



GRIFFITH JOURNAL OF

LAW & HUMAN DIGNITY

GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

Editor-in-Chief

Charlotte Mitchell

Executive Editors

Hana Katouli

Thao Nguyen

Laurynn Williams

Editors

Luella Boyd

Kirsten Gunhold

Annabelle Lewis

Jennifer Paptic

Harper Plant

Alexander Reeves

Louise Sullivan

Consulting Executive Editor

Kate Mitchell

Kayleigh Ng Cheng Hin

Consulting Executive Editor

Dr Allan Ardill

Volume 11 Issue 1
2023

Published in August 2023, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

CONTENTS

CATHERINE WALKER-MUNRO & DR BRENDAN WALKER-MUNRO	<i>COUNTERING TERROR: TERRORISM LAWS, DOMESTIC VIOLENCE & THE AUSTRALIAN CONTEXT</i>	1
LISE BARRY & RACHEL PARSONS	<i>STRIKING THE BALANCE: APPLYING A HUMAN RIGHTS APPROACH TO CONSENT FOR PEOPLE WITH DEMENTIA IN RESIDENTIAL AGED CARE</i>	39
MICHAEL HEAD	<i>DEFENDING THE RIGHT TO PROTEST</i>	70
BRIANNA DARWIN	<i>THE CANADIAN RESIDENTIAL SCHOOL SYSTEM: AN INTERNATIONAL LAW FAILURE</i>	92

DEFENDING THE RIGHT TO PROTEST

MICHAEL HEAD*

Amid rising global protests, the right to protest is being increasingly objected to by business interests and curtailed by governments and legislatures. This article contends that confronted by this political reaction, the right to protest can only be defended through mass struggles rather than legal challenges – although these struggles may well include related legal battles. As history suggests, while legal cases may be important at times, ultimately their outcome will be determined by the sway and swell of political social and class forces

* Professor Michael Head: Western Sydney University School of Law.

CONTENTS

I INTRODUCTION	71
II LEGISLATIVE ATTACKS ON THE RIGHT TO PROTEST.....	72
III THE CONTEMPORARY RISE OF MASS PROTESTS	77
IV HISTORICAL STRUGGLES	79
V PROTESTS AND ‘VIOLENCE’	83
VI CONCLUSION.....	87

I INTRODUCTION

Many of the official contemporary assaults on the right to protest are made under the banner of protecting the public and business operations from what is regarded as disruption or obstruction. Often such legislative and enforcement measures have been introduced in response to tactics adopted by climate change activists. This article points out, however, that these measures are capable of being applied far more broadly to protests of all kinds that are seen as threats to the existing economic and political order and can therefore only be understood in the context of rising social discontent.

This article’s underpinning argument is that the right to protest, as it has developed historically, is an essential social, civil and political right, bound up with other basic democratic rights, notably freedom of speech and the rights to associate and organise. It is not purely an individual right, but a societal one that has historically been fought for through mass action. The right to protest is inherently related to struggles, past and present, to build collective, class or mass movements to effect social and political change.

II LEGISLATIVE ATTACKS ON THE RIGHT TO PROTEST

Recent years have seen legislative attacks on the right to protest in Australia and other comparable countries. The potential impact of these laws was underscored in December 2022, when a young woman was sentenced to prison for 15 months with a minimum of eight months before possible parole, for her participation in a climate change protest that only briefly blocked one of the five city-bound vehicle lanes on the Sydney Harbour Bridge. Deanna ‘Violet’ Coco faced seven charges, including interfering with the safe operation of a bridge, using or modifying an authorised explosive [a flare] not as prescribed, possessing a bright light distress signal in a public place, and resisting arrest. She was also fined \$2,500 and initially denied bail to appeal.¹

Coco was the first person to be convicted under the *Roads and Crimes Legislation Amendment Act 2022* (NSW) (‘RCLAA’), which provided for penalties of up to two years in jail and/or a \$22,000 fine for disruption to roads, train stations, ports, and public and private infrastructure.² Court documents in December 2022 indicated that more than a dozen climate activists faced possible jail time over protests in Sydney.³ Coco later had her sentence reduced on appeal, with the judge saying it had been based on false police evidence. District Court Judge Mark Williams questioned police assertions on the scale of the disruption and rejected suggestions that Coco was a ‘danger to the community’. Williams J ruled that she had been imprisoned on a ‘false factual basis’, including claims that an ambulance had been impeded. Therefore, Williams J set aside the sentence and instead imposed a 12-month good behaviour bond.⁴

¹ Mike Head, ‘Climate change protester jailed for 15 months in Australia’, *World Socialist Web Site* (Web Page, 5 December 2022) <<https://www.wsws.org/en/articles/2022/12/06/zrja-d06.html>>; Michael McGowan, ‘At least a dozen climate activists face jail time under NSW laws used to lock up Violet Coco’, *The Guardian* (Web Page, 12 December 2022) <<https://www.theguardian.com/australia-news/2022/dec/12/at-least-a-dozen-climate-activists-face-jail-time-under-nsw-laws-used-to-lock-up-violet-coco>>.

² See *Crimes Act 1900* (NSW) s214A and *Crimes (Sentencing Procedure) Act 1999* s17.

³ McGowan (n 1).

⁴ Tiffanie Turnbull, ‘Violet Coco: Activist’s jail term overturned in Australia protest row’, *BBC News* (Web Page, 15 March 2023) <<https://www.bbc.com/news/world-australia-64898508>>.

The RCLAA did not use the word protest, but its provisions were so broad that they could be invoked against many forms of protest and not just over climate change. The Act set punishments for anyone who enters, remains on, climbs, jumps from or otherwise trespasses on a ‘major road, bridge or tunnel’, in a way which ‘seriously disrupts or obstructs’ vehicles or pedestrians. The same penalties applied to anyone who trespasses on or blocks entry to any part of a ‘major facility’. Both types of locations were to be prescribed by regulations, giving the State’s executive governments a broad power to designate them. The Act inserted into the *Crimes Act 1900* (NSW) a sweeping new s 214A:

Damage or disruption to major facility

(1) A person must not enter, remain on or near, climb, jump from or otherwise trespass on or block entry to any part of a major facility if that conduct—

- (a) causes damage to the major facility, or
- (b) seriously disrupts or obstructs persons attempting to use the major facility, or
- (c) causes the major facility, or part of the major facility, to be closed, or
- (d) causes persons attempting to use the major facility to be redirected

...

(7) In this section— major facility means the following, whether publicly or privately owned—

- (a) a railway station or other public transport facility prescribed by the regulations,
- (b) a private port within the meaning of the Ports and Maritime Administration Act 1995, or another port prescribed by the regulations,
- (c) an infrastructure facility, including a facility providing water, sewerage, energy, manufacturing, distribution or other services to the public, prescribed by the regulations.

Similar provisions were inserted into the *Roads Act 1993* (NSW), including a new s 144G(6) that defined ‘major bridge or tunnel’ as ‘a bridge, tunnel or road prescribed by the regulations for the purposes of this section.’

Recent years have seen remarkably similar laws introduced internationally against protests that threaten business interests or obstruct access to ‘critical’ infrastructure, which can include roads and other public places traditionally used for protests. In addition to other countries, such legislation has been passed in Britain, the United States,

and Australia. Significantly, these laws go beyond proscribing alleged violent conduct in order to outlaw peaceful actions that allegedly disrupt social or commercial activities.

In 2022 and 2023, the British government brought forward an escalating series of measures to strengthen police powers, severely affecting the right to protest. Public Order Bills⁵ sought to make it unlawful for a person to interfere with the use or operation of key national infrastructure, including airports, the road network and railways. Protests would be deemed illegal if they would cause 'serious disruption' to two or more individuals, or to an organisation. The bills sought to give police the power to shut down protests before any disruption occurred.⁶ A coalition of 74 human rights and other organisations objected that the provisions 'constitute a drastic, further expansion of police power, allowing the police to intervene in and impose conditions on protests that have a 'more than minor', rather than 'serious' impact'.⁷

The potential for these provisions to effectively outlaw demonstrations was displayed in May 2023 during the coronation proceedings for King Charles III. Newly enacted powers under the *Public Order Act 2023* (UK), given Royal Assent by the King several days earlier, were invoked by London's Metropolitan Police. These officers arrested 64 anti-monarchy protesters and other people for offences including affray, public order offences, breach of the peace and conspiracy to cause a public nuisance. Among those arrested to prevent their participation in demonstrations were leaders of Republic, a registered pressure group that advocates the abolition of the monarchy and its replacement with a parliamentary republic. Before any protesting had begun, six members of Republic, including its leader, were arrested near Trafalgar Square where the group planned to hold a rally near the statue of the deposed monarch Charles I (1600-1649). Police seized

⁵ See: Joint Committee on Human Rights, Government creating hostile environment for peaceful protest, report finds, 17 June 2022

<<https://publications.parliament.uk/pa/jt5803/jtselect/jtrights/351/report.html>>.

⁶ Luke McGee, 'The British government wants to hand police unprecedented powers to handle protesters. Human rights activists say it's an affront to democracy', *CNN* (Web Page, 17 January 2023) <<https://edition.cnn.com/2023/01/17/uk/uk-public-order-bill-police-protests-intl-gbr-cmd/index.html>>.

⁷ Liberty Human Rights, 'Joint Briefing on The Public Order Bill For Report Stage in The House Of Lords', (Online Report, January 2023) <<https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/03/Joint-civil-society-briefing-for-Report-Stage-of-the-Public-Order-Bill-January-2023-1.pdf>>.

a vanload of placards reading ‘Not My King.’ A video viewed by millions of people on Twitter showed a reporter asking why the arrests were being carried out and a police officer replying: ‘I’m not going to get into a conversation about that, they are under arrest, end of’.⁸

In the United States, particularly since 2017, many bills have been introduced to outlaw or restrict protests. As of January 2023, according to the International Center for Not-for-Profit Law’s US Protest Law Tracker, 45 states had produced 249 bills, with 39 enacted and five pending. The database documented that anti-protest bills were often introduced in response to prominent protest movements, including demonstrations against police violence, campaigns against new oil and gas pipelines, rallies on college campuses, and protests supporting better wages and working conditions for teachers.⁹ Prototypes for many of these bills were produced by the American Legislative Exchange Council (ALEC) in the aftermath of the 2016 Dakota Access Pipeline protests. These initiatives were largely driven by oil and energy corporations through ALEC, a pro-business think-tank.¹⁰

In Australia, quite similar laws have been introduced at both the federal and state levels, epitomised by the New South Wales measures. The *Criminal Code Amendment (Agricultural Protection) Act 2019* (Cth) was notable. It potentially extended criminal liability, with prison terms of up to five years, to people convicted of using social media or other telecommunications to promote or advertise protests against agribusinesses. It created two new offences in the *Criminal Code Act 1995* (Cth)¹¹ (*‘Criminal Code’*) that would apply where a person used a carriage service to transmit, make available, publish, or otherwise distribute material to incite another person to trespass,¹² or commit

⁸ Robert Stevens, ‘London Police Carry Out Mass Arrests During Coronation Of King Charles’, World Socialist Web Site (Web Page, 9 May 2023) <<https://www.wsws.org/en/articles/2023/05/07/Siop-M07.html>>.

⁹ The International Center for Not-for-Profit Law, ‘US Protest Law Tracker’, *The International Center for Not-for-Profit Law* (Web Page, January 2023) <<https://www.icnl.org/usprotestlawtracker/>>.

¹⁰ Alex Hertel-Fernande, *State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States — and the Nation* (Oxford University Press, 2019); Nina Lakhani, ‘Revealed: rightwing US lobbyists help craft slew of anti-protest fossil fuel bills’, *The Guardian* (Web Page, 15 September 2022) <<https://www.theguardian.com/us-news/2022/sep/14/rightwing-lobbyists-at-heart-of-anti-protest-bills-in-republican-states#:~:text=The%20American%20Legislative%20Exchange%20Council,guise%20of%20protecting%20critical%20infrastructure>>.

¹¹ *Criminal Code Act 1995* (Cth) sch 1 (*‘Criminal Code’*).

¹² *Ibid* s 474.46.

property offences,¹³ on premises defined as agricultural land. The *Criminal Code* s 11.4 defines incitement loosely as ‘urging’ the commission of an offence, ‘even if committing the offence incited is impossible’. In a submission to the Senate Legal and Constitutional Affairs Legislation Committee in 2019, the Law Council of Australia pointed to the potential politically chilling impact of these provisions.¹⁴

This trend has only continued. As noted by the Human Rights Watch World Report 2023, in 2022 several Australian states introduced laws targeting peaceful climate and environmental protesters with disproportionate punishments and excessive bail conditions. Along with New South Wales, ‘new anti-protest laws passed in the States of Victoria and Tasmania also invoke severe penalties for non-violent protest’.¹⁵ As the Human Rights Watch then reported, the legislation being debated in the Tasmanian parliament would permit protesters to be fined up to \$12,975 or be jailed for 18 months for a first offence. Similarly, organisations could be fined up to \$103,800 if they were judged to have obstructed workers or caused ‘a serious risk’.¹⁶ In Victoria, legislation before parliament would authorise sentences of up to 12 months in jail or \$21,000 in fines against protesters convicted of attempting to prevent native forest logging, banning them from protest areas.¹⁷ In 2023, the South Australian parliament passed new laws that impose severe punishments of up to three months’ jail for anyone whose activity caused an ‘obstruction’ in a public place, even ‘indirectly’. The amendments to the State’s *Summary Offences Act* banned any activity that allegedly disrupts ‘free passage of a public place.’¹⁸ That could include handing out leaflets on a footpath or in a public mall, demonstrating outside parliament house, participating in a workers’ march against low pay and intolerable conditions, or joining a picket during a strike. The legislation was passed through both houses of state parliament in a matter of hours, despite several

¹³ *Ibid* s 474.47.

¹⁴ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Criminal Code Amendment (Agricultural Protection) Bill 2019* (Submission, 31 July 2019).

¹⁵ Human Rights Watch, *World Report 2023* (Report, January 2023) 50-1 <https://www.hrw.org/sites/default/files/media_2023/01/World_Report_2023_WEBSPREADS_0.pdf>.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ *Summary Offences Act 1953* (SA) s 58.

hastily called protests, and shock and condemnation voiced by a wide range of civil liberties, legal and other non-government organisations.¹⁹

The adoption of such laws, with the potential to be used widely to outlaw protests that threaten business interests, needs to be placed in a broader context, both contemporarily and historically.

III THE CONTEMPORARY RISE OF MASS PROTESTS

One of the most striking, and potentially significant features of the world political situation since the beginning of the second decade of the 21st century has been the rise of mass protests, both domestically and globally. Although the issues may be various, and often take a national form, their true character and root causes can be gauged only by considering the international scale of this development.

Several studies have examined this phenomenon which has developed on every inhabited continent. One academic study, published in 2022, concluded that the underlying causes lay in rising social unrest and political disaffection:

The two first decades of the twenty-first century saw an increasing number of protests around the world. From Africa to Europe, from the Americas to Asia, people have taken to the streets demanding real democracy, jobs, better public services, civil rights, social justice, and an end to abuse, corruption and austerity, among many other demands. What these protests have in common—regardless of where they take place geographically or where their demonstrators are on the political spectrum—are failures of democracy and of economic and social development, fueled by discontent and a lack of faith in the official political processes. The main findings of this study indicate that social unrest rose in every region during the period covered.²⁰

The study classified the almost 3,000 protests it reviewed into four main categories, by descending frequency of occurrence:

- (i) protests related to the failure of political representation and political systems, which focused on the lack of real democracy, corruption and other grievances;

¹⁹ Mike Head, 'South Australian Labor government imposes draconian anti-protest laws', *World Socialist Web Site* (Web Page, 3 June 2023) <<https://www.wsws.org/en/articles/2023/06/03/tvur-j03.html>>.

²⁰ Isabel Ortiz et al, *World Protests: A Study of Key Protest Issues in the 21st Century* (Palgrave Macmillan, 2022) 1-2.

- (ii) protests against economic injustice and austerity reforms;
- (iii) protests for civil rights, ranging from indigenous or racial rights to women's rights and personal freedoms; and
- (iv) protests for global justice and a better international system for all, instead of for the few.²¹

The fourth category included 'environmental and climate justice, based on the historical responsibilities for climate change and calling for urgent action to redress climate change and protect the environment'. That was a cause of 359 protests, nearly 13 percent of all protests in the study.²² The study noted:

*Decades of neoliberal policies have generated more inequality, eroded incomes and welfare to both the lower and the middle classes, fueling frustration and feelings of injustice, disappointment with malfunctioning democracies and failures of economic and social development, and a lack of trust in governments. In 2020, the coronavirus pandemic has accentuated social unrest.*²³

The protests included 'the Arab Spring', the 'Indignados' (Outraged) and 'yellow vests' movements of Europe, the 'Occupy' movement in the United States, and in the 'Estallido Social' (Social Uprising) in Chile and other countries in Latin America. The research identified 250 methods of protest, including relatively new ones, such as 'digital and online activism'.²⁴ The study kept records of protest movements across 15 years, marking them as 'protest events' when they spanned more than one year, for a total of 2,809 protest events. By this method, the number of such events each year more than tripled between 2006 and 2020, from 73 to 251.²⁵ The study concluded that the protests were of historic proportions and significance:

There have been periods in history when large numbers of people rebelled against the way things were, demanding change, such as in 1848, 1917, and 1968; today we are

²¹ Ibid, 1-3.

²² Ibid, 47.

²³ Ibid 112.

²⁴ Ibid 4.

²⁵ Ibid 16.

*experiencing another period of rising outrage and discontent, and some of the largest protests in world history.*²⁶

The above excerpt refers to the 1848 revolutions across Europe, which largely failed to overthrow the old monarchies, the February and October 1917 revolutions in Russia, which culminated in the establishment of a Soviet government, and the general strikes, anti-Vietnam War and civil rights movements of the 1968 period.

IV HISTORICAL STRUGGLES

Like all such fundamental democratic rights, the right to protest is a product of immense social struggles throughout history, and not the law itself. Protest rights may be partly recognised in law, often in an attenuated and limited form, but they arise from centuries of frequently convulsive struggles against authoritarian forms of rule. Globally, this can be traced back for thousands of years, to events such as the slave revolts led by Spartacus during the Roman Republic.²⁷ However, modern examples of battles for the right to protest, at least in the Western context, primarily arises from the first challenges to feudal order reflected in the Magna Carta of 1215, and the subsequent development of the English, French and American revolutions against absolutism in the 17th and 18th centuries.

Then came the development of mass politics, bound up with the rise of capitalism, the growth of the working class, and the eruption of social, industrial, and other struggles during the 19th and 20th centuries for political, organisational and freedom of speech rights.

Throughout history, despite lip service paid to it, the right to protest has been often contested or curtailed by governments and legislatures and objected to by business interests. For these reasons, the right to protest can be defended only through similar mass struggles, not legal challenges, although these struggles may well include related legal battles. While legal cases may be important at times, their outcome will be

²⁶ Ibid 112.

²⁷ Keith Bradley, *Slavery and Rebellion in the Roman World, 140 B.C.–70 B.C.* (Indiana University Press, 1989) 83–101.

determined ultimately, as history suggests, by the sway and swell of political social and class forces.

The rights of assembly and protest in countries with a British heritage are often attributed to parliamentary democracy, augmented by the common law that is regarded as developing organically, at least since 1215. This uncritical approach ignores or downplays the bitter struggles that have been waged and are still being waged for freedom of assembly and protest. For example, according to a New South Wales parliamentary briefing: 'The right to protest peacefully is a defining feature of liberal democracy, a system of government characterised by the tolerance of dissenting minority opinion'.²⁸ According to the report, 'the legal basis of the right to protest' is derived from 'the common law right to peaceful assembly' dating back to the Magna Carta.²⁹

At the same time, the briefing noted that this 'important' and seemingly ancient right has been subjected to extensive limits by the criminal law in New South Wales, including the *Summary Offences Act 1988* (NSW), *Crimes Act 1900* (NSW), *Inclosed Lands Protection Act 1901* (NSW), *Forestry Act 2012* (NSW), *Mining Act 1992* (NSW) and *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). Since the publication of this brief in 2015 the list of such provisions has grown to include the 2022 amendments discussed above. This tendency toward eviscerating protest rights underscores the thesis of this article: such democratic rights depend on the broader struggle – beyond parliaments, the law, and the courts – to defend and extend democracy.

Scholarly analyses of the history of protest law have generally not identified the dynamic relationship between social and political struggles and the law. However, some studies have empirically established connections between the rise of protest movements in certain periods and their impact on the course of history in defiance of the official and legal responses. For example, in relation to the American Revolution, Antonia Malchik noted:

²⁸ Tom Gotsis, NSW Parliamentary Research Service, *Protests and the law in NSW Briefing Paper No 07/2015* (Briefing Paper No 7/2015, NSW Parliamentary Research Service, June 2015) 1.

²⁹ Ibid 5-6, citing James Jarrett and Vernon Mund, 'The Right of Assembly' (1931) 9(1) *New York University Law Quarterly Review* 1; George Smith, 'The Development of the Right of Assembly – A Current Socio-Legal Investigation' (1967) 9(2) *William & Mary Law Review* 359, 361-2.

How we characterise crowds depends on who commands the narrative. The Boston Tea Party, where protesters dumped 342 chests of tea into Boston Harbor in 1773 in response to a tax they disliked, is taught to US schoolchildren as one of the founding myths both of America and of our modern idea of patriotism wrapped in protest against one's government. Its name – the Boston Tea Party, not the Boston Tea Riot – evokes joyousness and order, not anger and chaos. On the other hand, at least one British newspaper of the time called it a 'riot', and the British government responded with harsh laws that Americans dubbed the Intolerable Acts. If America had lost its revolutionary war, our children today would likely be taught the British perspective: rather than patriotic, the dumping of tea was unlawful and chaotic, the entire evening a riot resulting in the egregious destruction of property.³⁰

Similarly, in examining the Peterloo Massacre of 1819 and the development of the mass Chartist movement in Britain, which demanded the right to vote, Michael Lobban noted the connection between the rise of mass movements for democratic and social rights and the repressive responses of the ruling authorities. He concluded:

Until the end of the eighteenth century, when riotous activity was relatively common, the ruling classes were not as frightened of crowds as they would later become—indeed, the idea of national police force scared them more. The fear of the crowd grew as the crowd was seen as a threat to the established order; and paradoxically, this occurred when the crowds were becoming less turbulent, but more organized. The fact that they were political crowds made them a threat: the fact that they might pose a public order threat allowed the authorities to clamp down on them (footnotes removed).³¹

Instructing the jury in the trial of Henry Hunt and other organisers of the St Peter's Fields meeting, Justice Bayley said the banners carried by participants objecting to 'taxation without representation' and being 'sold like slaves' were themselves evidence of a seditious conspiracy and unlawful assembly.³² 'Is the telling a large body of men they are sold like slaves likely to make them satisfied and contented with their situation in society?' he asked rhetorically.³³

³⁰ Antonia Malchik, 'Riot Acts' *Aeon* (Web Page, 23 December 2019) <<https://aeon.co/essays/the-history-of-riot-shows-the-importance-of-democratic-tumult>>.

³¹ Michael Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770–1820' (1990) 10(3) *Oxford Journal of Legal Studies* 307, 352.

³² *R v Hunt* (1820) 1 St Tr NS, at 479 cited in Lobban (n 31) 344.

³³ *Ibid.*

In that massacre, cavalry troops charged into a crowd of 60,000 to 80,000 people gathered at St Peter's Field, Manchester, for a public meeting which had been declared illegal, to demand parliamentary representation. Shortly after the meeting began, local magistrates called on the military to arrest the speakers on the platform and to disperse the crowd. Soldiers on horses charged in with sabres drawn, killing 15 people, and injuring 400–700, including women and children.³⁴

Whereas the arrested speakers were charged with sedition, found guilty and jailed, a test case against four members of the armed forces ended in acquittal because the court ruled that their actions had been justified to disperse an illegal gathering.³⁵ Nine days after the massacre, the Home Secretary, Lord Sidmouth, had conveyed Prince Regent's gratitude to the magistrates for their action in 'preservation of the public peace'.³⁶

It could be argued that these historical experiences are no longer relevant due to the emergence of more democratic forms of rule. However, the global unrest documented above suggests otherwise. Once again, momentous protests are arising, challenging the survival of ruling authorities. As some studies have documented, there has been a considerable reversion by governments, legislatures and judiciaries towards more repressive responses to public assemblies. For instance, Professor Tabatha Abu El-Hage contrasted the 2021 removal of Occupy gatherings in the United States protesting against gross economic inequality, to earlier records which displayed greater official tolerance of protest assemblies.³⁷

An examination of this history demonstrates the need for a method of approach that critically examines the socio-economic tensions and class conflicts that fuel protests and provide the context for the shifting governmental and legal reactions. This framework of analysis has been outlined with regard to the changing face of what can be classified as 'crimes against the state'—those offences officially regarded as threatening the existence of the economic and political order itself:

³⁴ Robert Reid, *The Peterloo Massacre* (William Heinemann Ltd, 1989) 161-8; see also Robert Poole, *Peterloo: The English uprising* (Oxford University Press, 2019) 345-52.

³⁵ *Ibid* 204-5.

³⁶ Anthony Babington, *Military Intervention in Britain* (Routledge, 1990) 46–58.

³⁷ Tabatha Abu El-Haj, 'All Assemble: Order and Disorder in Law, Politics and Culture' (2014) 16(4) *UPaJ Const L* 949.

In every epoch, the offences, both common law and statutory, have become more draconian, far-reaching and severely punished whenever the ruling establishment has felt threatened by domestic opposition, particularly from the plebeian masses, or by foreign rivals, especially once war loomed or armed hostilities broke out. Far from being fixed, or clearly defined by legal criteria, offences evolved and sharp shifts occurred in the frequency of prosecution of various offences, in response to perceived political dangers.³⁸

A similar approach is needed to the law of protest. Significantly, the authorities and the courts have regarded perceived threats to the established order to be far more serious when they involve the working class. In 1842, English Chief Justice Tindal declared that if an audience came from the ‘poorer class’, that could make an otherwise lawful statement a seditious one:

He that addresses himself to a crowded auditory of the poorer class, without employment or occupation, and brooding at the time over their wrongs; whether imaginary or real, will not want ready hearers...³⁹

That ruling was delivered in the context of the mass trials conducted at the height of the Chartist movement.⁴⁰

V PROTESTS AND ‘VIOLENCE’

Aside from preventing ‘disruption’ or ‘obstruction’, governmental, legislative, police and military measures against protests are often justified on the grounds of protecting society or its members from violence. Commonly, distinctions are drawn between ‘non-violent’ protests, which are supposedly tolerated, at least partially, and ‘violent’ ones, which are criminalised. Governments frequently insist they are upholding the right to peaceful protest, subject to restrictions deemed ‘reasonable’ and ‘proportionate’, even while curtailing protest rights in the name of combatting violent, riotous, menacing, or disorderly expressions of dissent.

Some theorists of protest oppose ‘violent’ methods, either on normative or programmatic grounds. Among them is Chris Hedges. In *Wages of Rebellion: The Moral Imperative of*

³⁸ Michael Head, *Crimes Against the State: From Treason to Terrorism* (Ashgate, 2011) 21.

³⁹ *R v Harris and Twenty-eight Others* (1842) Car & M 661, note (a); 174 ER 678.

⁴⁰ Lobban (n 31) 350–1.

Revolt, he argued that a revolution is inevitable in the United States, where political and corporate elites hold the power, and repressed, increasingly impoverished Americans, have a 'moral imperative' to revolt. Hedges said the United States government had become one of 'totalitarian corporate power'.⁴¹ It had 'cowed the nation' to make people submit their freedoms to it, making them too fearful to revolt. However, throughout history the masses had eventually woken up and revolted.⁴²

Hedges contended that most successful revolutions were non-violent. Yet, history has often shifted fundamentally on the back of violent overthrows of authoritarian regimes, not least the English Civil War of the 1640s, the American Revolution of 1776, the French Revolution of 1789 and the Russian Revolution of 1917. In each instance, the violence originated in the vicious responses of the ruling order.

Hedges advocated non-violent civil disobedience almost exclusively for practical reasons, saying that non-violence was ultimately more effective than violence. He did not unequivocally condemn violence on moral grounds. Rather, violence or property damage legitimised the state's violent response in the eyes of the masses, whose emotional reaction was key to the success of a revolution.

Some scholars have sought to make similar distinctions between violent and non-violent protest methods in the context of the United States constitutional right to assemble, despite the difficulty of drawing lines between the two. Their studies have shown that judicial decisions bracket threatened damage to property with potential physical harm to people. Martin McMahon reviewed cases showing that alleged violence against either persons or property was enough to transform a political demonstration into a 'riot'.⁴³ To this point, Margot Kaminski concluded that 'a law that bans large assemblies that are physically harmful or destructive is likely constitutional'.⁴⁴

⁴¹ Chris Hedges, *Wages of Rebellion: The Moral Imperative of Revolt* (Knopf Canada, 2015) 17.

⁴² *Ibid* 66.

⁴³ Martin J. McMahon, What Constitutes Sufficiently Violent, *Tumultuous, Forceful, Aggressive, or Terrorizing Conduct to Establish Crime of Riot in State Courts*, 38 A.L.R. 4th 648 §§ 18-19 (1985) cited in Tabatha Abu El-Haj, 'Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Speech' (2015) 80(4) *Missouri Law Review* 961.

⁴⁴ Margot Kaminski, 'Incitement to Riot in the Age of Flash Mobs' (2012) 81 *U CIN L REV* 10.

Tabatha Abu El-Haj applied a broader standard to the protests against police killings and violence in the United States, defending the right of crowds to be 'disruptive'. She said rioting, or what was depicted as rioting, had been used for centuries to push forward progress, usually as a last resort. Abu El-Haj argued that such considerations should be taken into account when interpreting the United States Constitution's First Amendment:

While there is no question that some of the participants in the Baltimore crowds, like those in Ferguson, crossed the line between constitutionally protected and unlawful assembly, angry and leaderless crowds that form to respond to perceived abuses of governmental power are always disruptive. More importantly, the Founders fully understood this when they singled out assembly for First Amendment protection.⁴⁵

In *Languages of the Unheard: Why Militant Protest is Good for Democracy*, Stephen D'Arcy argued that the crucial distinction is between democratic and undemocratic action, rather than violence and non-violence.⁴⁶ He proposed a 'democratic standard' that allowed participants, in some circumstances, to 'set aside discussion and apply forceful pressure through adversarial, confrontational protest'.⁴⁷

D'Arcy wrote that a riot is the last resort of the disenfranchised and oppressed, citing Martin Luther King, who once insisted: 'What we must see is that a riot is the language of the unheard.' King did not defend riots but said they were understandable as frustrated responses to persistent injustice and unresponsive systems of power. D'Arcy went further, arguing for 'justifiable militancy' and drawing an analogy to the use of physical force to protect a child:

As a practical matter, almost everyone who claims to oppose all violence would in fact support the use of physical force to repel a child's attacker. We should, therefore, regard sweeping pronouncements against all violence with a suspicious eye. For the most part, these declarations are a way of hiding the difficult questions behind a veil of superficial moral certainty.⁴⁸

⁴⁵ Tabatha Abu El-Haj, 'Defining Peaceably: Policing the Line between Constitutionally Protected Protest and Unlawful Assembly' (2015) 80(4) *Missouri L REV* 962, 963. See also Abu El-Haj (n 32) 951, 1032-9.

⁴⁶ Stephen D'Arcy, *Languages of the Unheard: Why Militant Protest is Good for Democracy* (Zed Books, 2013) 3.

⁴⁷ *Ibid* 4.

⁴⁸ *Ibid* 1-7.

D'Arcy suggested that by this 'democratic standard', outbursts of rebellion could sometimes be defensible, even admirable, and extended this approach from 'spontaneous revolts' to other forms of confrontational protest or rebellion, such as general strikes, sit-ins, road blockades and occupations, sabotage, and armed insurgencies. He contended that militancy could be a civic virtue, an aid to democracy and a principled response to the intransigence of elites and the unresponsiveness of institutions to the public interest.

D'Arcy differentiated 'riots' associated with a quest for equality from other 'genres' of rioting such as rioting at sports events, acquisitive rioting (looting), and authoritarian rioting, such as the Tulsa race riot of 1921, which was used to further oppress marginalised people. In fact, using 'riot' to describe both sporting events and political or social protest could be a calculated political move to depict protest or assembly as unlawful and unjustified.

However, D'Arcy rejected revolutionary socialism as an alternative to the capitalist order. He counterposed his 'democratic standard' to what he called the amoralist view, that the end justifies the means. D'Arcy claimed that this was argued by Leon Trotsky, the co-leader of the October 1917 Soviet Revolution in Russia. However, that contention flies in the face of what Trotsky actually wrote and advocated in justifying both the October 1917 Revolution and the struggle against the Stalinist betrayal of that revolution. In *Their Morals and Ours*, Trotsky specifically rejected the charge of 'amoralism'.⁴⁹

Trotsky insisted that all methods of struggle, including deception and violence, had to be judged according to their contribution to human liberation from every form of slavery and submission. Taking the example of the American Civil War that led to the abolition of slavery, but which involved the use of severe methods by the North led by Abraham Lincoln, Trotsky wrote:

*A slave-owner who through cunning and violence shackles a slave in chains, and a slave who through cunning or violence breaks the chains – let not the contemptible eunuchs tell us that they are equals before a court of morality!*⁵⁰

⁴⁹ Leon Trotsky, *Their Morals and Ours: The Moralists and Sycophants Against Marxism* (New Park Publications, 1968) 7.

⁵⁰ *Ibid* 32.

Replying to critics who nevertheless asked whether all means are morally legitimate for the goal of human liberation, Trotsky argued that not all means were acceptable:

Permissible and obligatory are those and only those means, we answer, which unite the revolutionary proletariat, fill their hearts with irreconcilable hostility to oppression, teach them contempt for official morality and its democratic echoers, imbue them with consciousness of their own historic mission, raise their courage and spirit of self-sacrifice in the struggle.⁵¹

VI CONCLUSION

Trotsky was justifying revolution, not just protest. Nevertheless, this historical worldview, that of Marxism, offers a better guide to asserting and defending the right to protest, rather than arbitrary distinctions between violence and non-violence or appeals to a 'democratic standard' that deny the root causes of dissent. Ultimately, defending the right to protest is bound up with the necessity to rid the world of its driving forces: social inequality and oppression. This would include recognising the right of climate activists to obstruct traffic and corporate activities if that raises public consciousness of the need for root and branch political change to avert a planetary and social catastrophe.

As this article has demonstrated, legislative and enforcement measures introduced in response to tactics adopted by climate change activists can be broadly applied to all forms of protest that may be seen as a threat to the existing economic and political order. These developments can be understood only in the context of deepening social unrest on a global scale. In the words of the study cited earlier, we have entered 'another period of rising outrage and discontent'. The right to protest has been fought for historically through mass action. It can be defended only in that fashion, in the struggle for fundamental economic, social and political change.

⁵¹ Ibid 44.

REFERENCE LIST

A Articles/Books/Reports

- Abu El-Haj, Tabatha, 'All Assemble: Order and Disorder in Law, Politics and Culture' (2014) 16(4) *U Pa J Const L* 949
- Abu El-Haj, Tabatha, 'Defining Peaceably: Policing the Line between Constitutionally Protected Protest and Unlawful Assembly' (2015) 80(4) *Missouri L REV* 962
- Babington, Anthony, *Military Intervention in Britain* (Routledge, 1990)
- Bradley, Keith, *Slavery and Rebellion in the Roman World, 140 B.C.-70 B.C.* (Indiana University Press, 1989)
- D'Arcy, Stephen, *Languages of the Unheard: Why Militant Protest is Good for Democracy* (Zed Books, 2013)
- Gotsis, Tom, NSW Parliamentary Research Service, *Protests and the law in NSW Briefing Paper No 07/2015* (Briefing Paper No 7/2015, NSW Parliamentary Research Service, June 2015)
- Head, Michael, *Crimes Against the State: From Treason to Terrorism* (Ashgate, 2011)
- Hedges, Chris, *Wages of Rebellion: The Moral Imperative of Revolt* (Knopf Canada, 2015)
- Hertel-Fernande, Alex, *State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States — and the Nation* (Oxford University Press, 2019)
- Poole, Robert, *Peterloo: the English uprising* (2019, Oxford University Press)
- Human Rights Watch, *World Report 2023* (Report, January 2023)
- Jarrett, James and Vernon Mund, 'The Right of Assembly' (1931) 9(1) *New York University Law Quarterly Review* 1
- Kaminski, Margot, 'Incitement to Riot in the Age of Flash Mobs' (2012) 81 *U CIN L REV* 10
- Liberty Human Rights, *Joint Briefing on The Public Order Bill For Report Stage in The House Of Lords* (Online Report, January 2023)
<<https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/03/Joint-civil-society-briefing-for-Report-Stage-of-the-Public-Order-Bill-January-2023-1.pdf>>

Lobban, Michael, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770–1820' (1990) 10(3) *Oxford Journal of Legal Studies* 307.

McMahon, Martin J, *What Constitutes Sufficiently Violent, Tumultuous, Forceful, Aggressive, or Terrorizing Conduct to Establish Crime of Riot in State Courts*, 38 A.L.R. 4th 648 §§ 18–19 (1985).

Ortiz, Isabel, et al, *World Protests: A Study of Key Protest Issues in the 21st Century* (Palgrave Macmillan, 2022)

Reid, Robert, *The Peterloo Massacre* (William Heinemann Ltd, 1989)

Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Criminal Code Amendment (Agricultural Protection) Bill 2019 (Report, 31 July 2019)

Smith, George, 'The Development of the Right of Assembly – A Current Socio-Legal Investigation' (1967) 9(2) *William & Mary Law Review* 359

Trotsky, Leon, *Their Morals and Ours: The Moralists and Sycophants Against Marxism*. (New Park Publications, 1968)

B Cases

R v Harris and Twenty-eight Others (1842) Car & M 661; 174 ER 678R v Vincent (1842) Car & M 661n

R v Hunt (1820) 1 St Tr NS

C Legislation

Crimes Act 1900 (NSW)

Criminal Code Act 1995 (Cth)

Criminal Code Amendment (Agricultural Protection) Act 2019 (Cth)

Enclosed Lands Protection Act 1901 (NSW)

Forestry Act 2012 (NSW)

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

Mining Act 1992 (NSW)

Public Order Act 2023 (UK)

Roads Act 1993 (NSW)

Roads and Crimes Legislation Amendment Act 2022 (NSW)

Summary Offences Act 1953 (SA)

Summary Offences Act 1988 (NSW)

D Other

Head, Mike, 'Climate change protester jailed for 15 months in Australia', *World Socialist Web Site* (Web Page, 5 December 2022)

<<https://www.wsws.org/en/articles/2022/12/06/zrja-d06.html>>

Head, Mike, 'South Australian Labor government imposes draconian anti-protest laws', *World Socialist Web Site* (Web Page, 3 June 2023)

<<https://www.wsws.org/en/articles/2023/06/03/tvur-j03.html>>

Human Rights Watch, *World Report 2023* (Report, January 2023) 50-51

<https://www.hrw.org/sites/default/files/media_2023/01/World_Report_2023_WEBSPREADS_0.pdf>

Lakhani, Nina, 'Revealed: rightwing US lobbyists help craft slew of anti-protest fossil fuel bills', *The Guardian* (online at Web Page, 15 September 2022)

<<https://www.theguardian.com/us-news/2022/sep/14/rightwing-lobbyists-at-heart-of-anti-protest-bills-in-republican-states#:~:text=The%20American%20Legislative%20Exchange%20Council,guise%20of%20protecting%20critical%20infrastructure>>

Liberty Human Rights, *Joint Briefing on The Public Order Bill For Report Stage in The House Of Lords* (Online Report, January 2023)

<<https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/03/Joint-civil-society-briefing-for-Report-Stage-of-the-Public-Order-Bill-January-2023-1.pdf>>

Malchik, Antonia, 'Riot Acts' *Aeon* (Online, 23 December 2019)

<<https://aeon.co/essays/the-history-of-riot-shows-the-importance-of-democratic-tumult>>

McGee, Luke, 'The British government wants to hand police unprecedented powers to handle protesters. Human rights activists say it's an affront to democracy', *CNN* (online

atWeb Page, 17 January 2023) <<https://edition.cnn.com/2023/01/17/uk/uk-public-order-bill-police-protests-intl-gbr-cmd/index.html>>

McGowan, Michael, 'At least a dozen climate activists face jail time under NSW laws used to lock up Violet Coco' *The Guardian* (online atWeb Page, 12 December 2022) <<https://www.theguardian.com/australia-news/2022/dec/12/at-least-a-dozen-climate-activists-face-jail-time-under-nsw-laws-used-to-lock-up-violet-coco>>

Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Criminal Code Amendment (Agricultural Protection) Bill 2019* (Submission, 31 July 2019) <[https://lawcouncil.au/publicassets/c60383b3-15b4-e911-9400-005056be13b5/3654%20-%20Criminal%20Code%20Amendment%20\(Agricultural%20Protection\)%20Bill%202019.pdf](https://lawcouncil.au/publicassets/c60383b3-15b4-e911-9400-005056be13b5/3654%20-%20Criminal%20Code%20Amendment%20(Agricultural%20Protection)%20Bill%202019.pdf)>

Stevens, Robert, 'London police carry out mass arrests during coronation of King Charles', World Socialist Web Site (Web Page, 9 May 2023) <<https://www.wsws.org/en/articles/2023/05/07/siop-m07.html>>

The International Center for Not-for-Profit Law, 'US Protest Law Tracker', *The International Center for Not-for-Profit Law* (Web Page, January 2023) <<https://www.icnl.org/usprotestlawtracker/>>

Turnbull, Tiffanie, 'Violet Coco: Activist's jail term overturned in Australia protest row' *BBC News* (online atWeb Page, 15 March 2023) <<https://www.bbc.com/news/world-australia-64898508>>