Keeping the Peace and Preventive Justice—A New Test for Breach of the Peace?

Richard Glover

Senior Lecturer, Law School, University of Wolverhampton

The increased academic interest in the "preventive turn" in the criminal law over recent years1 has focused attention on the concept of "preventive policing".2 This has coincided with a revival of interest in preventive measures to preserve public order, such as the contentious police strategies of "kettling" (or more correctly "containing") protesters and "pre-emptive arrests". The lawfulness of such strategies has been considered in a number of legal challenges, the most recent of which was R. (on the application of Hicks) v Commissioner of Police of the Metropolis (hereafter "Hicks"),3 in which the Supreme Court held that "pre-emptive" arrests before the wedding of Prince William and Kate Middleton in 2011 were not in breach of art.5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "the European Convention on Human Rights").

As these challenges have been largely unsuccessful, the police have continued, despite considerable criticism,4 to utilise these strategies. For example, in recent times protestors ranging from the far-right5 to anti-fracking6 have complained about being "kettled" and it is evident that such tactics remain an essential part of the "modern" core principles of policing public order. 7 However, the origins of these measures are far from modern. They may be found in the law on breach of the peace, which derives from the very early days of the common law but remains at the heart of public order policing in England and Wales.8

The meaning of a breach of the peace is considered later in this article but, in brief, its essence may be described as "violence or the threat of violence to persons or property".9 It has been long associated with "preventive policing" as part of "preventive justice", a doctrine that may be traced back to Blackstone.10 However, in its modern conception, it consists of prospective measures and practices aimed at preventing crime.11 The increased use of breach of the peace powers in the policing of protests12 may be attributable to the "preventive turn" in contemporary criminal justice detected by some academics.13 However, it may also result, more prosaically, from the increased reluctance on the part of some protestors to co-operate with the police.14

Whatever the reason, the leading case is R. (on the application of Laporte) v Chief Constable of Gloucestershire 15 (hereafter "Laporte"), in which the House of Lords reprised the law and considered the point at which the police should be permitted to intervene in order to prevent a breach of the peace. Lord Bingham, providing the lead opinion, held that violence must be "imminent" before intervention by arrest or other measures could be considered lawful. However, it is argued here that this "new test of imminence"16 has created marked uncertainty in the law.

It is possible to discern manifest differences in the definition of "imminence" in the Laporte judgment itself and this uncertainty is reflected in later case law. "Imminence" has been given a "narrow" but also a broad or "flexible" definition17 and, most recently, the Supreme Court in Hicks appeared to use it in both senses.18 Accordingly, it is submitted that the term has become overly technical and, as Gearty rightly anticipated, has tended to become a mere "password for police

action”19 that fails to provide suitable guidance on when intervention to prevent a breach of the peace is lawful.

Criticism of the uncertain state of the law is not entirely new. In Keeping the Peace: the Police and Public Order (hereafter “Keeping the Peace”),20 published just over 50 years ago, Sir David Williams was highly critical of the use of breach of the peace powers.21 In seeking to clarify the law around “preventive justice” he observed that a useful test to determine the point at which preventive action should be taken would be to ask whether there was “a clear and present danger” of a breach of the peace.22 The expression is derived from US constitutional law, 23 but is present in domestic jurisprudence relating to breach of the peace24 and other areas of the law. 25 Williams did not further develop the idea, but this article contends that it meets the rule of law concerns regarding the “imminence test” in Laporte and that there are both practical reasons and reasons of principle for preferring a “clear and present danger” test.

In the United States, “clear and present danger” marks the point at which, as a matter of strict principle, First Amendment freedom of speech rights may be limited.26 However, in Strasbourg jurisprudence, it also relates to the limits on the “right to protest”, which is protected by a combination of the “qualified” rights to freedom of expression and of assembly, under arts 10 and 11 of the European Convention on Human Rights. 27 Therefore, the proposed new test has the potential to engage these rights at an early stage and, accordingly, also has implications for the art.5 right to liberty and security considered by the Supreme Court in Hicks. 28 However, before addressing these issues in more detail, it is necessary to consider the meaning of breach of the peace at common law.

The meaning of “breach of the peace”

A lay person could be forgiven for expecting breach of the peace to be a criminal offence and, given its established nature, clearly defined. However, although breach of the peace is a criminal offence in Scotland,29 it is not in England and Wales.30 In terms of definition, the expression must also be treated with considerable caution. In the first place, it should not be confused with a police constable’s historic and primary duty to preserve the Queen’s peace by preventing the commission of criminal offences and protecting property, which is a duty of more general nature.31 In the second place, the doctrine should not be taken entirely at “face value” because, as Glanville Williams aptly commented, “The expression ‘breach of the peace’ seems clearer than it is”.32

As “peace” is an ordinary English word, it might be anticipated that it would mean simply “quietness” or “an absence of noise”. Indeed, it is apparent that, at one time, it was thought that any public disturbance constituted a breach of the peace and that the presence of violence was only significant because it provided a power of arrest.33 In modern times, a more precise description of the doctrine has been achieved and Watkins LJ’s judgment in Howell34 is the common starting point for any analysis of the law. Following Howell, it is now quite clear that the term “‘peace’ … functions in contradistinction to ‘war’: peace is a freedom from violence or the threat of violence”.35 That is, “harm” or “violence” rather than mere rowdiness is required. Watkins LJ stated that:

“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, affray, a riot, unlawful assembly or other disturbance.”36

However, it is evident from this judgment that Watkins LJ also acknowledged the flexibility of breach of the peace and, therefore, did not commit himself to a precise definition of what he regarded as an “evolving” common law concept.37 Accordingly, Watkins LJ may be regarded as not having intended

to deliver a full definition of the doctrine in Howell. Rather, his purpose appears to have been to provide a "description of the characteristics or hallmarks" of breach of the peace or, at most, "a partial definition"38 that emphasised its preventive character and that its essence was violence or the threat of violence.39

This description of the law in Howell was broadly welcomed and has been generally accepted as accurate.40 In Laporte, Lord Bingham stressed that the essence of breach of the peace was to be found in violence or threatened violence,41 and the settled nature of the law has been noted by the European Court of Human Rights.42 If, following Laporte, it can be said with a degree of certainty what constitutes a breach of the peace, unfortunately, the same cannot be said of the power to prevent a breach of the peace. Sir David Williams commented in Keeping the Peace that there were "many doubtful points about this power"43 and that remains the current position.

Laporte and the common law power to prevent a breach of the peace

The common law power to prevent a breach of the peace has been summarised, in practical terms, as the power to intervene in "heated or difficult situations" when violence is occurring or threatened and it is not possible to establish who is doing what, or precisely what offences may have been, or will be, committed.44 It enables police officers to take immediate preventive action and then determine at a later stage who, if anyone, needs to be taken to a police station and charged. However, as Sir David Williams noted, this invests the police with a great deal of discretion, particularly in relation to prospective violence, a fact that has serious implications for the freedoms of assembly and speech. For Williams this was a problem starkly illustrated by Duncan v Jones, 45 a judgment which he regarded as demonstrating "apparent indifference" to the competing demands of free speech and public order. 46

Duncan was convicted of obstructing the police in the course of their duty for refusing to desist from speaking at a protest meeting. The Divisional Court dismissed her appeal on the basis that the police reasonably apprehended a breach of the peace, as following a similar meeting there had been an earlier disturbance. Williams acknowledged that the constable on the spot should be invested with a considerable measure of discretion, but considered that this went too far in relation to protest meetings and that the law was unacceptably opaque. His solution was a "permit system", similar to that which operated in the United States.47 However, he also suggested, without further discussion, that a preferable method for establishing the point at which the police might exercise their discretion to intervene and prevent a breach of the peace, would be to ask whether there was a "clear and present danger" of a breach of the peace.

Just over 70 years after Duncan v Jones, the House of Lords in Laporte was also called upon to consider the scope of police powers in relation to protests. The case was concerned with a potential breach of the peace at an anti-Iraq War protest at R.A.F. Fairford. The House of Lords rejected unanimously the defendant's argument, based on Piddington v Bates, 48 that the test for any intervention was whether there were reasonable grounds for anticipating a breach of the peace as a real, not a remote possibility. 49 Lord Bingham cited Albert v Lavin50 as authority for the proposition that violence should be "imminent":

"[E]very citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so".51

His Lordship argued that this reflected the trend of existing authority and in a statement that Lord Brown opined could not be improved upon52 held that:

“Every constable, and also every citizen, enjoys the power and is subject to a duty to seek to prevent, by arrest or other action short of arrest, any breach of the peace occurring in his presence, or any breach of the peace which (having occurred) is likely to be renewed, or any breach of the peace which is about to occur.”53

Lord Bingham stated that “about to occur” here meant that a breach of the peace should be reasonably apprehended as on the verge of happening. That is, it should be “on the point of happening” or “imminent”,54 and served as a “threshold requirement”55 for the power to arrest for breach of the peace. This “new test of imminence”56 undoubtedly represented a change in the law from Piddington v Bates. 57 However, it is contended that the test in Laporte is problematic as, despite its apparent simplicity, it lacks sufficient certainty.

“The imminence test”

Following Laporte, Thornton et al asserted that the test for determining when the police might intervene to prevent a breach of the peace was now crystal clear. They cited Lord Bingham’s opinion and stated that: “The term ‘imminent’ is to be applied narrowly and connotes a sense of immediacy”.58 However, some academics were more sceptical about the test. Both Mead and Fenwick were critical of the lack of clear guidance as to the meaning of “imminent”59 and Gearty feared that the imprecision of the term would lead to the police simply “ticking a box” to describe the threat of violence as “imminent” without providing full justification for that assessment.60

If academic views were disparate in relation to “imminence”, there appeared also to have been a division of opinion among the Law Lords in Laporte, notwithstanding Lord Brown’sjudgment that all the Lords accorded with the views expressed by Lord Bingham.61For example, Lord Mance appeared to follow Lords Bingham and Brown in adopting a “narrow” definition of imminence. However, along with Lord Carswell, he also put forward, simultaneously, a broader conception.62 This coincided with Lord Rodger’s argument in favour of a “flexible” definition of “imminence”, while recognising that the power to prevent an apprehended breach of the peace was “exceptional” and should be kept within proper bounds.63

In examining the disparity in the Law Lords’ interpretation of the term “imminence” it should be borne in mind that Lord Bingham was the senior Law Lord at the time and, unusually, his time in office has been eponymised as “the Bingham Court”.64 It is said that the “sheer force of his intellect and the clarity of his thinking would win his colleaguesround”.65 Therefore, Lord Bingham’s analysis of the law may well have acted as a powerful influence upon his fellow Lords. However, as Lord Dyson MR hasremarked, extra-judicially, Lord Rodger’s opinion in Laporte was equally significant and substantial. Indeed, Lord Dyson MR contends that it is Lord Rodger’s opinion which is the “invaluable” guide to the meaning of imminence in the common law on breach of the peace.66

Lord Rodger acknowledged that in public order situations a shorter rather than longer period would be required before there could be lawful intervention, but opined that it was plain that violence did not have to be on the verge of happening to count as “imminent”:

“This does not mean that the officer must be able to say that the breach is going to happen in the next few seconds or next few minutes. That would be an impossible standard to meet, since a police officer will rarely be able to predict just when violence will break out. … There is no need for the police officer to wait until the opposing group hoves in sight before taking action.”67

Accordingly, Lord Rodger contended that a breach of the peace would be imminent if the police “reasonably considered that a breach of the peace … was going to happen in the near future” and if it was “likely to happen”.68

Notwithstanding the views expressed by Lord Rodger and the support proffered by Lords Carswell and Mance, the trend of decisions following Laporte initially favoured the "narrow" definition of "imminence", contained in Lord Bingham's leading opinion, as authoritative. In Austin v Commissioner of Police of the Metropolis (hereafter "Austin"),69 the Court of Appeal was unequivocal as to how the imminence test should be applied and its findings on the common law were not challenged in the House of Lords.70 Lord Clarke (now a Justice of theSupreme Court) said of Laporte:

"The House held unanimously that the expression 'about to be' was to be equated with imminent or on the point of happening … [and] rejected the somewhat looser approach of both the Divisional Court and of this court … a threshold of imminence must be passed before action may be taken to prevent a breach of the peace and … once the test of imminence is passed, action which is both reasonably necessary and proportionate to prevent a breach of the peace may be taken."71

Despite this unambiguous and clear exposition of the ratio of Laporte, a differently constituted Court of Appeal in R. (on the application of Moos) v Commissioner of Police of the Metropolis (hereafter "Moos")72 endorsed the more "flexible" definition of "imminence" that had been accepted by the High Court.73 However, the sharpest break with Lord Bingham's "narrow" definition came in Hicks. 74

Hicks was concerned with a claim for judicial review arising out of protests in London related to the 2011 Royal Wedding. The police had reasonable grounds for believing that there would be violence if the claimants were not stopped. However, when the claimants were arrested they were over a mile away from the route of the wedding procession and there was evidence that they were not expected to reach their destination for at least another 20 minutes.75 Therefore, it seemed, on a strictly "narrow" definition of imminence, that a breach of the peace was not imminent at this time—it was neither "about to happen" nor "on the point of happening". However, Richards LJ firmly rejected that approach and favoured Lord Rodger's "flexible" definition that permitted a breach "in the near future" to suffice.76

Accordingly, the arrests were lawful and the claims dismissed. The claimants were permitted to appeal to the Supreme Court on the ground that the arrests were contrary to art.5 of the European Convention on Human Rights but, importantly, and underlining the break with the "narrow" definition of imminence, leave to appeal on the ground that Richards LJ had misdirected himself on the meaning of "imminence" was firmly refused.77

Although Richards LJ's definition of "imminence" was not in issue before the Supreme Court in Hicks, 78 the Justices did not reject it. It is plainly problematic that what has become the prevailing "flexible" definition of "imminence" is clearly at odds with the "narrow" definition in Lord Bingham's authoritative leading opinion in Laporte. Therefore, "imminence" now has the appearance of being an ordinary word but is, in effect, a technical term capable of interpretation either narrowly or flexibly. This casts doubt on the utility of the "imminence test" and, of course, where the law is left uncertain this has implications for the rule of law.

Rule of law problems for the "imminence test"

The requirement that the law be stated clearly and with certainty has been widely accepted by legal philosophers as an essential component of the rule of law principle. For example, Raz, while commenting that the rule of law was just one of the virtues that law should possess, argued that "laws should be prospective, open and clear"—a principle he derived from the basic rule of law. 79

Thus, the conflict between the two definitions of imminence represents a classic rule of law problem, in that it is difficult for members of the public to foresee with "fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge".80

In relation to breach of the peace, it seems likely that most members of the public would assume that "imminence" is defined narrowly as meaning "about to happen" or "on the verge of happening" and, accordingly, be surprised to find the law permits intervention at an earlier stage. The problem of a lack of certainty in the law is particularly acute in relation to breach of the peace because the public are not only the subjects of intervention but, in common with police officers, obliged to intervene in order to prevent a breach of the peace, in particular, when called upon to do so.81

As a result of such confusion in the law, there is also the risk that the police may be slow to respond in some circumstances. This appears to occur when policing situations are unclear and Waddington argues that uncertainty is a "potent disincentive to action", causing the police to avoid situations that might have untoward consequences.82 However, the uncertainty of a situation may also prompt police overreaction, as in response to the 2009 G20 protests, where the police were criticised for "overly aggressive" and "disproportionate" policing.83 Indeed, in that regard, the uncertain meaning of "imminence" has particularly important implications for the exercise of the "right to peaceful protest".

This right is, in effect, protected by an amalgam of arts 10 and 11 of the European Convention on Human Rights relating to the freedoms of assembly and expression.84 These freedoms may be subject to restrictions under arts 10(2) and 11(2) where those are "prescribed by law". The lawfulness of the restrictions is normally uncontroversial,85 but they must be "convincingly established"86 as "necessary in a democratic society", in that there must be a "pressing social need".87 These restrictions should be "proportionate to the legitimate aim pursued" and implemented for reasons that are "relevant and sufficient".88

Consideration should also be given to the intrusiveness of any measure and a fair balance being achieved between individual rights and the interests of the community. 89 In this context, the imminence of violence will usually be decisive as, for example, in Moos. 90 Accordingly, if the meaning of "imminence" is left uncertain, this has the potential for a corresponding effect on the exercise of the right to protest, leaving the parameters of that right equally uncertain. This may also be, as Lord Rodger feared, "a recipe for officious and unjustified intervention in other people's affairs" by the police.91 The same problem arises in relation to art.5, which states that no-one shall be deprived of their liberty unless the circumstances fall within one of the cases listed in art.5(1)(a)–(f), but the deprivation must also be "in accordance with a procedure prescribed by law".92 This includes the requirement that the law be "sufficiently accessible to the individual and sufficiently precise to enable the individual to foresee the consequences of the restriction".93

This danger of uncertainty in the law is underlined by Moses LJ's comments in the Court of Appeal in Hicks that the definition of "imminence" in Laporte could not be improved upon and that it was simply not possible to define it with any assurance. To attempt to do so was merely "searching for a chimera".94 Unfortunately, as we have seen, the judgment in Laporte did not provide a singular, clear definition of "imminence". It is submitted that, with respect, if that is the best that can be achieved, the "imminence test" should be abandoned as a means of determining when a constable (or member of the public) may lawfully intervene to prevent a breach of the peace. It has been commonly argued that the law on breach of the peace should be abolished altogether95 and the powers provided for in statute. That may be an attractive proposal, which would lead to more

certainty in the law, but there seems little or no prospect of it happening. Over many years, numerous reports, commissions and legislative bills that proposed reform have all come to nought.96 It is clear that Parliament has no appetite for reform. In recent years, the containment of protestors, grounded in the law on breach of the peace, was strongly criticised by the Parliamentary Joint Committee on Human Rights97 but, notably, this did not lead to arguments for abolition or reform of breach of the peace and its associated powers. Prior to this, although proposals for reform made it as far as publication in the Serious Organised Crime and Police Bill, they were never enacted in the 2005 Act of the same name.98 In the light of this, it seems that if reform is to occur it will be only through the common law. It is submitted that a "clear and present danger" test goes some way towards meeting the rule of law problems associated with the "imminence test" in Laporte. The phrase is familiar, as it is in common usage, and lacks the ambivalence that "imminence" has developed over recent years. In terms of principle, it has particular value because of its close association with the European Convention on Human Rights and its origins in US constitutional law on freedom of speech.

A "clear and present danger" test for breach of the peace?

A "clear and present danger" standard was originally propounded by Justice Holmes in Schenck v United States99 as the point at which First Amendment protection of freedom of speech in the United States might be limited. The case was concerned with defendants convicted under the Espionage Act 1917 of attempting to obstruct military recruitment during the First World War. The US Supreme Court rejected the contention that their actions were protected by theFirst Amendment and upheld the convictions on the grounds that:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."100

Unfortunately, "clear and present danger" has tended to become a by-word for the argument that normal legal rules may be suspended in times of emergency. However, this is misleading, as in Holmes's formulation, the phrase was limiting rather than permissive. That is, it did not suggest that whenever the state faced a "clear and present danger" it could take whatever steps it considered necessary. Rather, the phrase set a threshold below which the state could not intervene and underlined that it was a matter for the courts to determine.101

It is submitted that, as Sir David Williams anticipated in Keeping the Peace, a "clear and present danger" test can be used appropriately to determine the point at which a constable (or member of the public) may intervene to prevent a breach of the peace. It would be clearer and more helpful for the police and the public, planning their own affairs on the basis of how the state will use its coercive powers, than the "imminence test". As the phrase is in common usage in England and Wales, it is not surprising to find a clear strand of case law in which "clear and present danger", or words to the same effect, has been already applied to breach of the peace. In Foulkes v Chief Constable of Merseyside102 Beldam LJ stated that the power to arrest to prevent a breach of the peace arose, exceptionally, where there was

"a sufficiently real and present threat to the peace to justify the extreme step of depriving of his liberty a citizen who is not at that time acting unlawfully".103

Importantly, Beldam LJ, like Lord Bingham, drew expressly on Albert vLavin104 as authority but, unlike Lord Bingham, did not conclude that it necessarily created an imminence test. Rather, his Lordship held, in a test approved and applied in later cases,105 that the imminence of the threat of

violence was secondary to, but informed whether there was “a real and present threat”. This phrase is clearly analogous to a “clear and present danger”. However, it is contended that the latter is the preferable expression, as it better conveys the exceptional or emergency nature of the power to intervene to prevent a breach of the peace.106 It places appropriate stress on the “danger” of violence which, as we have seen, was regarded in Howell and Laporte as the essence of the doctrine of breach of the peace. It is also contended that the danger should be “clear”, in that it is unambiguous, and “present” in the sense that it presents itself to a person and is, thus, relatively immediate without, necessarily, being “on the verge of happening”, in the very “narrow” sense of imminence outlined by Lord Bingham in Laporte. 107

“Clear and present danger” is an expression that is well understood by the courts in this jurisdiction in relation to breach of the peace and other areas of the law. 108 It is also found throughout the Common Law world109 and appears unlikely to present an interpretative challenge for the courts. Moreover, it is submitted that the proposed test would also preserve the practical advantages of the current “flexible” definition of imminence applied in Hicks110 by not requiring intervention to be restricted to situations where violence is “on the point of happening”.

The “clear and present danger” test would provide that violence should not be “absent” as it should, at least, be “likely to occur in the near future”.111 This emphasises the predictability of violence, without ignoring the question of its proximity, and thus, as Lords Rodger and Carswell reflected on in Laporte, accords better with the reality of modern public order policing,112 which does not depend solely on police officers being at the scene of public disorder in order to perceive the possibility of violence. However, importantly, following the “constitutional shift” wrought by the Human Rights Act 1998, police decisions must now be determined by a combination of both practical and constitutional considerations, and it is significant that there are also important reasons of principle for preferring a “clear and present danger” test to the “imminence test”.

The “clear and present danger” test and the policing of protests

As we have seen, in the United States “clear and present danger” marks the point at which First Amendment freedom of speech rights may be limited. Therefore, it is particularly appropriate that this standard should also be used in relation to breach of the peace powers, which are commonly exercised at protests. Further, reference to “clear and present danger” is also found in Strasbourg jurisprudence relating to the “right to protest”, protected by a combination of the “qualified” rights to freedom of expression and of assembly under arts 10 and 11 of the European Convention on Human Rights.

Under arts 10(2) and 11(2) a restriction on rights to freedom of expression and of assembly should be “prescribed by law” and “necessary in a democratic society”. The term “necessary” in this context has been held to be neither synonymous with “indispensable” nor asflexible as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”.113 Rather, it has been interpreted consistently as meaning that these rights may be restricted where there is a “pressing social need”.114 However, importantly, it is also settled authority that this strict test115 contains, in turn, the equally stringent116 “clear and present danger” standard.117 Therefore, it may be asserted that the right to peaceful protest can be restricted under the European Convention on Human Rights where there is a “clear and present danger” and the restriction is “proportionate to the legitimate aim pursued”118 with reasons that are “relevant and sufficient”.119 Thus, in Arrowsmith v United Kingdom, 120 interference with arts 10 and 11 rights was held to be justified where there was a “clear and present danger” of disorder resulting from the appellant’s efforts to persuade soldiers stationed at an army base not to serve in Northern Ireland, contrary to the Incitement to Disaffection Act 1934. More

recently, in Vajnai v Hungary121 it was held that the removal of a red star from a protestor's jacket was an infringement of art.10 rights because it was not "necessary in a democratic society", as there was no "real and present danger" of any political movement or party restoring the Communist dictatorship in Hungary.

Accordingly, it is contended that a "clear and present danger" test would provide clarity and a degree of flexibility, but also an infusion of human rights into the common law on breach of the peace. By inference from the law relating to arts 10 and 11, a "clear and present danger" test would require the police to consider the principles that are pertinent to the limitations on the right to protest. It would thereby give "further effect" to the "right to protest" within the common law, consistent with Parliament's purpose in enacting the Human Rights Act 1998. 122 However, it is also necessary to address what effect this test would have on the application of the right to liberty and security under art.5 of the European Convention on Human Rights, which was central to the judgments in both Austin v United Kingdom123 and Hicks. 124

The "clear and present danger" test and art.5

The case of Hicks brought together four separate sets of claims. The proceedings raised a variety of issues, but the "Hicks claims" related specifically to the pre-emptive arrest and containment of a number of sets of protestors.125 It was contended that they were removed from the streets of central London, on "dubious" grounds,126 and then released after the "kiss on the balcony".127 The Supreme Court held that, notwithstanding these early releases, the detentions were justified under article 5(1)(c) because the purpose was to bring the claimants "before the competent legal authority", which was dependent on "the cause for detention continuing long enough for the claimants to be brought before the court".128 The Justices were influenced, in particular, by the opinion that it would have been "contrary to the spirit and underlying objective of article 5" if claimants released early were in any stronger position to claim deprivations of liberty than if they had been detained and later bound over by a court.129

Article 5 states that any deprivation of liberty must be in accordance with a procedure prescribed by law. That was not in doubt in Hicks, as the High Court found that the arresting officers had reasonable grounds for believing that a breach of the peace wasimminent.130 However, as the proposed "clear and present danger" test will directly impute "right to protest" principles derived from arts 10 and 11 into the common law, this will also have an effect on art.5 issues.

Public authorities are, of course, already obliged by the Human Rights Act 1998 to act compatibly with the European Convention on Human Rights. 131 Notwithstanding that, the judgment in Hicks was strongly criticised for its deference to police arguments and overlooking the impact on the right to protest of permitting temporary detention in these circumstances.132 It is contended that as well as giving "further effect" to the "right to protest", a "clear and present danger" test would also serve as a useful counter-weight to the influential principle, applied in Hicks, 133 that art.5 should not be interpreted in such a way as to make it impracticable for the police to perform their duty of maintaining public order. 134 The new test would place "right to protest" principles at the very forefront of police officers' minds before they intervened to restrict the liberties of protestors. Accordingly, in cases where it is asserted that a deprivation of liberty can be justified under one of the cases listed in art.5(1)(a)–(f), as in Hicks, the courts would also be required to apply these principles in determining whether the intervention was "prescribed by law". However, it is arguable that these principles would also affect the question of whether there had been a deprivation of liberty in the first place, which was the matter in issue in Austin v United Kingdom. 135

In Austin v United Kingdom, the European Court of Human Rights was called upon to consider whether there had been a breach of art.5 when the police used containment cordons to prevent a breach of the peace at an "anti-capitalism" protest on May Day 2001.136 The Grand Chamber, in a controversial judgment, held that although there had been a restriction on liberty of movement, protestors and passers-by who had been held for over five hours had suffered no deprivation of liberty. 137 This seems a surprising conclusion, given that the duration of the containment and the associated discomfort (from lack of toilet facilities, food and drink, etc.) appeared, as the court recognised, to point towards a deprivation of liberty. 138 One might have expected that this would have been a deprivation of liberty, albeit that it was justifiable under the exceptions in art.5(1)(a)–(f). This, however, was not the Grand Chamber's opinion.

In explaining its judgment the Grand Chamber reiterated that the overriding purpose of art.5 is to protect individuals from arbitrariness139 and stated that, accordingly, where an alleged deprivation is not the "paradigm confinement in a cell", the starting point must be the person's "concrete situation".140 Therefore, although the "purpose" of a particular measure was not relevant, the "type and manner" of its implementation should be taken into account and regard paid to the "specific context and circumstances" surrounding the restriction.141 This distinction between "purpose" and "context" has been described as "unconvincing",142 as the concepts appear to mean much the same thing.143 Nevertheless the Grand Chamber held, in light of the "real risk of serious injury or damage" and the potential for matters to be worsened if "more robust" policing methods were preferred, that there had been no deprivation of liberty. 144

It may be that in some circumstances, such as those in Austin, a "clear and present danger" test would make little difference to whether there had been a deprivation of liberty, as the courts will find that intervention was necessary to prevent serious public disorder. However, in other less extreme circumstances, the requirement for the police to consider whether there was a "clear and present danger" before intervening to arrest or by way of containment would be of more significance. It is submitted that, as a consequence of the close relationship between arts 10 and 11 and the proposed "clear and present danger" test, principles pertinent to arts 10 and 11 should also form part of the "specific context and circumstances" surrounding the restriction and become relevant to whether there has been a breach of art.5.

If that seems surprising, it is hardly less so than the distinction drawn by the Grand Chamber between "purpose and context", which has been described as "bizarre".145 Further, in determining if there has been a deprivation of liberty at demonstrations, it would have the advantage of striking a balance more clearly between preventing public disorder and permitting political expression, which the European Court of Human Rights has held to be one of the essential foundations of a functioning democratic society. 146

Conclusion

This article has been concerned with the preventive justice doctrine of breach of the peace. It has examined critically the test for determining the point at which the power to intervene to prevent a breach of a peace may be exercised lawfully. It has done so with specific reference to Sir David Williams' suggestion, in Keeping the Peace, of a "clear and present danger" test to determine the point at which intervention should be lawful.

The House of Lords' re-examination of the law on breach of the peace in Laporte appeared initially to offer a new degree of clarity in the law. However, as has been argued here, it has become apparent that the "imminence test" is inadequate and that an alternative test is required. "Imminence" has been described as a "relative concept"147 and, although complete certainty in the

law may be unobtainable,148 it has become evident that the current test lacks sufficient certainty to meet rule of law concerns.

It has been argued in this article that the "clear and present danger" test meets these rule of law concerns more effectively than the current law and, in the absence of legislative reform, is a suitable common law alternative. There are also practical reasons for preferring such a test. The phrase is readily understandable and lacks the technicality and ambivalence that the term "imminence" has developed in recent case law. Moreover, it avoids the restrictiveness of Lord Bingham's "narrow" definition of imminence, so that the police are not forced into "crisis management", where they intervene at the very last minute to prevent violence that is "about to happen".

The "clear and present danger" test should also act as a strong human rights brake on any over-readiness on the part of the police to intervene in lawful protests, as the test imputes "right to protest" principles derived from arts 10 and 11 directly into the common law. Gearty suggested that the judgment in Austin v United Kingdom149 was part of a broader process of the "hollowing out" of liberty, human rights and the rule of law, 150 and the judgment in Hicks might be regarded in the same light. It is contended that a "clear and present danger" test would, to some extent, forestall that process. The parameters for police intervention would be more clearly set by a test forged in principle rather than "imminence". The latter is, as Moses LJ151 suggested, a now purely "chimerical" term, the meaning of which cannot be established with sufficient certainty to meet rule of law standards.

Although the "clear and present danger" standard has its origins in the United States, it is strongly rooted in domestic jurisprudence, and is also at the heart of Strasbourg jurisprudence relating to the right to protest. It is submitted that the test avoids the significant problems of the "imminence test" in terms of lack of certainty and clarity. Moreover, it would be a more effective method of balancing the competing demands of free speech and public order that so concerned Sir David Williams in his work.152

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