside a training centre in 1934. Inspector Jones requested that she moved her meeting, and, on refusing and continuing to speak she was arrested in order to prevent a reasonably anticipated breach of the peace which was an arrest power, but not an offence. She was then charged and convicted of obstructing a police officer in the execution of his duty which was an offence but did not have an arrest power attached at this time, demonstrating interplay of breach of the peace power and substantive criminal offence. This led to the appeal *Duncan v Jones*. For the appellant, Denis Pritt KC argued that it was not unlawful to hold a public meeting on the highway and that the police officer was not acting 'in the execution of his duty' when he was obstructed by Mrs Duncan.³⁸ He continued to argue that the appellant could not be found guilty of a legal act because of the apprehended illegal actions of others. He cited the authority of *Beatty v Gilbanks*³⁹, in which the Divisional Court held that the Salvation Army's procession, whether intended to provoke a violent reaction from their rivals, the Skeleton Army, or not, did not actually break the law. It was held that the Salvation Army's assembly was lawful. Lord Hewart CJ dismissed the appeal and clarified that there was no 'right' to public assembly, and it was 'nothing more than a view taken by the Court of the individual liberty of the subject.'⁴⁰ He concluded that the policeman was acting within the execution of his duty and therefore the appellant did wilfully obstruct the respondent and dismissed the appeal. Pritt raised the issue in the Commons, stating that 'it is extremely easy for the police to take repressive measures and find that often they are approved of by the courts.'⁴¹ This outcome effectively criminalised a failure to comply with a police officer's instruction to desist from perfectly lawful conduct.

In the year preceding this case, Hewart had also presided over *Thomas v Sawkins*. His controversial ruling in this case also upheld the right of the police to use preventative powers to avert a breach of the peace. Such tactics can be seen as ruthlessly authoritarian which restrict freedoms of expression. In this case the police entered a communist meeting held on private premises which the public were invited to. The holders of the meeting believed that they were entitled to refuse entry to the police, as they were the legal occupiers of the venue.

³⁸ [1936] 1 KB 220-221.

³⁹ *Beatty v Gilbanks* [1881-82] LR 9 QBD 308.

⁴⁰ [1936] 1 KB 222.

⁴¹ *HC Deb* 10 July 1936 vol.314 cc.1561.

Police Inspector Parry, along with Sergeants Lawrence and Sawkins of the Glamorgan County Police, entered the meeting using Common Law powers, anticipating that the meeting could become an unlawful assembly, a riot, that a breach of the peace may occur or that seditious speeches were to be made. They refused to leave the premises after Alun Thomas, a speaker at the meeting, had lodged a complaint against the officers at the police station. When Thomas proceeded to exercise his believed right to eject the police and placed his hand on Parry's shoulder, Sergeant Sawkins intervened by pushing Thomas' arm and hand away and stated, 'I won't allow you to interfere with my superior officer.'⁴² Thomas brought a criminal prosecution against Sawkins under s42 of the Offences Against the Person Act 1861. It was agreed that neither Thomas nor Sawkins used more force than was reasonably necessary in the execution of their duty as steward or police officer, but if the prosecution could prove that Sawkins had no right to be in the hall at the time of the incident, his actions would have constituted assault.

Lord Chief Justice Hewart asserted that 'a police officer has *ex virtute officii* full right so to act when he has reasonable ground for believing that an offence is imminent or is likely to be committed' and dismissed the appeal.⁴³ The persuading argument came from Vaughan Williams KC for the respondent who reasoned that the police by oath swear to keep the peace and, by their duty of preventive justice, have a right to enter private premises to prevent a breach of the peace.⁴⁴

The reasonable anticipation of a breach of the peace was echoed by Lord Hewart who confirmed that it was part of the 'preventive power, and, therefore, part of the preventive duty, of the police... to enter and remain on the premises.'⁴⁵ Such a strong emphasis on the preventive power of the police has deep implications for civil liberties. This measure does in fact open the discretionary power of the police to act under the apprehension of an offence being committed and effectively punishes the person that the police are acting against without them even committing an offence. Justice Avory stated the authority of the police most clearly confirming that 'no express statutory authority is necessary where the police have reasonable grounds

⁴² [1935] 2KB 251.

⁴³ [1935] 2KB 255.

⁴⁴ [1935] 2KB 253.

⁴⁵ [1935] 2KB 254.

to apprehend a breach of the peace'.⁴⁶ This effectively provided the police with the power to enter public meetings on private premises when a breach of the peace was anticipated, setting a new precedent.

Following the controversial outcome of *Thomas v Sawkins*, Thomas Kidd of the National Council for Civil Liberties (NCCL) reflected on its potential effect stating, 'Judge-made law, as binding as parliamentary law, could undermine democracy.'⁴⁷ Despite the emphasis on the preventive duty of the police to anticipate breaches of the peace, *Duncan v Jones* and *Thomas v Sawkins* demonstrate the potential for police to act as political censors and be supported by the judiciary.

6 Modern Police Tactics, Counter-Terrorism Legislation and the Human Rights Act 1998

Recent police action has also placed a strong significance on preventative tactics. However, since the Human Rights Act 1998, and the adoption of the ECHR, fundamental rights are now protected by law. This adds a new dimension to the accountability of the police with reference to their discretionary powers such as anticipating a breach of the peace. Indeed, the authority of *Duncan v Jones* has since been mitigated by the ruling of Sedley LJ in *Redmond-Bate v DPP*⁴⁸. Like *Duncan*, *Redmond-Bate* also involved an arrest for the wilful obstruction of a police officer in the execution of his duty, who was acting to preserve the peace. Ms Redmond-Bate was one of three Christian fundamentalists who were preaching on the steps of Wakefield Cathedral, while a crowd of about 100 people gathered, some of which were hostile to the speakers. The critical question of where the threat to public order came from, being either the speakers or the hostile elements of the crowd, was the decisive issue. It was judged that the police should direct their powers to those responsible for a breach or anticipated breach of the peace, which in this case should have been those in the crowd that were unreasonably reacting to the religious speakers. Despite much of the HRA 1998 not being in full force at this time, Sedley LJ referred to it in his judgment, stating that in the interregnum, Common Law and executive action should seek compatibility with the ECHR or risk 'putting the United Kingdom in breach of the Convention and rendering it liable to proceedings before

⁴⁶ [1935] 2KB 257.

⁴⁷ S. Scaffardi, *Fire Under the Carpet: Working for Civil Liberties in the 1930s* (Lawrence and Wishart Limited, 1986) p.78

⁴⁸ *Redmond-Bate v DPP* [2000] HRLR 249.

the European Court of Human Rights.⁴⁹ Articles 9 and 10, freedom of thought, conscience and religion and freedom of expression respectively, were mentioned in the judgment in defence of the appellant, which contrasted the view held by Lord Hewart CJ mentioned above that such rights are, 'nothing more than a view taken by the court of the individual liberty of the subject.'⁵⁰ He also recognised that there was, and had been for a long time, good reason in policing and law to respect the Convention rights, marking a subtle constitutional shift that was cemented by the HRA 1998.

Paradoxically, despite the capacity for human rights to now have legal protection, a sequence of counter-terrorism legislation has been enacted which has further damaged civil liberties and individual freedoms. The Terrorism Act 2000 widened the definition of terrorism and made further powers available for the proscription of organisations that were believed to be involved with terrorism. Since the terror attacks on New York and Washington on 11 September 2001, the Anti-Terrorism, Crime and Security Act 2001 and the Prevention of Terrorism Act 2005 have made provisions for terror suspects to be submitted to pre-charge detention and control orders respectively. More legislation followed the terror attacks in London on 7 July 2005 which included the Terrorism Act 2006, Identity Cards Act 2006 and the Counter Terrorism Act 2008.

Amongst the implications of these further Acts, was the continued assault on freedom of expression which came in ss. 1(3) and 2(4) Terrorism Act 2006 as it created an offence to glorify the commission or preparation of terrorism under both the encouragement of terrorism and dissemination of terrorist publications. Liberty challenged Clause 2 of the Draft Bill, stating that it criminalised opinions, which was a measure that should not be tolerated in a democracy as it was both 'repressive and counter productive.'⁵¹ Ewing criticised the scope of s2 and highlighted the concerns of academics and librarians whose courses may concern terrorism or international relations.⁵² Hunt also expressed concern regarding the Acts potentially 'chilling effect' on speech as it could reasonably be expected that broadcasters, Internet Service Providers and other organisations and individuals may consequently practice self-censorship. However, Hunt accurately anticipated that the creation of new terrorism

⁴⁹ *Ibid*, 255-256.

⁵⁰ [1936] 1 KB 222.

⁵¹ G. Crossman, *Draft Terrorism Bill: Liberties Briefing*, Sept 2005, p.9.

⁵² K. D. Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (Oxford University Press, 2010) p.219.

related offences of publication and dissemination, under ss.1 and 2 of the 2006 Act, would not 'precipitate a rush of criminal prosecutions and/or convictions' due to the uncertainty of outcome faced by prosecutors relating to publications where the nature of the 'encouragement' element is ambiguous.⁵³

The most significant prosecutions under s2 are that of Abdul Rahman and Bibal Mohammed. In November 2007, Rahman was the first the first person to be convicted of disseminating terrorist information under the Terrorism Act 2006 whilst also pleading guilty to two other charges. The s2 charge related to a letter found in Rahman's bedroom from a school friend, Awan Aslam. The letter referenced Al-Qaeda fighters killed in action, Aslam's experiences in fighting (although the details of where and against whom are not clear) and outlined the military need of assistance to combat air power, with instructions to disseminate the information to six named people. In March 2008 at Leeds Crown Court, s2 was used independently for the first time to convict Mohammed of disseminating terrorist material. This related to DVDs he sold on stalls around the country which glorified the terror attacks of 9/11. In the judgment of James Stewart QC the material was designed to 'induce young British Muslims to be recruited to the terrorist cause'.⁵⁴ Rahman and Mohammed both succeeded in having their sentences reduced following an appeal in 2008.⁵⁵

Public order and counter-terrorism legislation has significantly corroded the liberties of freedom of expression and assembly on individuals attending protests and demonstrations. This is most notably highlighted by *R (o/a Laporte) v Chief Constable of Gloucestershire*.⁵⁶ In 2003, the police stopped and searched three coaches travelling to RAF Fairford to participate in an anti-war demonstration. The Gloucestershire Police used s.60 Criminal Justice and Public Order Act 1994 to stop and search those attending. They then used Common Law powers of breach of the peace to send the coaches back home, denying the passengers to exercise their right to protest. The House of Lords held that the stop and search was legal but that the police had exercised breach of the peace powers too early as the threat to public order posed by the passengers was not imminent. The police decision to deny the coach travellers their right to protest was especially disproportionate considering that

⁵³ A. Hunt, 'Criminal prohibitions on direct and indirect encouragement of terrorism' *Criminal Law Review*, June 2007, 457.

⁵⁴ *MailOnline*, 20 March 2008. <http://www.dailymail.co.uk/news/article-540470/Muslim-man-sold-DVDs-glorifying-9-11-atrocities-jailed-new-terror-laws.html>

⁵⁵ *Rahman and Mohammed v R* [2008] EWCA Crim 1465.

⁵⁶ *R (o/a Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55.

there was a police presence at Fairford which was organised to manage 10,000 people, and the police search had only identified eight passengers who were members of the radical group known as the Wombles.

Counter-Terrorism laws have also been controversially used in non-terror related incidents. The controversial s.44 Terrorism Act 2000 entitles police to perform a stop and search on a member of the public without 'reasonable suspicion' in areas authorised by the police and the Home Secretary. Gillan and Quinton, a student protester and a journalist, were both subjected to a stop and search whilst on their way to a protest outside an arms fair at the Excel conference centre, London, in 2003. Under the belief that the stop and search was a breach of their human rights, they took their case to appeal. The appellants argued that the stop and search violated Article 5 of the ECHR, the right to liberty and security. The Court of Appeal, confirmed by the House of Lords, held that a brief search could not be regarded as a 'deprivation of liberty'.⁵⁷ However, in 2010, the European Court of Human Rights unanimously found that the stop and search was not in accordance with the law for the purposes of Article 8(2) as it did not respect their right to private life.⁵⁸ This confirmed that the statutory power was so vague and imprecise that it afforded extremely wide discretionary power to the police. The Coalition Government have addressed this authoritarian and oppressive power by introducing c.58 Protection of Freedoms Bill which repeals s.44 of the Terrorism Act 2000.

Although Gillan and Quinton's application was finally upheld on the basis that the stop and search did not respect their right to a private life, the police tactics employed have further implications on freedom of expression. As both appellants were proceeding to a protest outside an arms fair, the indiscriminate stop and search powers employed meant that protesters with peaceful intentions were subjected to intrusive and humiliating searches: a potentially degrading or frightening experience that may prevent further participation in public protests or demonstrations by the individual or an observer. Concern over police tactics that could potentially, and undemocratically, discourage people practising their right to protest was addressed by the Human Rights Joint Committee in 2009. Their Seventh Report acknowledged criticism from protestors and human rights groups that 'techniques such as penning in protestors and attempting to collect names and addresses... could have the effect

⁵⁷ *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12.

⁵⁸ *Gillan v United Kingdom* [2010] 50 EHRR 45.

of intimidating and deterring protest.⁵⁹ The Committee recommended that greater clarity was needed in respect to police powers and there was a need to 'draft legislation itself in sufficiently precise terms so as to constrain and guide police discretion'.⁶⁰ An important suggestion that aimed to remove unnecessary discretion was to amend s.5 Public Order Act 1986. The Committee advocated that language that was 'insulting' should not be criminalised, as this could be used inappropriately by the police to restrict freedom of speech.⁶¹ This amendment would continue to protect people from abusive and threatening words or behaviour. The nature of the suggested changes emphasised the need for effective dialogue between the police and the protestors that would help establish a trusting relationship between them that could quickly counteract any conflict. It was also highlighted that the police, at all levels, should receive regular, relevant and up to date training that would enable them to adopt a human rights approach to policing protest.⁶²

Since these recommendations the Metropolitan Police have received further criticism for allegedly disproportionate tactics that they employed during the student tuition fees protests in November and December 2010. The police tactics employed during these protests are especially illuminating as the protestors are not extremists with a radicalised or provocative agenda and they are not a potential threat to national security. Small minorities among the protestors caused public disorder and the stringent and indiscriminate response of the Metropolitan Police intensified the friction between them. Following the violence at the demonstration on 10 November 2010, the Metropolitan Police Commissioner Sir Paul Stevenson argued that 'The game has changed', using this tough rhetoric to defend the large use of riot police at the protest on 24 November.⁶³ Incidents of unduly aggressive policing and the use of truncheons were widely reported in the media⁶⁴ which has led to fears that aggressive policing is a tactic purposefully employed to deter the participation in public protests. This has been raised in letters to the national press as well as by left

⁵⁹ Human Rights Joint Committee (HRJC), 'Seventh Report: Demonstrating respect for rights? A human rights approach to policing protest' (2009) chapter 3 paragraph 54, accessed from <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/4706.htm> on 3 Jan 2011.

⁶⁰ HRJC, 'Seventh Report, Conclusions and Recommendations', paragraph 4 accessed from <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/4711.htm> on 3 Jan 2011

⁶¹ HRJC, 'Conclusions', para.5.

⁶² HRJC, 'Conclusions', para.25.

⁶³ *The Guardian*, 25 Nov 2010.

⁶⁴ See *The Guardian*, 10 Dec 2010, for incident relating to Alfie Meadows, a 20 year old student who required surgery after being hit by a police baton and suffered bleeding on the brain. See *The Telegraph*, 12 Dec 2010, for the incident involving Jody Macintyre, who suffers from cerebral palsy, who was tipped out of his wheelchair and dragged across the road by a police officer.

wing organisations. In the *Guardian*, Mike Hames wrote, 'It is evident to me that the intimidation and violence used against the students were designed not only to deter students, but also the massive protests expected against other cuts.'⁶⁵ An article in *Socialist Action* criticised the Conservative led coalition government for their tough pro-police response which they claimed would, 'de-legitimise protest and deter participation in future demonstrations through fear of violence from the police.'⁶⁶

The most serious complaints about police tactics have centred on the use of 'kettling'. This is a tactic used to contain protestors in police cordons for long periods of time to prevent potentially volatile situations arising. The 'kettle' is indiscriminate and often leaves peaceful protesters imprisoned without food or toilet facilities for long periods at a time. Following the controversial use of this tactic by the Metropolitan Police at the May Day demonstrations in 2001 and the G20 protests in 2009, 'kettling' has already been subject to the scrutiny of the UK courts in *Austin v Commissioner of Police of the Metropolis*⁶⁷ and *Moos v Commissioner of Police of the Metropolis*⁶⁸ respectively.

Louis Austin had been held within a police cordon with approximately 3,000 other protestors for around seven hours in cold and uncomfortable conditions. This preventative police tactic was utilized to avert a potential breach of the peace following unexpected numbers of demonstrators arriving at Oxford Circus as the organisers deliberately did not give notice to the police. Austin challenged the Metropolitan Police's use of this tactic in the context of Article 5(1) of the ECHR claiming a deprivation of liberty. Both the Court of Appeal and the House of Lords held that Article 5(1) was not engaged. In the leading judgment Lord Hope stated that such tactics of crowd control should not fall within the ambit of Article 5(1) as long as they are proportionate and are not enforced for longer than necessary.⁶⁹ These judgments have received notable criticism from Helen Fenwick and David Mead.

Fenwick criticised the outcome of *Austin* affirming that it has 'aided in opening the door to police policies of suppression and intervention in protest, coming close to

⁶⁵ *The Guardian*, 28 Dec 2010.

⁶⁶ *Socialist Action*, 19 Dec 2010, accessed from <http://www.socialistaction.net/Tories-attack-the-right-to-protest.html> on 3 Jan 2011.

⁶⁷ *Austin v Commissioner of Police of the Metropolis* [2005] EWHC 480; [2007] EWCA 989; [2009] UKHL 5.

⁶⁸ *R. (on application of Moos) v Commissioner of Police of the Metropolis* [2011] EWHC 957

⁶⁹ [2009] UKHL 5 at [37].

political censorship⁷⁰ and advocated that a review of the breach of the peace doctrine is overdue. By comparing *Austin* with *Laporte*, Fenwick argues that these varying judgments demonstrate the imprecision of the breach of the peace doctrine and advocates its abolition in accordance with proposals of the Organisation for Security and Co-operation in Europe and the 2009 Joint Committee on Human Rights.⁷¹ Mead attacked the subsequent police use of 'kettling' following *Austin*, arguing that what underpinned the decision was that a cordon is only lawful where it is the only possible solution to a potentially dangerous and volatile situation. Regarding the seemingly calculated use of this tactic by the Metropolitan Police at the G20 protests in April 2009, Mead probed the understanding of the police, stating that there was nothing in the speeches made in the House that authorised 'kettling' as a 'legitimate, premeditated tactic rather than as a spontaneous response.'⁷² Indeed, following *Moos*, his deliberation has proven to be accurate. If the use of a police cordon is planned in advance of a protest, rather than as a response to disorder, or potentially imminent disorder, then the question of when police intervention of this kind is lawful or not must be found in the principle of immediacy determined in *Laporte*. The utilizing of the breach of the peace doctrine in this way must always be subject to proportionality and necessity. This is certainly present in the judgment of *Moos*. Despite the risk of violent protestors joining Camp Climate, the peaceful protest at Bishopsgate in which Joshua Moos was present, May J ruled that at the time of the containment it was 'only a risk; and it was not... a risk of imminent breaches of the peace sufficient to justify full containment'.⁷³ The claimants therefore succeeded in establishing that the containment of the Camp Climate protest in the first instance, as well as the police pushing operation that moved the protest between 20 and 30 meters from their position in which shields and batons were violently used to achieve this, were not lawful. Although the Metropolitan Police have issued their intention to appeal this decision, *Moos* has established that the principle of immediacy that was applied in *Laporte*, is also applicable to the police tactic of 'kettling'. This reasserts that the Common Law power or duty of the police to take preventative action has a threshold requirement of imminence and that any action taken must be reasonable and proportionate. These requirements will also be fundamental to subsequent legal action arising from the student protests during

⁷⁰ Helen Fenwick, 'Marginalising human rights: breach of the peace, "kettling", the Human Rights Act and public protest' (2009) *Public Law* October, 763.

⁷¹ Fenwick, 'Marginalising', pp.757-758.

⁷² David Mead, 'Of Kettles, cordons and crowd control – *Austin v Commissioner of Police for the Metropolis* and the meaning of "deprivation of liberty"', (2009) *European Human Rights Law Review* 3, 394.

⁷³ [2011] EWHC 957 at [59].

November and December in 2010. A further dimension that has been highlighted by Emma Norton, the legal officer at Liberty, is that the use of the police cordon does not 'distinguish between the law-abiding majority and the handful intent on violence.'⁷⁴ This is a key element to this particular situation when considering that many of the contained protestors were school children.

It is also essential to examine the tactic of 'kettling' within the context of policing the demonstrations of extremist groups such as the EDL. As with the demonstration in Bradford mentioned above, Theresa May also issued a ban on all processions in Leicester to take effect on 9 October 2010 following the EDL's application to demonstrate in the city. This was issued amid fears that the EDL were planning to attack Mosques in the area increasing the likelihood of serious public disorder. This meant that the EDL could only demonstrate by way of static protest, albeit within the protection, or confinement, of heavy police lines. On the same day, a counter protest by Unite Against Fascism (UAF) was also taking place and the objective of the police was to keep the two groups apart. However, the containment of the EDL within a police cordon to prevent them from causing disorder failed as a large group broke free from the static demonstration causing damage to property and having skirmishes with the local youth. In its report of the policing of the demonstration, the Network for Police Monitoring (Netpol) emphasized that the EDL had broken through police cordons before and this was anticipated by the local community.⁷⁵ The benefit of banning processions was also questioned by Netpol as this led to a shuttle bus service being provided to transport EDL members from their prearranged meeting point to the rally site. Incidentally, the meeting point was an area in which three pubs were in the vicinity and the provision of alcohol was facilitated for the EDL protestors.⁷⁶ Following their transportation to the rally site, there were confrontations with the police 'who deployed riot shields and batons along with dogs and horses.'⁷⁷ A contrast in public order tactics can be drawn with the EDL rally at Luton on 5 February 2011 in which a procession ban was not sought and the police facilitated a one mile march for both the EDL and UAF. Although the march hindered local

⁷⁴ *The Observer*, 26 Dec 2010.

⁷⁵ Val Swain, *Report on the policing of the English Defence League and Counter Protests in Leicester on October 9th 2010*, Network for Police Monitoring (2011) p.5.

⁷⁶ Swain, *Protests in Leicester*, p.10; the report also points out that for previous EDL demonstrations licensed premises had been closed.

⁷⁷ *Ibid.*

business and shops were boarded up, the protests caused relatively little violent disorder.⁷⁸

The policing operation in Luton was less autocratic and restrictive than that applied at Leicester and could be heralded a success due to the fewer incidents of violence. Yet the authorisation of a ban on processions, enforcing a static EDL demonstration behind police lines, was not the only preventative tactic that restricted freedom of expression that was applied ahead of the Leicester demonstration. More controversially, the police had blatantly attempted to deter local people from attending the protests. This was done by 'distraction techniques' in which provision was made to local youth clubs and community centres to provide activities which aimed to keep young people away from the city centre. Children were also warned that under s46 Children Act 1989 the police would have the power to take any young person into police protection who were at risk of 'significant harm' due to lack of parental care. As this is a provision that aims to keep children safe from exploitation and abuse, Netpol reported that this was the first time they were aware of it being used in the context of political protest.⁷⁹ Further controversial police tactics which were aimed at deterring protest, was the manner in which the 'stay at home' message was largely targeted at the Muslim community. This kind of interference which was aimed at one section of the community is disproportionate and appears politically motivated as it is a duty of the police to facilitate public protest and such tactics of persuasion cannot be justified as necessary to prevent public disorder.⁸⁰

Since the introduction of the Human Rights Act 1998, it has been established that the various police tactics employed at protests and demonstrations have frequently violated human rights law. These have ranged from the inappropriate use of counter-terrorism legislation, with regard to the s44 stop and search powers, and the excessive use of breach of the peace powers, which prevented the coach passengers from proceeding on their way to a legitimate anti-war protest. In these instances, Human Rights Law has defended the rights of the protester and can be seen as a tool that will potentially counter unjust laws and disproportionate police

⁷⁸ *The Guardian*, 5 Feb 2011, only comments on 'some minor scuffles' and some fireworks and bottles being thrown. *BBC News* accessed from <http://www.bbc.co.uk/news/uk-england-beds-bucks-herts-12372713> at 22 Mar 2011, states that there were seven arrests for weapons offences and assault, while the *Police Oracle* accessed from http://www.policeoracle.com/news/Police-Prevent-Trouble-At-Luton-EDL-March_30628.html on 22Mar 2011, declared that the demo had 'ended as it began - with no reports of violence.'

⁷⁹ Swain, *Protests in Leicester*, p.7.

⁸⁰ *Ibid.*, pp.5 and 11.

tactics. Following the controversial police tactics employed at the student protests, the Metropolitan Police have been advised by the Independent Police Complaints Commission to review the use of kettling as a crowd control tactic.⁸¹ Lawyers are also currently planning a legal challenge against the Metropolitan Police for their use of this tactic on 9 December 2010 at Trafalgar Square, and they will argue that the five hour detention violated Articles 5, 10 and 11 of the ECHR.⁸² In this case, where police action has curtailed freedom of expression, it was not because of the protestors' message being threatening, abusive or insulting, but because of the anticipated disorder that would potentially have been caused by a minority of those involved. When the use of indiscriminate tactics obstructs the legitimate right to protest, the discretionary power of the police becomes undermined, their actions challenged, and they can potentially be found to have acted unlawfully.

Conclusion: Have the Rules of the Game Changed?

The protection of rights under the Human Rights Act 1998, now offers a greater potential to challenge controversial and aggressive police tactics on the grounds that they violate the freedoms and liberties now protected by the ECHR. However, it has been witnessed in *Norwood v UK* that freedoms of expression are not absolute. A person's claim to the protection of their rights will subsequently become invalid if they have been deemed to have abused the rights of others. The more controversial claims to the rights to freedom of expression, such as any made by Islam4UK, the EDL or BNP members, will therefore be unlikely to find compatibility or support from the ECHR.

The comparison between the two eras, has demonstrated that English Law in the past century, has always stopped short of defending any absolute claim to free speech, as guaranteed in the First Amendment of the US Constitution.⁸³ The preservation of public order has been a consistent priority in the drafting of new

⁸¹ *BBC News*, 9 Dec 2010, accessed from <http://www.bbc.co.uk/news/uk-11963274> on 22 Dec 2010.

⁸² *Press TV*, 15 Dec 2010, accessed from <http://www.presstv.ir/detail/155567.html> on 6 Jan 2011.

⁸³ See *Snyder v Phelps* (2011) 562 US, in which the US Supreme Court ruled 8-1 that the Westboro Baptist Church were entitled to First Amendment protection because their discourse, despite being hateful and hurtful, addressed matters of public import. Members of the Church have regularly picketed military funerals to advance their belief that the American deaths in Afghanistan and Iraq are God's punishment for America's tolerance of homosexuality. Their placards included messages such as "Thank God for Dead Soldiers" and "You're Going to Hell".

legislation and in High Court decisions which has been to the detriment of civil liberties. During the drafting of the Public Order Act 1936, concern about the effect of new legislation on the liberty of the people was considered, but it was deemed that the greater good was to protect the security of the public. The necessity of the Act was summarised by Labour MP Ernest Thurtle, 'to sacrifice in some minor degree some of the liberties we have hitherto enjoyed, I think the gain we shall get from the Bill will more than compensate us for those sacrifices.'⁸⁴ The Marquess of Reading later stated that, 'we prefer to look upon this Bill less as restricting liberty than as repressing abuses of liberty.'⁸⁵

In the period that has followed the terror attacks on London in 2005, the principle of defending rights and liberties has remained unchanged. However, the tragic death of the 52 victims has changed the level of fear and insecurity associated with modern terrorism and the severity of the rhetoric used by politicians and public figures. Following the attacks, Tony Blair famously declared, 'Let no one be in any doubt that the rules of the game are changing' and suggested that amendments would be made to the Human Rights Act if necessary to enable the deportation of extremist clerics.⁸⁶ While in opposition, David Cameron raised the rhetoric of fear associated with the new terror threat by stating, 'Every man, woman and child is a target for terrorists who are actively plotting indiscriminate slaughter on a massive scale.'⁸⁷ His speech underlined that the law courts 'seem to bend over backwards to accommodate terror suspects' and advocated that a new Bill of Rights would replace the Human Rights Act. Cameron then stated that 'a future Conservative government will not hesitate to take whatever measures are necessary to protect British citizens from harm.'⁸⁸

The comparison of state responses to extremist movements in the 1930s and to the modern threat of terrorism reveal that the conflict faced between prioritising either individual liberty or collective security is consistent in both eras, and in this case, the rules of the game have not changed. The arguments against unnecessary measures that were raised in the 1930s against the Public Order Act and Common Law judgments remain relevant today. The broad breach of the peace powers that incorporate the wide use of police discretion, which have been growing since the

⁸⁴ *HC Deb* 16 Nov 1936 vol.317 c.1438.

⁸⁵ *HL Deb* 11 Dec 1936 vol.103 c.752.

⁸⁶ *The Independent*, 6 Aug 2005.

⁸⁷ D. Cameron, 'Speech to the Community Security Trust', accessed from http://www.conservatives.com/News/Speeches/2008/03/David_Cameron_Speech_to_the_Community_Security_Trust.aspx on 27 Aug 2010.

⁸⁸ Cameron, 'Speech,'

1930s, allow for inconsistency in police tactics and can produce further restrictions on liberty, especially freedom of expression and assembly.

This comparison demonstrates that there is a constant need for laws to be proportionate to the risk they deem to counteract so that they do not destabilise our democratic principles. While such fundamental rights and freedoms are now more readily protected by virtue of the Human Rights Act 1998, our domestic courts have manifestly failed in this regard. Ultimately it was the European Court of Human Rights that finally declared the use of s.44 to be a violation of Article 8 offering at least some optimism that the UK courts should take note of such reasoning to challenge the use of autocratic police discretion and oppressive law. The failure to extend or protect the right of freedom of expression to Norwood, the EDL and Islam4UK, reveal that the legal establishment has tended to continue its historic tradition of limiting the use of free speech to radical or extremist individuals and groups on that basis of the vague all encompassing notion of the breach of the peace. In 1936, before such rights had legal protection, Labour MP Andrew MacLaren warned that to curtail liberty to preserve democracy is to say that you are 'willing to kill democracy in order to save it',⁸⁹ and that principle is still relevant today in assessing how proportionate the current anti-terror legislation is in striking an appropriate balance between collective security and individual liberty.

⁸⁹ *HC Deb* 16 Nov 1936 vol 317 c1442