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Leverage Campaigning in the UK and the Trade Union Act 2016.

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Submitted in fulfilment of the requirements of the Degree of
LL.M by research.

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Abstract

This thesis analyses the legal changes to the pre-strike ballot and picketing provisions contained in the Trade Union Act 2016 (TUA). Firstly, it seeks to understand the provisions as responses to trade unions' uses of so-called 'leverage' tactics, especially during the Grangemouth industrial dispute of 2013.¹ Secondly, it seeks to understand them as the most recent episode in the history of the 'golden formula'² for determining the lawfulness of industrial action with reference to its *purpose* of furthering a trade dispute.³ The main research question the thesis asks is this: can the TUA, and the policy to which it was pursuant, rightly be understood as a response to leverage campaigns and what does this imply for industrial action, and labour's capacity to exercise its right to protest? Having traced the development of the provisions of the TUA – from the Carr Review⁴ and the Conservative Party's 2015 General Election manifesto, throughout the consultation and parliamentary processes, to the enacted legislation – the thesis then assesses the provisions in the context of the leverage campaign strategy and tactics, drawing here on a comparison with similar developments in the US. The conclusion is drawn that the TUA should be understood as a response to leverage campaigns because it brings unions' protest activity within the scope of the Trade Union and Labour Relations (Consolidation) Act 1992. A comparison of UK and US case law supports the additional conclusion that it is increasingly difficult for unions in this country to protest lawfully in the context of a trade dispute.

¹ Dixon, H. (2013). *Unite union accused of using bully tactics in Grangemouth dispute*. Available: <https://www.telegraph.co.uk/news/uknews/scotland/10416408/Unite-union-accused-of-using-bully-tactics-in-Grangemouth-dispute.html>. Last accessed 21/09/2019

² Wedderburn (1986) 'The Worker and the Law' 3rd ed. London Penguin Books p.520-521

³ TULRCA s219

⁴ Bruce Carr QC, '*The Carr Report: The Report of the Independent Law Governing Industrial Action*' (*The Carr Review*) (October 2014). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/363806/Carr_Review_Report.pdf. (Last accessed 22/09/2019)

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signed:

Printed Name: Mairin Macleod

Introduction

I. Research Questions

In 2013 Len McCluskey, General Secretary of Unite the Union (Unite) and credited with the development of leverage campaigning in the UK, asked ‘Can Unions Remain Within the Law Any Longer?’⁵ He did so in response to proposed legislative amendments which would render many of the tactics and activities associated with leverage campaigns – namely high-profile protest activity – unlawful. Those proposals were presented by the Government of the day as a necessary response to the development of tactics by unions (described as ‘leverage’) which Unite allegedly engaged in during an industrial dispute with Ineos at the Grangemouth petrochemical refinery in 2013,⁶ and which the Government condemned at extreme.⁷ As such, many of the proposed reforms centred around the regulation of tactics, and particularly protest activity. Although many of the proposed reforms did not make it onto the statute books, the subsequent Trade Union Act 2016 (TUA) introduced the most significant changes to the law governing industrial action since the 1980’s, imposing a number of additional burdens on unions taking industrial action. The aim of this thesis is to provide an answer to Len McCluskey’s question by providing an assessment of the provisions of the TUA which relate to undertaking industrial action and focus on protests, like those seen in Grangemouth: ‘leverage’. In that assessment I seek to understand the legislation first as a response to leverage and protest, and secondly in relation to the so-called ‘golden formula’ for determining the lawfulness of industrial action by reference to its purpose.

⁵ McCluskey, L. (2015). Can Unions Stay Within the Law Any Longer. *Industrial Law Journal*. 44 (3), 439-449

⁶ Dixon, H. (2013). n.1.

⁷ *The Carr Review* (October 2014) n.4, [1.6] and UK Government, Cabinet Office *Press Office: Government review into the law governing industrial disputes* (04/04/2014), available: <https://www.gov.uk/government/news/government-review-into-the-law-governing-industrial-disputes> (last accessed 22/09/2019)

Of course, there is nothing new about the attempt to use the law to restrict the right to organise and take industrial action in a variety of ways. The Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) contains detailed provisions setting out the requirements for lawful industrial action which long pre-date the TUA, and have often given rise to interim interdicts⁸ to restrain industrial action.⁹ Further, at the end of the last century, a Labour Prime Minister, Tony Blair, boasted that British law was the most restrictive on trade unions in the Western world.¹⁰ However, what marks the TUA out as quite novel in the history of industrial action law, and worthy of further research, is its focus on the union tactic of protesting. Whereas, historically, the legislation was framed such that courts need not enquire into the nature of trade union tactics, provided that they were undertaken in contemplation or furtherance of a trade dispute,¹¹ the TUA imposes regulations which, in response to leverage, are likely to force the courts to make an assessment of union tactics by seeking to bring the tactic of protest within the restrictions of the TULRCA, whatever its purpose.

The TUA has already attracted substantial academic criticism for its lack of evidence,¹² for simultaneously incentivising leverage protests¹³ whilst providing opportunities for relief in the form of interim interdicts,¹⁴ and for being pursuant to an increasingly authoritarian political agenda.¹⁵ This thesis begins to contribute to the existing research by drawing these criticisms together. It engages in an analysis of the underlying policy narrative and rhetoric which informed the TUA, and identifies a public policy of restraining protest activity by providing opportunities for employers to mitigate or restrain protest activity. Much of the academic criticism assumes,

⁸ Throughout the thesis I will make use of legal terminology relating to Scots Law particularly interim interdict and liability in delict. The equivalents in English law are interim injunctions and liability in tort.

⁹ See: Network Rail; EDF Energy Powerlink Ltd v National Union of Rail, Maritime and Transport Workers [2009] EWHC 2852 (QB); Milford Haven Port Authority v Unite the Union [2010] EWHC 501(QB), and British Airways Plc v Unite the Union [2009] EWHC 3541(QB) In Dukes, R. (2003). The Right to Strike under UK Law: Something More Than a Slogan? NURMT v SERCO, ASLEF v London & Birmingham Railway Ltd. *The Industrial Law Journal*. 40 (3), 302-311.

¹⁰ UK Government, White Paper, *Fairness at Work* Cm. 3908 (London 1998)

¹¹ Express Newspapers v McShane 108 [1979] ICR 210

¹² Dukes, R and Kountouris, N. (2016). Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door? *Industrial Law Journal*. 45 (3), 350

¹³ Ford M, and Novitz T. (2016). Legislating for Control; The Trade Union Act 2016. *Industrial Law Journal*. 45 (3), 298

¹⁴ Dukes, R and Kountouris, N. n.12, 353

¹⁵ Bogg, A (2016) 45 (3) Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State *Industrial Law Journal* 229-336

rightly, that the TUA is a response to leverage. However, it does so on the basis of an understanding of leverage simply as a synonym for protests which are associated with industrial action,¹⁶ without engaging with the features of leverage or the structural reasons for its development, and without addressing the question of whether, and if so how, the TUA can rightly be understood as a response to its development.

This thesis seeks to add significantly to the existing commentary on the TUA by developing an analysis of the Act in the context of leverage campaigning. Part of that analysis involves a comparison between leverage campaigning and the US experience of regulating so-called ‘comprehensive campaigns.’ That comparison makes two valuable contributions relating to understanding leverage, and the judicial interpretation of the lawfulness of leverage campaigns. By comparing the development of leverage in the UK with comprehensive campaigns in the US, the thesis provides an explanation for the development of leverage campaigning which demonstrates how particular features of it – namely protest activity – develop out of a need for lawful means, which are both effective and *not* dependent upon compliance with a restrictive legal framework. By then comparing the judicial interpretation of leverage tactics, including protest activity, in the UK with the same in the US, the thesis highlights elements of UK law which mean that protest activity by unions *in furtherance of trade disputes* may today be unlawful.

II. Research Methods

The thesis combines a close reading of the relevant legislation and case law with qualitative analysis of the policy documents which preceded the adoption of the legislation, additional publications from the Government of the day, and formal, as well as, informal statements by Cabinet Ministers. It also reviews existing academic commentary on the legislation. In places, it adopts a comparative methodology to supplement analysis of UK law with a comparison of UK and US law, directed at

¹⁶ Dukes, R and Kountouris, N. n.12, 337

allowing for predictions to be made as to how the TUA, and protest activity, is likely to be interpreted in the British courts.

The main question which the thesis addresses is Len McCluskey's: can unions remain within the law any longer?¹⁷ To address this question, the thesis formulates two further research questions. Firstly, how might we define 'leverage', and what precisely about the concept of 'leverage' was the Government responding to when it introduced the TUA? Secondly, what are the implications of the TUA for the lawfulness of industrial action and protest activity?

In answering these questions, the thesis is organised into four chapters. Each chapter assess different features of the narrative surrounding the TUA as it developed, or the TUA itself, against the context of an understanding of the strategy of leverage which emerges from a comparison with similar developments in the US.

The first chapter establishes that specific political and legal context. It sets out a definition of leverage which goes beyond that offered by the media and by the Government in the wake of the Grangemouth dispute, where 'leverage' arguably gained its pejorative connotations. Instead, by comparing leverage with the development of comprehensive campaigns in the US, a more strategic definition of leverage is identified, one which is intrinsically linked with the pre-existing restrictions of the legal framework. It suggests that the use of protest activity, as central to leverage campaigns, follows from a need for labour to develop tactics which are effective, and lawful – without relying on compliance with a restrictive legal framework to be so.

Chapter two provides a detailed assessment of the Government's initial efforts at directing the narrative surrounding leverage: 'The Carr Report: The Report of the

¹⁷ McCluskey, L. n.5, 439-449

Independent Law Governing Industrial Action’ (The Carr Review). It demonstrates that the Carr Review was designed to affirm a narrative identified during the Grangemouth dispute – that leverage is defined by protests during industrial disputes and is inherently extreme. It does so, by firstly assessing the Review as it was commissioned (in particular the choice of author, and limited terms of reference). It goes on to consider Carr’s approach and findings, and how biases evident in the commissioned Review are reflected in them – in particular, in the way Carr defers to the opinions of ‘contributors’ to the Review to inform the content, even if these opinions are not supported by evidence. Finally, it considers the use that was subsequently made of the Review and how it informed a particular narrative of leverage campaigns and protests by unions.

Chapter three is similarly concerned with the narrative surrounding the TUA. It focuses on the policy which underpins it and the extent to which the enacted provisions give effect to that policy. It engages in a detailed analysis of the Consultations, policy documents and rhetoric of ministers to trace the development of provisions, such as the balloting requirements and picketing regulations, which do not *prima facie* regulate protest activity. By tracing their development, the research demonstrates how they operate as a response to leverage campaigning in that they are, indeed underpinned by an objective of restricting access to protest activity.

Finally, having identified that the TUA responds to the development of leverage campaigns by bringing protest activity within the confines of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), chapter four considers the implications of this for lawful industrial action and protest activity. Firstly, it considers the likely judicial interpretation of the provisions of the TULRCA, as amended by the TUA, to regulate protest activity (namely s229 and s220A to amend pre-action balloting provisions, and picketing), and whether they are likely to give rise to orders for interim relief. Secondly, it considers the likely judicial treatment of protest activity. By comparing UK efforts at regulating protest activity with the US experience of litigation over the lawfulness of similar tactics, the research identifies features of UK law (other than the TUA) whereby these protests may be unlawful. It

indicates that the judiciary is likely to interpret unions' protests, like those seen during the Grangemouth dispute, to be unlawful either by non-compliance with the amended TULRCA or under the common law. This significantly undermines assumptions, identified in chapter one, about the lawfulness of protest activity which informed the development of the leverage strategy.

Returning then to Len McCluskey's question: on the basis of the research undertaken, it is argued in this thesis that it is likely to be increasingly difficult for unions engaged in protest activity to remain within the law. Given that the TUA was pursuant to a policy of responding to leverage campaigning by restricting unions' access to protest activity, and gives effect to that policy by bringing protest activity within the restrictions of the amended TULRCA, it significantly undermines assumptions about the lawfulness of protests in furtherance of a trade dispute. This is reinforced by a comparison between UK and US litigation over the lawfulness of the tactic, which suggests that specifically leverage protests (understood in terms of protests by unions, in furtherance of a trade dispute) may be unlawful under the TUA and, by the judicial interpretation of protests, directed at third parties, by unions. Thus, the *tactic*, irrespective of its purpose (arguably even *because* of its purpose) is increasingly likely to be unlawful.

1. Chapter 1. Leverage and the Law: Beyond Grangemouth

In 2015 the Conservative Government commissioned the Carr Review, and subsequently introduced the Trade Union Bill to Parliament that was later to become the Trade Union Act 2016 (TUA). In doing so, it presented itself as responding to a new kind of trade union activity or strategy, referred to as ‘leverage campaigning’ in the mainstream press. But what was meant by the term ‘leverage’? Where did it have its origins? What were its key features and potential benefits from a trade union point of view, or rather what was the Government responding to, particularly in relation to the legal system which regulated industrial action (as it was prior to the 2016 amendments)?

In this chapter, I contextualise the TUA with reference to both the development of leverage campaigning and the pre-existing legal framework. I thereby demonstrate that there is a connection between a restrictive legal framework and the development of leverage as a union strategy, and the campaign tactics associated with it. This argument is supported by an assessment of the US law relating to industrial action – the US being the place where ‘comprehensive campaigning’ developed, arguably inspiring the modus operandi of ‘leverage’. Developing from a framework which, much like the UK, restricts industrial action, comprehensive campaigns were designed to exploit protections conferred by the First Amendment.

1.1 The 2013 Industrial Dispute between Ineos and Unite at Grangemouth (The Grangemouth Dispute)

The term ‘leverage’ came to prominence in the UK in 2013 when workers at the Ineos petrochemical plant in Grangemouth engaged in non-traditional tactics in the course of an industrial dispute. Workers were balloted for strike action following the suspension of convenor Stephen Deans – who was accused of using Ineos company facilities as part of an electoral fraud allegation in the Falkirk constituency by-

election.¹⁸ At the same time, Ineos were consulting on variations to pensions and other terms and conditions – this was not the first time Ineos had been in dispute with Unite over these terms and conditions.¹⁹

Notably the dispute quickly escalated from initially concerning the treatment of Stephen Deans, to concerning the financial viability of the plant – managers gave interviews suggesting it couldn't survive without union concessions,²⁰ threatening a cold-shut down,²¹ and writing down the value of assets in the plant to £0.²² The plant is not only a significant employer in Scotland,²³ but also supplies the majority of fuel to Scotland, Northern Ireland and the North of England.²⁴ The importance of the political and economic consequences of the closure of Grangemouth is evidenced by the then First Minister Alex Salmond's intervention to attempt to broker a deal, and Ineos eventually securing a Government underwritten loan to support the plant.²⁵ Supporting the plant, however, did not extend to maintaining the terms and conditions of employees, and it was suggested that workers “virtually begged for their jobs back”²⁶ when they accepted reduced terms and conditions. Described as a ‘plot’²⁷ the actions of Ineos - in publicly suggesting the plant was in financial difficulty - were suspected as having been designed to force the workers to accept reduced terms and conditions under threat of plant closure and therefore job losses.

¹⁸ <https://www.theguardian.com/politics/2013/oct/11/oil-workers-scotland-strike-stephen-deans-unite> (last accessed 22/09/2019)

¹⁹ <https://www.telegraph.co.uk/finance/newsbysector/industry/10398888/Grangemouth-timeline-of-the-dispute.html> (Last accessed 22/09/2019)

²⁰ Jeff. D. (2013). *£300m Survival Plan for Grangemouth*. Available: <http://www.scotsman.com/news/scotland/top-stories/300m-survival-plan-for-grangemouth-1-3118462>. (Last accessed 20/09/2019.)

²¹ Ibid

²² McCulloch, S. (2013). *INEOS writes down £400m of assets at Grangemouth plant to 'nil value'*. Available at: <https://www.insider.co.uk/news/ineos-writes-down-400m-assets-9868168>. Last accessed 21/09/2019.

²³ Morris, B. (2013). *Why Grangemouth matters*. Available: <https://www.bbc.co.uk/news/business-24624934>. (Last accessed 21/09/2019.)

²⁴ Ibid

²⁵ <https://www.bbc.co.uk/news/uk-scotland-24671184> (last accessed 22/09/2019)

²⁶ Seymour, R. (2013). *How Ineos humiliated Unite in Grangemouth*. Available: <https://www.theguardian.com/commentisfree/2013/nov/09/ineos-unite-union-grangemouth-oil-refinery>. (Last accessed 21/09/2019.)

²⁷ Lyon, M. (2017). 'The Build-up of the plot', and 'The Execution of the plot beings'. In: Lyon, M. *The Battle of Grangemouth*. London: Lawrence and Wishart. 120-140, and 141-159.

In the US, Bronfenbrenner has identified the ‘threat to close’ as a ‘pervasive and effective’ method for resisting trade union recognition.²⁸ Bronfenbrenner’s research - which includes both the threat to close and actual closure - outlines the subtle, and less subtle, ways in which employers threaten the workforce with closure when facing union certification. Methods range from appearing to start moving operations elsewhere (such as to Mexico in the 1995 recognition campaign at ITT Automotive in Michigan)²⁹ to speeches by management which imply an intention to close, depending on the result of a union certification election.³⁰ If the developments identified by Bronfenbrenner are indicative of a tool for resisting union activities, then the Grangemouth dispute may not be the last dispute where the *threat* to close is exercised to gain concessions from the workforce. Neither public nor political concern for this largely unregulated and high-risk employer strategy, however, has been the legacy of the Grangemouth dispute. Instead, what attracted the attention of the media and Government were the tactics engaged in by the Union. Although the planned strike – which achieved a mandate of 86% turnout and 90% in favour³¹ – was eventually called off,³² the tactics in which the Union engaged were widely reported in the mainstream media and attracted significant Government interest, including the commissioning of the Carr Review.³³

As the dispute escalated, and in the face of escalating employer tactics, so too did the campaign tactics, from traditional tactics – consisting of an over-time ban, and work-to-rule from 7th October 2013,³⁴ and planned strike action on the 20th October 2013³⁵ – to non-traditional tactics. These included a daylight vigil, in lieu of the called-off strike, to “show...unity and resolve” over the treatment of Stephen Deans,³⁶ and demonstrations at the plant supported by the Truck Drivers branch of Unite who

²⁸ Bronfenbrenner, K. (1997) *‘We’ll Close! Plant Closings, Plant-Closing Threats, Union Organising and NAFTA’* Cornell university Press Special Report. Available at: <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://scholar.google.co.uk/&httpsredir=1&article=1018&context=cbpubs> (Last Accessed 22/09/2019)

²⁹ Ibid

³⁰ Ibid

³¹ *The Carr Review* (October 2014) n.4, [4.11]

³² Lyon, M. (2017). *The Battle of Grangemouth*. London: Lawrence and Wishart, 162

³³ *The Carr Review* (October 2014) n.4, [1.1]

³⁴ Ibid [4.11]

³⁵ Ibid. 27-18

³⁶ Lyon, M n.35

“marched across Bo’ness Road lead by bagpipes”.³⁷ What attracted significant media attention, and the label of ‘leverage’, were the protests. These protests took place at premises associated with Ineos, such as at the private properties of senior managers, and at the premises of companies associated with Ineos, and Ineos management.³⁸ Those protests featured a range of publicity-generating tactics, including the use of flags, banners and the stationing of a large inflatable rat.³⁹ They also allegedly included the distribution of leaflets, or as the *Daily Mail*, amongst others, reported ‘wanted posters’,⁴⁰ concerning the Ineos management.⁴¹ These tactics were reported in a highly emotional manner with the plant managers giving interviews in which one claimed to have “feared for the safety of his wife and two young children”⁴² with another claimed his daughter received a ‘wanted poster’.⁴³ Alongside this reporting, management gave interviews that questioned the financial viability of the plant.⁴⁴ Thus, the media portrayal of the campaign emphasised the extreme elements, inferring a connection between the tactics of the industrial action, and the survival of the plant.

As a result of the reporting of the Grangemouth dispute the term ‘leverage’ not only came to describe an amalgamation of campaign tactics, including protest activity, it was also given a pejorative inference. The Grangemouth dispute should therefore be understood as a politically palatable opportunity to intervene in the law governing industrial action.

³⁷ Lyon, M n.35

³⁸ *The Carr Review* (October 2014) n.4, 27-28

³⁹ Shipman, T and Bentley P. (2013). *Terrorised by union bullies: How Labour's Unite paymasters intimidated managers and their children in bitter oil refinery battle*. Available: <https://www.dailymail.co.uk/news/article-2480643/Labours-Unite-paymasters-intimidated-managers-oil-refinery-battle.html>. (Last accessed 21/09/2019.)

⁴⁰ Ibid.

⁴¹ Ibid

⁴² Ibid, see also Dixon n.1

⁴³ Ibid

⁴⁴ See The Financial Times (6 September 2013) *Ineos considers shutting Scottish plant*, <http://www.ft.com/cms/s/0/08141296-16e0-11e3-9ec2-00144feabdc0.html>. (Last Accessed: 20/09/2019), and The Scotsman (1 October 2013) *£300 million survival plan for Grangemouth*. Available at: <http://www.scotsman.com/news/scotland/top-stories/300m-survival-plan-for-grangemouth-1-3118462> (Last Accessed: 20/09/2019) both cited in *The Carr Review* (October 2014) n.4 [4.14]

1.2 Understanding Leverage Campaigning

In 2015, two years after Unite's defeat in the dispute with Ineos, Len McCluskey argued that the Conservative Government was seeking to legislate in response to leverage to render it unlawful.⁴⁵ McCluskey is the General Secretary of Unite and has been credited with the development of leverage in the UK. If what he claimed is correct, then any assessment of the TUA also requires an assessment of what is meant by 'leverage'. By reviewing Unite's formal definition of leverage, and how it has been replicated by other unions, and in other campaigns, it is possible to understand what it was about the leverage strategy and tactics, that the Government was responding to.

In a manner which seems to have become generally accepted,⁴⁶ Unite defines leverage as follows:

“leverage is a process whereby the Union commits resources and time to making all interested parties aware of the treatment received by Unite members at the hands of the employer... We ask all interested parties to make moral and ethical decisions about their future relations with an employer. Unite will make sure all are aware of the true facts behind an employers' poor treatment of our members. We will ask those who object to the behaviour of an immoral employer to conduct lawful protest against the actions of the employer”.⁴⁷

This definition emphasises the research and resource intensive strategy,⁴⁸ to identify and influence through third parties, which underpins leverage. It emphasises “making all interested parties aware of the treatment received by Unite members”,⁴⁹ and asking

⁴⁵ McCluskey, L. n.5

⁴⁶ <http://www.unitetheunion.org/growing-our-union/organising-toolbox/leverage/> last accessed 20/11/2018, cited in, *The Carr Review* (October 2014) n.4 [2.10]- [2.11]

⁴⁷ Ibid

⁴⁸ French, S, and Hodder, A. (2016). Plus Ca Change; The Coalition Government and Trade Unions. In: S Williams, P Scott *Employment Relations Under Coalition Government; The UK Experience 2010 - 2015*. New York and London: Routledge. 165-185

⁴⁹ Unite the Union 'Leverage' n.46

those interested parties to “make moral and ethical decisions about their future relations with an employer”.⁵⁰ As Len McCluskey stressed, in his Industrial Law Society Wedderburn Lecture, the union “fights with research, planning and the execution of tactical activity – within a strategy and *within the law*”,⁵¹ directing its actions at “interested parties” such as suppliers, financiers, customers and the general public. Whereas in the traditional strike the economic harm associated with a withdrawal of labour is at stake, Unite’s definition suggests that what is at stake in the leverage campaign is the employer’s reputation. This is evident in the directing of publicity generating tactics towards key stakeholders, including the general public, who may consequently seek to change, or cease doing business with the targeted employer.

The Unite definition also indicates the means by which leverage is to be given effect: the “lawful protest”. For example, during the 2011-2012 dispute over the withdrawal of companies from the joint agreement in the engineering sector (referred to as the BESNA dispute in the Carr Review)⁵² – acknowledged by Unite to have been a ‘leverage’ campaign⁵³ – large-scale protests took place. Those protests were concentrated at the sites of contractors who were considering withdrawing and culminated in a ‘day of action’ in November 2011.⁵⁴ If the employer’s reputation is what is at stake, protests are a useful tactic as they widely publicise the dispute both directly and indirectly. Directly, the protest activity might take place at the sites of those stakeholders, or involve other grassroots activists.⁵⁵ Indirectly, the activity attracts the attention of the media, particularly where the protests feature publicity-generating props such as; an inflatable rat-shaped balloon – known as ‘Scabby’⁵⁶ – the distribution of leaflets, noisy PA systems, and displaying banners. French and Hodder described these publicity-generating tactics as ‘leverage type’ because they commonly feature in leverage campaigns, and have also been adopted by community branches,

⁵⁰ Ibid

⁵¹ McCluskey, L. n.5, 446 my emphasis.

⁵² Referred to the BESNA dispute after the agreement from which members sought to withdraw - the Building and Engineering Services National Agreement.

⁵³ Unite the Union, ‘Leverage’, n.46

⁵⁴ *The Carr Review* (October 2014) n.4, 59

⁵⁵ French, S, and Hodder, A. n.48

⁵⁶ Lasswell, M. (2019). *Justice for Scabby the Rat*. Available:

https://www.washingtonpost.com/opinions/unions-have-suffered-enough-leave-scabby-the-rat-alone/2019/09/06/40081276-cff6-11e9-87fa-8501a456c003_story.html. (Last accessed 22/09/2019.)

and other unions, to escalate pressure on an employer by targeting its reputation, without necessarily forming part of the centralised and resource intensive ‘leverage strategy’.⁵⁷

Arguably, both the leverage strategy, and leverage type tactics have their origins in the US, where ‘comprehensive campaigns’ developed.⁵⁸ In the 1970’s Ray Rodgers – organiser for the Amalgamated Clothing and Textile Workers Union – researched the target employer, JP Stevens, and identified relationships, particularly financial, upon which the company was dependent. Tactics – such as large-scale demonstrations – were then directed at those relationships.⁵⁹ This comprehensive campaign strategy has also been distinguished from traditional methods with reference to its locus, which is community based, and not restricted to workers at the targeted workplace.

Comprehensive campaigns, similarly to leverage campaigns, commonly include a broad range of participants (such as activists) and are not restricted to the workers party to a dispute. They often also have a more politicised rhetoric.⁶⁰ Judge Wald defined comprehensive campaigns as “negative publicity campaigns aimed at reducing the employer’s goodwill with employees, investors, or the general public”.⁶¹ Since then, the strategy has been replicated in a number of high-profile campaigns in the US, including the Justice for Janitors campaign,⁶² and organising efforts of the United Food and Commercial Workers International Union (UFCW) at Smithfield’s Tar Heel Plant.⁶³ Thus, the comprehensive campaign targets an employer’s reputation through publicity-generating tactics that commonly include protest activity.

⁵⁷ Ibid

⁵⁸ Sometimes these are referred to as ‘corporate campaigns’

⁵⁹ Jarley, P and Maranto C.L. (1990) Union Corporate Campaigns: An Assessment *Industrial and Labor Relations Review* 34 (5), 505-506, 513

⁶⁰ Garden C. (2011). Labour Values and 1st Amendment Values; Why union Comprehensive Campaigns are Protected Speech. *Fordham Law Review*. 79 (6), 2622

⁶¹ Food Lion, Incorporated v United Food and Commercial Workers International Union, Afl-Cio-Clc, United Steelworkers of America, Afl-Cio-Clc, 103 F.3d 1007 (D.C. Cir. 1997) (Food Lion v UWFCW) per Justice Wald, footnote 9.

⁶² Walringer R, Wong K, Erikson C, Milkman R, Mitchell D.J.B, Velenzuela A, Keitlin M (1998) Helots No More; A Case Study of the Justice for Janitors Campaign in Los Angeles. In Bronfenbrenner K, Freidman S, Hurd R.W, Oswald, Seeber R. L. (Eds) ‘*Organising to Win: New Research on Union Strategies*. Ithaca and London. Cornell University Press. 102-119

⁶³ C Garden. n.60, 2626-2632

In the UK, similar developments have been evident in the course of what is termed ‘organising unionism’. Here, collective action acts as a “nucleus for recruitment”.⁶⁴ The type of collective action in question resembles comprehensive campaigns as it involves “the identification of levers, allies, and pressure points to discourage employer opposition...”⁶⁵ Heery describes that collective action as relying on “...planned, organised campaigns in which the union researches the target company... and development of community support so that the campaign extends beyond the workplace...”⁶⁶ In ‘organising unionism’, then, there is an emphasis on the strategic targeting of an employer’s reputation – much like in both comprehensive and ‘leverage’ campaigns.

There is also evidence of the leverage type activity, identified by French and Hodder, in trade union responses to austerity policies and changing labour markets. Policies following the 2008 economic crash included a reduction in public spending – including a public sector pay-cap and recruitment freeze – which had a particular impact in the public sector.⁶⁷ As a traditional trade union stronghold, the public sector, arguably, became the “battleground for employment policies”,⁶⁸ as powerful unions became increasingly militant in their opposition. For example, the Public Sector and Commercial Services Union (PCS) published critical pamphlets,⁶⁹ participated in widespread industrial action – including a day of ‘co-ordinated action’⁷⁰ by thirty unions⁷¹ – and (ultimately unsuccessful) litigation to judicially review changes to the public sector pensions schemes.⁷² Since then smaller, grass-roots or activist-lead trade unions⁷³ have developed campaigns which focus around high-profile protest activity.

⁶⁴ Bronfenbrenner, K. and Juravich, T. (1998). *It Takes More Than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy*. In: Bronfenbrenner, K., Friedman, S., Hurd, R. W., Oswald, A., & Seeber, R. L. (Eds.), n.62.

⁶⁵ Heery, E., Simms, M., Simpson, D., Delbridge, R., Salmon, J. (1999). "Organizing unionism comes to the UK". *Employee Relations*. 22 (1), 40.

⁶⁶ Ibid.

⁶⁷ French, S. and Hodder, A. n.48, 65-185.

⁶⁸ Ibid

⁶⁹ Public and Commercial Services Union (PCS) (2012) ‘There is an Alternative; the Case against Cuts in Public Spending’, and ‘Austerity Isn’t Working; There is an Alternative’ Available at: <http://www.pcs.org.uk/en/campaigns/campaign-resources/austerity-isnt-working-there-is-an-alternative.cfm> (Last accessed; 09/08/2018)

⁷⁰ <https://www.bbc.co.uk/news/uk-15953806> (Last accessed: 20/09/2019)

⁷¹ French, S. and Hodder, A. n.48, 165-185.

⁷² Ibid

⁷³ Gall, G. (2017). *The New, Radical Independent Unions - Is Small Necessarily Beautiful?*. Available at: <https://www.huffingtonpost.co.uk/gregor-gall/the-new-radical->

For example, the Independent Workers of Great Britain union (IWGB) have effectively used high-profile protest activity to apply pressure to employers and win concessions.⁷⁴ Similarly, pressure groups who are not trade unions but campaign on labour issues, have developed and adopted the strategy of generating publicity. For example, Better Than Zero⁷⁵ is a Scottish Trade Union Congress affiliated pressure group which has had success in campaigns relating to the use of zero-hour contracts and tipping policies. Often these campaigns involve large well-publicised demonstrations.⁷⁶

Despite Unite denying that the leverage strategy was deployed during the Grangemouth dispute,⁷⁷ there too there is some evidence of French and Hodder's 'leverage type activity'. In addition to the protest activity which attracted much of the negative press attention, the union engaged in publicity-generating tactics which might damage the employer's credibility and reputation. For example, while consulting on changes to the terms and conditions Ineos issued employees with consent forms, which union members chose to return to the union, rather than Ineos "as a show of collective resistance".⁷⁸ Similarly, in the face of the employer's claims relating to the financial insecurity of the plant, the union had Ineos' accounts forensically examined,⁷⁹ and engaged with chartered accountant Richard Murphy to demonstrate that the company's alleged financial distress necessitating concessions from the workforce was misleading.⁸⁰

It may be, then, that leverage campaigning has its origins in the development of comprehensive campaigning in the US. There, the strategy of targeting an employer's

independe_b_18529226.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xllmNvLnVrLw&guce_referrer_sig=AQAAAGNtLh-EvoGtftmrOqjq5nzDtAVy. (Last accessed 21/09/2019).

⁷⁴ Osborne, H and Butler, S. (2016). *Collective action via social media brings hope to gig economy workers*. Available at: <https://www.theguardian.com/money/2016/aug/19/collective-action-via-social-media-brings-hope-to-gig-economy-workers>. (Last accessed 21/09/2019.)

and Beckett, A. (2015). Vuvuzelas Unite. Review of *Trade Union Bill (HC Bill 58)* and *Trade Union Membership 2014: Statistical Bulletin*. *London Review of Books* vol. 37 no. 20 pp. 25-28.

Available: <https://www.lrb.co.uk/v37/n20/andy-beckett/vuvuzelas-unite> (Last accessed 2/09/2019.)

⁷⁵ <http://www.betterthanzero.scot/events> (Last accessed: 20/09/2019)

⁷⁶ Ibid

⁷⁷ <https://www.bbc.co.uk/news/uk-politics-24976760> (Last accessed: 20/09/2019)

⁷⁸ M Lyon n.35, 162

⁷⁹ Ibid, 126

⁸⁰ Ibid, see also <https://www.bbc.co.uk/news/uk-scotland-2456047> (Last accessed: 20/09/2019)

reputation through high-profile publicity-generating activities – including protest activity – began to develop in the 1970s. There appear to be a number of tactics common to both the comprehensive and leverage strategy including: litigation, distributing critical leaflets and engaging professional services and litigation to challenge employer’s claims. What they have in common is that they undermine the employer’s credibility, publicise the dispute, and are lawful. Whilst the choice of campaign tactics will vary depending on what will attract publicity, and most affect the employer’s reputation, protest is a consistent feature of comprehensive campaigning and leverage alike.

1.3 The Law of Industrial Action

Campaign strategies and tactics do not develop in a vacuum, and the legal framework regulating industrial action is likely to have a significant influence over their development. The US experience of developing comprehensive campaigns in light of the First Amendment is evidence of this. Could it be the case that the development of leverage campaigns in the UK has similarly been motivated by the need to develop an effective strategy which is not constrained by a restrictive legal framework? A comparison between the US experience of regulating comprehensive campaigns, and the UK law of industrial action demonstrates that much of the effectiveness of the leverage strategy rests on the assumption that it is lawful, and not dependent upon compliance with onerous statutory requirements in order to be lawful.

1.3.1 The National Labor Relations Act

In the US, like the UK, the law governing industrial action sets out the parameters within which industrial action is lawful. Section 7 of the National Labor Relations Act 1935 (NLRA) confers a right to “self-organisation, to form, join, or assist labor organisations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or

other mutual aid or protection...”⁸¹ Collective bargaining is defined as “the duty to bargain in good faith”, with the objects of collective bargaining being restricted to wages, hours, and terms and conditions of employment.⁸² That right includes a right to strike,⁸³ but restricts other tactics short of a strike. It specifically prohibits types of picketing,⁸⁴ secondary action,⁸⁵ and secondary boycotts in s8(b)(4)(ii)(B). Inserted by s158 of the Labor Management Reporting and Disclosure Act 1959 in an attempt to close perceived loopholes, s8(b)(4)(ii)(B) renders it an unfair labour practice to “threaten, coerce or restrain any person engaged in commerce, or in an industry affecting commerce, where the object is forcing or requiring any person to cease using, selling, handling, transporting, or otherwise, dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person”.⁸⁶ Although some tactics have been protected through the ‘publicity proviso’ (*National Labor Relations Board v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*),⁸⁷ for the most part, s8(b)(4)(ii)(B) could render many comprehensive campaign tactics unlawful. As a result of litigation arguing that s8(b)(4)(ii)(B) is unconstitutional, because it renders unlawful speech that is protected by the First Amendment, the US law of industrial action has developed in a way which protects and incentivises comprehensive campaign tactics.

The First Amendment prevents government from making any law abridging freedom of speech, beyond a “substantial government interest, and where that interest is not content-neutral.”⁸⁸ Interpreting restrictions on free speech is subject to the constitutional avoidance doctrine, whereby the “elementary rule... [is] that every reasonable construction must be resorted to in order to save a statute from unconstitutionality”.⁸⁹ Legislation, the US equivalent of an interdict (known as enjoining), and arguably s8(b)(4)(ii)(B) itself may all therefore be unconstitutional if

⁸¹ NLRA s7

⁸² NLRA s9

⁸³ NLRA s13

⁸⁴ NLRA S8(b)(7)

⁸⁵ NLRA S8(b)(4)

⁸⁶ NLRA S8(b)(4)(ii)(B)

⁸⁷ Ibid

⁸⁸ *United States v O’Brien* 391 US 367 (1968)

⁸⁹ *RB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979), *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203-04 (1944), *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469 (1941). Cited in Estlund, C. (2002). The Ossification of American Labor Law. *Columbia Law Review*. 102 (6), 1580

they restrict freedom of speech.⁹⁰ Reconciling s8(b)(4)(ii)(B) with the First Amendment, in light of non-traditional comprehensive campaign tactics, and in accordance with the constitutional avoidance doctrine, has posed a significant challenge to the courts.⁹¹

In *Thornhill v Alabama (Thornhill)*⁹² Justice Murphy extended the protection of the First Amendment to include consumer picketing as a means of disseminating the facts of a labour dispute.⁹³ Based on the social role and democratic nature of industrial action, Justice Murphy thereby rendered the Alabama statute prohibiting picketing unconstitutional. The *Thornhill* doctrine has since been limited to circumstances of a supplier/distributor relationship (*NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*)⁹⁴ and to instances where only a part of, rather than the whole, business is targeted (*NLRB v. Retail Store Employees Union (SafeCo)*).⁹⁵ However, in a number of cases the courts have found that comprehensive campaign tactics, and arguably even the strategy,⁹⁶ are protected by the First Amendment. Following the constitutional avoidance doctrine, the strategy and tactics could not therefore be reached by s8(b)(4)(ii)(B).

There have been some tentative attempts by employers to argue that the strategy is unlawful as extortion under the Racketeer Influenced and Corrupt Organisations Act (RICO),⁹⁷ on the basis that the campaign would continue until a union's demands are accepted.⁹⁸ However, what the litigation on specific tactics indicates is that if a tactic can be likened to protest activity, and distinguished from picketing,⁹⁹ the protection of the First Amendment prevents s8(b)(4)(ii)(B) from reaching the activity. Thus,

⁹⁰ Garden, C n.560

⁹¹ Ibid

⁹² *Thornhill v Alabama* 310 U.S. 88 (1940)

⁹³ Ibid

⁹⁴ *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)* 308 F.2d 311 (D.C. Cir. 1962)

⁹⁵ *NLRB v. Retail Store Employees Union*, 447 U.S. 607 (1980)

⁹⁶ Gardner, C. n.560

⁹⁷ Ibid, 2621-2629

⁹⁸ Levin, B. (2011) Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim, *Alb. L. Rev.* 75 (1) 559 - 631

⁹⁹ Rakoczy, K. L. (2007). On Mock Funerals, Banners and Giant Inflatable Rat Balloons; Why Current Interpretation of s8(b)(4)(ii)(B) NLRA Unconstitutionally Burdens Union Speech. *American University Law Review.* 56 (6), 1621-1654.

activities such as handbilling (distributing flyers),¹⁰⁰ the use of banners,¹⁰¹ street theatre,¹⁰² and the stationing of an inflatable rat-shaped balloon,¹⁰³ are effectively authorised, thereby creating an incentive for their use.

1.3.2 The Golden Formula

Since the end of the nineteenth century, the bedrock of the UK framework regulating industrial action was the so-called ‘golden formula’.¹⁰⁴ The term was originally coined by Lord Wedderburn to describe the parameters within which industrial action would be lawful.¹⁰⁵ By stipulating that actions must be undertaken in contemplation or furtherance of the trade dispute,¹⁰⁶ it neatly encapsulates the principle that the lawfulness of tactics employed in the course of industrial conflict should be decided with reference to their *purpose* of furthering a trade dispute.

The test, “in contemplation or furtherance of a trade dispute”, first appeared in the Conspiracy and Protection of Property Act 1875 (hereafter CPPA). That legislation decriminalised industrial action, and later formed the basis of the framework established by the Trade Disputes Act 1906 (hereafter TDA). The TDA immunised industrial action against liability in delict, provided it was undertaken in ‘contemplation or furtherance of a trade dispute.’¹⁰⁷ This legislative intervention, following the recommendations of the 1894 Royal Commission on Labour,¹⁰⁸ were indicative of a strong commitment on the part of the Liberal Government to collective

¹⁰⁰ DeBartolo Corp. v. Gulf Coast Trades Council, 485 U.S. 568 (1988)

¹⁰¹ Overstreet v United Brotherhood of Carpenters Local 1506 409 f.3d 1699

¹⁰² Sheet Metal Workers Local # 15 (Brandon Regional Hospital), 356 NLRB No. 162 (2011).

¹⁰³ Eliason, 355 NLRB No. 159

¹⁰⁴ Wedderburn, n.2, 520-521

¹⁰⁵ Simpson, B. (1983). A Not So Golden Formula; In Contemplation of Furtherance of a Trade Dispute After 1982. *Modern Law Review*. 46 (1), 463-477.

¹⁰⁶ Wedderburn, n.2, 520

¹⁰⁷ TDA 1906 s1.

¹⁰⁸ Howell, C (2007). *Trade Unions and the State; The Construction of Industrial Relations Institutions in Britain 1890-2000*. Princeton: Princeton University Press, 64-65

bargaining, and notably correlated lawfulness with the purpose of the action taken, whatever the action should consist of.

That commitment to collective bargaining and to the principle of the golden formula, which started with the CPPA and TDA, was also found in later legislation including the Trade Union and Labour Relations Acts of 1974 and 1976.¹⁰⁹ A similar, initial commitment on the part of the judiciary is evident in the case of *Crofter Hand Woven Harris Tweed Co v Veitch (Crofter Hand Woven Harris Tweed)*.¹¹⁰ Therein, the ‘predominant object’¹¹¹ of the combiners, of “securing the economic stability of the island industry”¹¹² through “a better basis for collective bargaining, and thus directly improve wage prospects”¹¹³ was held to render the imposition of an embargo lawful. Despite the discovery in 1964 of the delict of intimidation, including intimidation by threatening breach of contract,¹¹⁴ legislative efforts in the 1960’s and 1970’s largely retained a commitment to the statutory principle encapsulated by the golden formula. From 1979, however, Conservative and Labour Governments alike imposed additional limitations to the scope of lawful industrial action that had more to do with the nature of the action and the procedure for authorising it, than its purpose. The relevant law is now found in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

1.3.3 The Trade Union and Labour Relations (Consolidation) Act 1992

A series of incremental reforms undertaken by the Conservative Governments of 1979-1997, and the Labour Governments of 1997-2010 shaped the framework contained in the TULRCA, as it was immediately prior to the coming into force of the TUA. The Conservative reforms should be understood as having taken place during a period of significant industrial unrest – including the Winter of Discontent (1978-

¹⁰⁹ Simpson, B. n.105, 466-467

¹¹⁰ *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435

¹¹¹ *Ibid*, as per Viscount Simon, 447.

¹¹² *ibid*

¹¹³ *ibid*

¹¹⁴ *Rookes v Barnard* [1964] AC 1129

1979), the Miner's Strike (1984-1985), the Wapping Dispute (1989) and the Summer of Discontent (1989).¹¹⁵ They should also be understood as pursuant to an economic policy which required restructuring of the labour market in the name of increased market flexibility, and which interpreted trade unions to be obstructions to that policy.¹¹⁶ Arguably, this period, characterised as one of 'decollectivisation',¹¹⁷ represented the abandonment of a public policy of supporting collective bargaining, which was not reversed by later Labour Governments. The incremental reforms restricted the scope of lawful industrial action in a number of ways not contemplated by the 1906 Act. However, many of these restrictions – namely the definition of a trade dispute, procedural requirements appended to the golden formula, and regulation of specific tactics – are carefully avoided in leverage campaigns, and especially by protest activity.

The narrowed definition of a trade dispute, introduced by section 18 of the 1982 Employment Act, and now contained in s219 TULRCA, confers statutory immunity where the industrial action "relates wholly or mainly"¹¹⁸ to a trade dispute.¹¹⁹

Although the list defining a trade dispute remains unchanged from those set out in s29(a)-(g) of the 1974 Act (now contained in TULRCA s244 (a)-(g)), which mirrored the objects of collective bargaining, the relationship between the action and the dispute was required to be more proximate.

Influenced still by the voluntarist approach, the 1980 Employment Act provided for balloting for industrial action if the unions chose to do so.¹²⁰ It was not until 1984 – following the Miner's strike – that the Trade Union Act of that year introduced mandatory secret balloting,¹²¹ which required a majority 'yes' vote.¹²² (In 1993, it was

¹¹⁵ Howell, C. n.108, 31

¹¹⁶ Davies, P and Freedland, M. (1993). *Labour Legislation and Public Policy*. London: Clarendon Press. 425-436

¹¹⁷ Howell, C. (2007). The Decollectivization of Industrial Relations, 1979-1997. In: Howell, C. n.108, 131-174.

¹¹⁸ Employment Act 1982 s18

¹¹⁹ as defined in s29(a)-(g)

¹²⁰ Howell, C. n.117

¹²¹ Trade Union Act 1984 s10

¹²² Ibid s11

provided that the vote must be postal.)¹²³ In addition, the 1984 Act prescribed a number of the features of the ballot: that an appropriate question be asked,¹²⁴ and that all those entitled to vote be informed of the results of the ballot – including the number of yes and no votes, and spoiled papers – as soon as was reasonably practicable.¹²⁵ These requirements are replicated in sections 226-234 TULRCA, and are increasingly determinative of the lawfulness of industrial action. Non-compliance with the procedural requirements has given rise to interim interdicts on the grounds that technical breaches of the provisions renders the action unable to benefit from statutory immunity, and therefore unlawful.¹²⁶

Since 1875,¹²⁷ the lawfulness of the tactic of picketing has been dependent not simply on its purpose, but also on how it is carried out. Prior to the coming into force of the TUA, s220 TULRCA stipulated that in order to be lawful, picketing had to be at the “place of work” of the picketers; moreover, according to the *Code of Practice on Picketing* no more than six workers should picket at any one location.¹²⁸ In a similar effort to regulate how a tactic is carried out, the 1980 Employment Act¹²⁹ largely prohibited (with some exceptions) secondary action, and entirely prohibited it under the 1990 Employment Act.¹³⁰ These restrictions continue under the TULRCA,¹³¹ and in the most recently updated *Code of Practice on Picketing*. The judicial rhetoric of cases since this restriction is in stark contrast to that of the court in *Crofter Hand Woven Harris Tweed*,¹³² as little attention is paid to the predominant object of the combiners.¹³³ Rather, the judges pay significantly more attention to answering

¹²³ Trade Union and Employment Reform Act 1992 s18

¹²⁴ Trade Union Act 1984 s10(4)

¹²⁵ Ibid s11

¹²⁶ See [2009] EWHC 2852 (QB) (EDF v RMT); [2010] EWHC 501(QB) (Milford Haven) and [2009] EWHC 3541(QB) (BA v Unite) cited in Dukes, R. (2011). n.9, 302-311.

¹²⁷ CPPA 1875 s7.

¹²⁸ Code of Practice on Picketing, section E subsection 56.

¹²⁹ Employment Act 1980 s17.

¹³⁰ Employment Act 1990 s.4

¹³¹ TULRCA s220 on peaceful picketing and TULRCA s224 on secondary action.

¹³² [1942] AC 435

¹³³ Ibid

whether the means used violate the terms of the legislation:¹³⁴ asking, for example, whether the union has engaged in secondary action,¹³⁵ or picketing.¹³⁶

As is clear from the above discussion, the restrictions of the 1980s, 1990s and 2000s developed *around* the golden formula. The legal framework retained a basic commitment to the statutory principle that industrial action taken in furtherance of a trade dispute should be lawful. However, a number of onerous procedural requirements were added, together with the regulation,¹³⁷ or prohibition,¹³⁸ of some specific types of action. The resulting framework was significantly more restrictive than the 1906 Act envisaged. As such, it created an incentive for unions to develop means, like those common to leverage and comprehensive campaigns, of taking action which fell outside of the framework governing industrial action, and so did not have to comply with its restrictive rules.

1.4 A Human Right to Strike; A Human Right to Protest

In addition to the assumption that protest activity by unions avoids the onerous requirements of the TULRCA, might it also be assumed to be a “jealously protected”¹³⁹ right under the European Convention on Human Rights (ECHR) and the Human Rights Act 1998? By reviewing judicial interpretations of the right to strike, compared with the right to protest, it is possible to demonstrate that the effect of the ECHR on labour rights has been to authorise restrictions on the exercise of the right to strike. Since the right to protest is more robustly protected by the ECHR than the right to strike, this may act as a further incentive for trade unions to construct their collective actions as protest rather than as industrial action, a specifically labour right.

¹³⁴ Bercusson, B. (1977). One Hundred Years of Conspiracy and Protection of Property: Time for Change. *Modern Law Review*. 40 (3), 269

¹³⁵ *Dimbleby and Sons v National Union of Journalists* HL ([1984] 1 WLR 427)

¹³⁶ [1975] 3 All E.R. 1

¹³⁷ TULRCA s220

¹³⁸ TULRCA s224

¹³⁹ *Thames Cleaning and Support Services Ltd v United Voices of the World* [2016] EWHC 1310 (QB), [44]

In respect of both a right to strike and to protest, two of the rights contained in the ECHR may be relevant: Article 10 (conferring the right to freedom of expression), and Article 11 (conferring the right to freedom of association). It is now well established law that Article 11 includes a right to strike,¹⁴⁰ although the question remains unanswered whether this is an essential element of protected freedom of association.¹⁴¹ It has also been said that there is a “functional synergy”¹⁴² between Article 10 and Article 11 when people come together in order to express a view.¹⁴³ Thus in addition to the right to strike, their combined effect is to create a human right to protest,¹⁴⁴ interference with which must be justified by reference to Article 10(2) or Article 11(2), as prescribed by law, and as proportionate and necessary in a democratic society.¹⁴⁵

Regarding the human right to protest, the European Court of Human Rights (ECtHR) has reiterated that “any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption to traffic, and that it is important for public authorities to show a certain degree of tolerance towards peaceful gathering if the freedom of association is not to be deprived of all substance”.¹⁴⁶ In the UK the question of consistency of the law governing protest activity with Convention Rights has commonly arisen in relation to the criminal law, namely in terms of breaches of the peace and contravention of s137 of the Highway Act 1980. In respect of the criminal law in *Steel v UK*¹⁴⁷ the court found that although the protests physically impeded activities, they constituted expressions of opinion within Article 10, and so the arrest and detention of Steel interfered with rights under Article 10.¹⁴⁸

¹⁴⁰ *Demir and Baykara v Turkey* [2008] ECHR 1345; (2009) 48 EHRR 54, *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251, and, *National Union of Rail, Maritime and Transport Workers v United Kingdom* (Application No 31045/10), 8 April 2014

¹⁴¹ Bogg, A and Ewing, K.D. (2014). The Implications of the RMT case. *Industrial Law Journal*. 43 (3), 221-252

¹⁴² Meade, D (2010). *The New Law of Peaceful Protest; Rights and Regulation in the Human Rights Era*. Oxford: Hart Publishing

¹⁴³ *Molnar v Hungary* (App 10346/05) 7/10/2008 cited in Meade, D (2010). *The New Law of Peaceful Protest; Rights and Regulation in the Human Rights Era*. Oxford: Hart Publishing p62

¹⁴⁴ *Steel and Morris v UK* [2005] ECHR 103 and *Zilibereg v Moldova* (Application no. 61821/00)

¹⁴⁵ ECHR Article 10(2) and Article 11(2)

¹⁴⁶ *Kudrevicius and others v Lithuania* (2016) 62 E.H.R.R. 34, [150]

¹⁴⁷ *Steel v UK* (1999) 28 E.H.R.R 603

¹⁴⁸ *Ibid* [29]

In *DPP v Zeigler*¹⁴⁹ the importance of the Convention Rights was made quite explicit¹⁵⁰ when the Judge stated that “the lawful exercise of Convention Rights in Articles 10 and 11 will mean that the prosecution have failed to prove that the defendant’s use of the highway was “unreasonable”. For that reason, the defendant will have “lawful excuse” for an obstruction of the highway. It will therefore not be a criminal offence.”¹⁵¹ Thus, protest activity in the UK must be considered in light of the Convention rights and attracts substantial and far-reaching protection from legislation which would restrict the exercise of those rights.

By comparison, in respect of the right to strike, the effect of the Convention Rights has tended to be to authorise restrictions. The jurisprudence of the ECtHR has gradually developed to acknowledge that ‘labour rights’ such as the right to collective bargaining,¹⁵² and the right to strike¹⁵³ are protected by Article 11 of the Convention. However, when trying to exercise those rights the courts have found that the UK’s onerous restrictions on industrial action, including strike action, fall within the wide margin of appreciation afforded to the UK.¹⁵⁴ In *RMT v UK*¹⁵⁵ the court found that the UK’s blanket statutory prohibition of secondary action was a justified and proportionate measure within the margin of appreciation for securing the trade union freedom conferred by the Convention Rights.¹⁵⁶ In that case the court was unwilling to determine whether the right to strike formed an “essential element” of the right to collective bargaining under Article 11, describing it as an “accessory”¹⁵⁷ to it. This suggests that legislative restrictions on any trade union activity that could be described as “accessory” might be lawfully restricted. Thus, in the labour context, the ‘dramatic

¹⁴⁹ *DPP v Zeigler* [2019] 2. W.L.R 1451

¹⁵⁰ Pritchard, M. (2019). *DPP v Ziegler: a clear framework for dealing with protest cases*. Available at: <http://www.centralchambers.co.uk/dpp-v-ziegler-a-clear-framework-for-dealing-with-protest-cases/>. (Last accessed 21/09/2019.)

¹⁵¹ [2019] 2. W.L.R 1451 [69]

¹⁵² *Demir and Baykara v Turkey* [2008] ECHR 1345; (2009) 48 EHRR 54

¹⁵³ *National Union of Rail, Maritime and Transport Workers v United Kingdom* (Application No 31045/10), 8 April 2014

¹⁵⁴ *Ibid*

¹⁵⁵ Application No 31045/10, 8 April 2014

¹⁵⁶ Bogg, A, and Ewing, K.D. n.141, 248-249

¹⁵⁷ Application No 31045/10, 8 April 2014

implications¹⁵⁸ of *Demir and Baykara v Turkey*¹⁵⁹ and other promising litigation¹⁶⁰ have not entirely been realised¹⁶¹ and have even been retreated on,¹⁶² leaving *labour's* rights severely restricted, and unprotected.

Protest activity during industrial disputes – like that common to leverage campaigning, and evident in the 2013 Grangemouth dispute – may be understood to fall somewhere between these two concepts. On the one hand it might be interpreted as protest activity which attracts substantial protection by the Convention Rights. On the other hand, its industrial context might be understood to be reason to characterise it as an exercise of freedom of association, in which case the kind of onerous restrictions which have been found to be compliant with Convention Rights might again be judged acceptable.

The importance of that distinction – between the right to protest and labour rights is demonstrated by briefly considering the US litigation concerning comprehensive campaigns under the First Amendment where the distinction has been made quite explicit. In those cases, a judicial line of reasoning developed which likened comprehensive campaign tactics to political protests, and distinguished them from the conduct of picketing (associated with labour). For example, in *DeBartolo Corp. v. Gulf Coast Trades Counc., (DeBartolo II)*¹⁶³ the handbills were not considered typical commercial speech as “they pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace”.¹⁶⁴ Similarly the use of banners, rat-shaped balloons and other expressive activities have been protected by the First Amendment¹⁶⁵ – in the same way as symbolic speech of street theatre during abortion protests, and flag burning¹⁶⁶ have

¹⁵⁸Ewing, K.D, and Hendy, J QC. (2010). Dramatic Implications of Demir and Baykara. *Industrial Law Journal*. 39 (1), 2-51.

¹⁵⁹ [2008] ECHR 1345; (2009) 48 EHRR 54

¹⁶⁰ For example; *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 2251, *Wilson, Palmer and ors v UK* (2007) 35 EHRR 20; [2002] IRLR 568

¹⁶¹ Arabadjeva.K (2017). Another Disappointment in Strasbourg; *Unite the Union v United Kingdom*. *Industrial Law Journal*. 46 (2), 289-302

¹⁶² *Ibid*,

¹⁶³ 485 U.S. 568 (1988)

¹⁶⁴ *Thornhill v Alabama* 310 U.S. 88 (1940)

¹⁶⁵ *Eliason*, 355 NLRB No. 159

¹⁶⁶ *Texas v. Johnson*, 491 U.S. 397, 404 (1989)

been constitutionally protected. As such, they attracted a high degree of First Amendment protection.

The judicial reasoning of those decisions is explored in greater detail in chapter four, however, for the meantime what it suggests is that in international human rights instruments economic or social rights do not enjoy the same degree of protection and enforceability as social or political rights.¹⁶⁷ On the basis of the comparison with the US litigation, the protests by unions, described as ‘leverage’, are assumed to be protests which should enjoy substantial protection under the ECHR. However, as will also be further explored in chapter four, and is indicated by the different treatment of the right to protest and the right to strike, that protection is very much contingent upon the judicial interpretation of the activity. Whether the protests associated with leverage campaigning would be treated as protests (like the US), or as an accessory to the right to strike and freedom of association, remains to be litigated. However, given the ECtHR’s willingness to authorise restrictions which effectively create an unexercisable right to secondary action¹⁶⁸ in the UK it does not seem implausible that legislative restrictions on leverage protests could fall within the margin of appreciation.

1.5 Conclusion

The legal framework regulating industrial action developed out of a public policy endorsement of collective bargaining and the recognition of the restrictions imposed upon it by the law of tort or delict. It was originally constructed around the golden formula, which encapsulated the statutory principle that the ‘purpose’ of industrial action should delineate its lawfulness, or unlawfulness. The nature of the action taken should be largely unscrutinised. As the law developed in response to changing social and political circumstances, it did so initially around that principle, leaving its essence

¹⁶⁷ Mantouvalou, V. (2012). Are Labour Rights Human Rights?. *European Labour Law Journal*. 3 (1), 151-172.

¹⁶⁸ Bogg, A, and Ewing, K.D. n.141.

intact while imposing additional procedural requirements and specific rules relating to picketing.

As was evident in the development of comprehensive campaigns in the US, restrictive laws can encourage unions to engage in new types of collective action that fall outside the scope of those laws. Leverage is not premised on the traditional threat of economic harm caused by the withdrawal of labour. Rather, it focuses on the reputation of the targeted employer among key stakeholders, by generating substantial publicity and public awareness of the dispute, while remaining within the law. A key means of achieving this is public protest. Not only is the protest an effective means of generating publicity, it is *prima facie* lawful. This is what Len McCluskey meant when he argued that the strategy was both lawful and beyond traditional methods.¹⁶⁹ This is the context, I argue, in which the interventions of the Carr Review, and the Trade Union Act 2016, should be assessed. The development of leverage was closely linked to the terms of the existing legal framework.

¹⁶⁹ McCluskey, L. n.5, 446

2. Chapter 2. The Carr Review

‘The Carr Report: The Independent Review of the Law Governing Industrial Disputes’ (The Carr Review) was commissioned in 2014 to ‘investigate the alleged use of extreme tactics in industrial disputes’.¹⁷⁰ If the Grangemouth dispute and the media reporting thereof created an opportunity for politically acceptable intervention, is it possible that the Government then used the Carr Review to shape a narrative that would justify the kind of intervention it wished to make? Is there evidence to suggest, in other words, that the Government sought to influence the eventual findings of the Review in order that it would legitimise future legislative interventions?

In this Chapter, I contextualise the Review in relation to Government policy and rhetoric of the time. I argue that the Government intended the Carr Review to reach conclusions about the damaging impact of industrial action of a particular type, namely protest activity, and to affirm a narrative that characterises such activity as extreme. Both the terms of the published Review, and the use made of it by the Government, can be seen to reflect the Government’s pre-existing biases. This should come as no surprise when we consider the identity of the Government’s choice of author for the Review and the terms of his remit.

2.1 In Response to the Grangemouth Dispute

Initially the Government was careful to frame its interest in the Grangemouth dispute in terms of its concern for the survival of an important employer and the national infrastructure. During a House of Commons debate, the then Secretary of State for Energy and Climate Change – Mr Edward Davey – responded to questions concerning contingency planning for the closure of the Grangemouth plant. Whilst acknowledging the importance of the plant to both the community and the economy,

¹⁷⁰ *The Carr Review* (October 2014) n.4 [1.4]

Mr Davey limited the Government's interest to "encouraging negotiations and making contingency plans for job centres and fuel provisions following any closure".¹⁷¹ However, once employees had 'practically begged' for the rejected deal to be put back on the table, as *The Guardian* reported,¹⁷² and Ineos had secured Government-backed loans, the dispute reached a conclusion and the rhetoric of the Government shifted. Now it inferred a causative link between the union's conduct and the near-closure of the plant, which merited investigation and, impliedly, legislative intervention. Speaking in the Commons on 30 October 2013, the then Prime Minister, David Cameron, called for a 'proper inquiry'¹⁷³ into what happened at Grangemouth, where he said a "rogue trade unionist...nearly brought the Scottish petrochemical industry to its knees".¹⁷⁴ Francis Maude – then, Paymaster General – defended the call for an inquiry on the basis that when protest activity "lapses into intimidation and inappropriate activity... the public have a right to know what happened".¹⁷⁵ He cited the Grangemouth dispute, arguing that the closure of the plant would have been a "terrible penalty" in terms of lost jobs and damage to the national infrastructure.¹⁷⁶ In this way, the Government gradually shifted its focus onto the conduct of the union, rather than the employer, implying a causal connection between the union tactics and the near-closure of the refinery. In the Press Release announcing the Carr Review, the Government stated that the "resilience of critical infrastructure" – in which it had a "keen interest" – "cannot be guaranteed without effective workforce relationships. These relationships, and the law that governs them, have consequences both for the operation of particular, critically important, facilities, as well as more widely in the economy, at both a local and national level."¹⁷⁷ Rhetoric connecting campaign tactics, particularly protest activity, and industrial action with damaging effects therefore underpinned the Review from the outset.

¹⁷¹ Hansard 23/10/2013 Vol 569 Col 303 and 308

¹⁷² Seymour, R. n.26

¹⁷³ HC Hansard 30/10/2013 Vol 569 David Cameron col 922 Available: <https://hansard.parliament.uk/commons/2013-10-30/debates/13103062000024/Engagements> (last accessed: 20/09/2019)

¹⁷⁴ Ibid

¹⁷⁵ www.bbc.co.uk/news/av/uk-politics-24978506/francis-maude-defends-inquiry-into-trade-union-tactics (Last Accessed: 20/09/2019)

¹⁷⁶ Ibid

¹⁷⁷ *The Carr Review* (October 2014) n.4 [2.2]

2.2 The Commissioned Review

The Government had initially envisaged that the Review would be a ‘partnership’ project with a panel of three – including representation from the CBI and TUC.¹⁷⁸ The project would have a broad scope including the underlying causes of industrial disputes and the roles of parties therein, including employers, workers and government.¹⁷⁹ However, in the face of a refusal by the TUC to participate, on the grounds that the Review was little more than a political stunt,¹⁸⁰ it was eventually decided that it should be conducted by a lawyer sitting alone,¹⁸¹ and its remit should be narrower.

In selecting who should conduct the review, the Government sought a ‘senior lawyer’ from ‘outside government’.¹⁸² Given that the Review asked for an assessment of the law¹⁸³ having a lawyer lead it should have lent a measure of credibility both in terms of expertise and political neutrality. The Government’s choice of Bruce Carr QC was nonetheless controversial.¹⁸⁴ It attracted significant criticism from the TUC which voiced its suspicion that Carr had been selected in order to give a legal thumbs up¹⁸⁵ to anti-union policy aims. He stood accused by the TUC of having “made a career out of being anti-union”.¹⁸⁶ Here, the TUC may have had in mind Carr’s representation of the employer in such politically contentious cases as *BA v Unite (BA case)*.¹⁸⁷ During which he described Unite as depriving “literally millions of a happy Christmas” by

¹⁷⁸ Ibid [1.4]

¹⁷⁹ Ibid

¹⁸⁰ www.bbc.co.uk/news/av/uk-politics-24978506/francis-maude-defends-inquiry-into-trade-union-tactics (last accessed 20/09/2019)

¹⁸¹ *The Carr Review* (October 2014) n.4 [1.5]

¹⁸² UK Government, Cabinet Office *Press Office: Government review into the law governing industrial disputes* (04/04/2014), n.7

¹⁸³ *The Carr Review* (October 2014) n.4 [1.4]

¹⁸⁴ <http://www.devereuxchambers.co.uk/barristers/profile/bruce-carr> (Last Accessed 22/10/2019)

¹⁸⁵ McCluskey, L Conference Speech 2014 available:

<http://www.unitetheunion.org/uploaded/documents/Len%20speech11-18561.pdf> (last accessed 22/11/2018) cited in *The Carr Review* n.4 [3.18]

¹⁸⁶ Power in a Union (29 March 2014), ‘Carr Review – “A Party Political Stunt”

<http://www.powerinaunion.co.uk/carr-review-a-party-political-stunt/> (Last Accessed 01/12/2018)

¹⁸⁷ *British Airways PLC v Unite the Union* [2009] EWHC 3541 (QB)

organising industrial action by cabin crew.¹⁸⁸ In court, he successfully persuaded Justice Cox that a strike at that time would be too disruptive¹⁸⁹ and therefore merited being restrained on an interim basis. The TUC would also have been right to argue that there were alternative legal professionals and academics with a similar background in industrial disputes and policy work who could have led the review. For example, John Hendy QC represented the Union in the *BA case*¹⁹⁰ with similar expertise in industrial relations law,¹⁹¹ and having worked on policy proposals such as *Reconstruction after the Crisis*.¹⁹²

Perhaps any perceived biases in the choice of author might have been overcome by sufficiently wide-ranging terms of reference. However, here again there is evidence of a bias in the commissioning of the Carr Review. In the Press Release announcing the Review, the Government set out the terms of reference, requesting: an assessment of the alleged use of extreme tactics in industrial disputes, including so-called leverage tactics, and the effectiveness of the existing legal framework to prevent inappropriate or intimidatory actions in trade disputes, with recommendations for change.¹⁹³ While the Government commissioned the Review in the aftermath of Grangemouth – which formed one of the key areas of interest¹⁹⁴ – the terms of reference contemplated an investigation that extended far beyond the particularities of that dispute and other disputes involving ‘critical infrastructure’. At the same time, however, they limited the purview of the Review very significantly to “extreme” tactics. A number of additional issues were explicitly excluded from the Review: blacklisting, and the procedural requirements of industrial action.¹⁹⁵ For the TUC, these exclusions suggested an inherent bias to the Review as only interested in ‘extreme’ tactics employed by trade unions, and not in those of employers.¹⁹⁶

¹⁸⁸ Milmo, D, and Webb, T. (2009). *British Airways strike: BA-Unite talks continue over 12-day Christmas action*. Available: <https://www.theguardian.com/business/2009/dec/17/british-airways-ba-unite-strike>. (Last Accessed 21/09/2019.)

¹⁸⁹ [2009] EWHC 3541 (QB)

¹⁹⁰ Ibid

¹⁹¹ <http://www.oldsquare.co.uk/our-people/profile/john-hendy-qc> (Last Accessed 22/09/2019)

¹⁹² Ewing, K.D, and Hendy, J QC (2013). *Reconstruction After the Crisis; A Manifesto for Collective Bargaining*. London: Institute of Employment Rights.

¹⁹³ Cabinet Office, *Government Review into the Law Governing Industrial Disputes* (April 2014) n.7

¹⁹⁴ Ibid.

¹⁹⁵ *The Carr Review* (October 2014) n.4, [2.3]

¹⁹⁶ Trades Union Congress (20 November 2013), ‘Press release: TUC calls for a proper national inquiry into blacklisting – not political posturing over union disputes’ Available:

By referring to “extreme tactics, including so-called leverage tactics”¹⁹⁷ the Government implied pre-emptively that leverage *was* “extreme”. No enquiry need be made, they seemed to suggest, as to whether leverage was extreme, had been extreme to date, or could be exercised in the future in a manner that was not extreme. Similarly, in asking for an assessment of the effectiveness of the law in preventing ‘extreme tactics, including so-called leverage tactics’, the Government indicated its condemnation of leverage and its belief that it should be unlawful. The terms of reference also seemed to direct Mr Carr to consider leverage campaigning, as protest activity, in isolation, without attempting to analyse or understand the structural reasons for its use. As was argued in chapter one, a restrictive legal environment is intrinsically linked with the development of leverage. It is telling then, that Mr Carr was only tasked with reviewing the use of leverage and the effectiveness of the law in terms of *preventing* “inappropriate or intimidatory”¹⁹⁸ tactics. He was not asked to consider how or why the unions had begun to use such tactics, nor to consider whether the legal framework itself might be part of the problem.

2.3 Carr’s Approach and Findings

Given that the Government’s biases regarding industrial action were built into the remit of the commissioned Review, it is perhaps unsurprising that Carr’s approach and findings also reflect those biases. Carr’s approach was to separate the two terms of reference, seeking firstly to identify the kind, or type of conduct at issue and secondly to review the effectiveness of the existing law governing that conduct. Both parts were largely informed by the views of individuals, organisations, or their representatives – who I refer to as contributors – who had responded to Carr’s call for submissions. Carr himself acknowledged a number of problems with obtaining information, ranging from trade union’s refusal to participate in what they considered a “political stunt”,¹⁹⁹

<https://www.tuc.org.uk/news/tuc-calls-proper-national-inquiry-blacklisting-%E2%80%93-not-political-posturing-over-union-disputes>
(Last Accessed 22/09/2019)

¹⁹⁷ *The Carr Review* (October 2014) n.4 [1.5]

¹⁹⁸ *Ibid*

¹⁹⁹ Trades Union Congress (29 March 2014), ‘Press release: Commenting on the Carr Review announced by the government today’ Available: <https://www.tuc.org.uk/news/carr-review-nothing->

to employers concerned about damaging their own industrial relations.²⁰⁰ Thus those contributors, who informed both terms of reference, came from a small pool of willing contributors who notably, had been subject to what might be described as ‘leverage campaigns’.

Carr interpreted the terms of reference as follows. Since neither “extreme”, nor ‘intimidatory’, nor ‘inappropriate’ actions were defined by the Government in its terms of reference, Carr relied on the definitions suggested by contributors. In assessing the law, he used the terms leverage, extreme and inappropriate or intimidatory actions interchangeably. In defining ‘leverage’ or ‘extreme’ tactics, Carr turned first to Unite, citing its leverage strategy document and its reference to: “targeting all areas of weakness of an employer” and a “... campaign strategy, underpinned by the escalation of pressure to create uncertainty”.²⁰¹ Carr also referred to Pinsent Masons’ assertion that a common theme of leverage actions was “an attempt to publicly intimidate or humiliate the individual or entity in question in order to pressurise the employer to make concessions... due to personal or economic consequences of such action.”²⁰² And he referred to the Engineering and Construction Industry Association (ECIA) description of ‘leverage’ as seeking to “extend the intimidation and disruption to those parties indirectly involved e.g. shareholders, suppliers and customers, and seek publicity...to make public the discomfort they are causing – in attempts to embarrass and further intimidate...”.²⁰³ The definitions cited by Carr share a number of common features: they all suggest that leverage is directed at suppliers, customers and shareholders, and senior management, and they agree that the purpose of leverage is to direct intimidation, disruption and humiliation at those parties to gain concessions.

Although Carr offered no definition of ‘leverage’ or extreme, or any specific tactics that would be subject to review, he set out early on that “where information was

more-%E2%80%9Cheadline-grabbing-party-political-stunt%E2%80%9D-says-tuc_(Last Accessed 22/09/2019)

²⁰⁰ *The Carr Review* (October 2014) n.4 [3.35]

²⁰¹ *The Carr Review* (October 2014) n.4 [2.10]

²⁰² *Ibid* [2.14]

²⁰³ *ibid* [2.17]

provided where a party believed the tactics used were ‘extreme’, then these should be the subject of consideration.’²⁰⁴ In other words, the views of contributors as to what should constitute ‘leverage or extreme tactics’ played an important role in determining the content of the Review. The contributions that Carr relied on so heavily were made in part by companies which had been the target of leverage action, or their legal representatives. Ineos has already been mentioned for its involvement in the high-profile 2013 Grangemouth Dispute. Pinsent Mason’s website boasts success in “advising a major mechanical and engineering contractor in injunction proceedings in the High Court, seeking to prevent Unite calling on employees to take industrial action... and obtaining an injunction preventing activists from targeting the house of a senior executive”.²⁰⁵

In meeting the first term of reference, Carr outlined nine disputes, giving an overview of the issue, the chronology of the dispute, and the conduct involved. In meeting the second term, he provided an overview both of the law governing the conduct identified by the initial review of the disputes, and the views of the contributors as to its effectiveness. Both the choice of disputes and Carr’s categorising of ‘extreme’ conduct suggest that the Review – perhaps predictably – implied a close connection between ‘extreme’ tactics and leverage campaigning, a high-degree of prevalence of these tactics in industrial action, and a failure in the legal framework to constrain them.

Turning first to the choice of disputes used to assess the use of extreme or leverage tactics (the First Term of Reference). This was based both on submissions to the Review, and on research undertaken by Carr’s team to identify disputes as including ‘leverage tactics’.²⁰⁶ The first four – the Ineos dispute at the Grangemouth Chemicals Refinery, disputes in London Underground Ltd. Transport for London, Fire and Rescue Services Disputes, Cleaners disputes, and the Total Lindsey Oil Refinery dispute – were chosen because they received submissions which specifically

²⁰⁴ *ibid* [2.8]

²⁰⁵ <https://www.pinsentmasons.com/en/expertise/services/employment/industrial-relations/> (Last Accessed 20/11/2018)

²⁰⁶ *The Carr Review* (October 2014) n.4 [4.4]

referenced those disputes. The second four – the BESNA Dispute, London Buses disputes, Howdens Joinery dispute and the DP World dispute – were chosen on the basis of research, relying primarily on publicly available material, which identified the disputes as either official Unite ‘leverage’ campaigns, or as exhibiting ‘leverage-style behaviour’.²⁰⁷ Had these disputes been chosen in pursuit of a definition of leverage-style tactics their inclusion may have been prudent. However, their inclusion was pursuant to the first term of reference, which asked for an ‘assessment of the alleged use of extreme tactics in industrial disputes’.²⁰⁸ This might have called for a review of a range of campaigns, including those in which no ‘extreme’ or ‘leverage’ tactics featured, or leverage tactics which were exercised peacefully. By reviewing only those nine disputes which might be characterised as including extreme tactics the Carr Review both creates an association between leverage campaigns and ‘extreme tactics’, and implies that the conduct is common to, or representative of, industrial disputes generally.

As part of the second term of reference, Carr extrapolated from the review of disputes, eight ‘themes’ of industrial action which were used to structure the assessment of the legal framework.²⁰⁹ Within each ‘theme’ the Review first outlined the kind of conduct falling within that theme, and then the relevant law in terms of potential sources of liability and remedies. Each theme also included an overview of the views of the contributors as to the effectiveness of that law. Review of some of these themes, and how Carr came to categorise the conduct in this way, indicates a determination to suggest that the ability of labour to protest in furtherance of a trade dispute presents a gap in the legal framework.

Of course, to some extent these ‘themes’ were limited by the fact that the terms of reference asked only about the effectiveness of the law in relation to ‘inappropriate or intimidatory’ conduct, and by Carr’s reliance upon the views of the contributors. However, while the chronology of the disputes offered by the Review provided some context for the escalation into the use of ‘extreme’ tactics, the effect of categorising

²⁰⁷ *ibid* [4.4]

²⁰⁸ *ibid* [1.5], my emphasis

²⁰⁹ *ibid* [1.5]

the conduct as ‘themes’ is to imply a high degree of prevalence, or recurrence, of these tactics in industrial disputes. Further, the effect of categorising the conduct and using this to structure the opinions as to the effectiveness of the law, suggests that it is the ability to engage in any of the ‘themes’ which presents a gap in the legal framework. This is particularly problematic given that some of those ‘themes’ describe conduct which is lawful, and not obviously extreme. For example, themes two and six – protests organised in furtherance of a trade dispute,²¹⁰ and trade union communication with third parties to try and influence the outcome of a dispute,²¹¹ are not obviously, in and of themselves, representative of extreme, inappropriate or intimidatory conduct. Further, it is not clear how the ability to engage in protests, or communicate with third parties, in fact, represents a gap in the law.

Even if conduct Carr described *within* themes two and six could be accurately described as ‘extreme’, the conduct could be better included elsewhere. For example, although much of the theme of ‘protests in furtherance of a trade dispute’ concerned the location of the protest, the Review also described protests involving large numbers, and lasting for long periods of time. This conduct might have been more accurately included in the themes of intimidation or harassment of either non-striking workers or senior managers.²¹² By setting protest and trade union communications as their own ‘themes’, the Carr Review suggests that it is the ability to engage in protest activity and communicate with third parties, which are themselves inherently extreme activities, and that this presents a gap in the legal framework.

The description of these categories: ‘protest in furtherance of a trade dispute’ and ‘trade union communication with third parties’, distinguishes the activities by their industrial relations context from similar activities out-with industrial relations. The ‘protest in furtherance of a trade dispute’ mirrors the language of the golden formula in s219 of the Trade Union and Labour Relations Consolidation Act. Similarly, theme 6 relates specifically to *trade union* communication with third parties²¹³, rather than,

²¹⁰ *ibid* [5.69]- [5.113]

²¹¹ *Ibid* [5.175]- [5.196]

²¹² *ibid* 105-114

²¹³ my emphasis

for example, communications by political activists. In so doing, the Review seeks to differentiate the activity of protesting and communicating in trade disputes from protests with a more political subject matter. It thereby implies that the gap in the legal framework is the ability of *labour*, or workers, to protest and, through communication, gain the support of third parties.

Carr's final theme, 'Alleged use of Extreme Tactics by Employers', covered only the intimidation of trade union representatives and activists in the form of increasing workloads (on the basis of submissions from the IWGB)²¹⁴ and evidence of a member being hit by a car during an FBU dispute.²¹⁵ Given the one-sided nature of the evidence it is unsurprising that this theme is quite brief, however it may be more interesting for what it excluded. Despite having its origins in the Grangemouth dispute, the Review does not consider the actions of Ineos in deploying their power as owners as a tactic. The dispute at Grangemouth has been described as an 'employers strike'²¹⁶ – on the basis of the employer's claims in the media²¹⁷ and actions – namely writing-down of the stock value to £0,²¹⁸ and cold-shutting down the plant²¹⁹ – which created uncertainty about the financial viability of the plant. As a result, the risk of losing the plant was too great for both the Government and the union. Employees returned to work and Ineos secured substantial Government loans. Yet the Carr Review did not consider these tactics in any of its eight themes.

Similarly, partially due to the terms of reference, the Carr Review specifically excludes some aspects of the law governing industrial action – namely blacklisting, and the pre-action ballot or notification requirements. As a result, it does not consider the use of interim interdict as a tactic of employers. The interim interdict, or injunction, has been identified as a powerful weapon in industrial disputes,²²⁰ and the

²¹⁴ *The Carr Review* (October 2014) n.4 [4.89]

²¹⁵ *ibid* [5.213]

²¹⁶ M Lyon n.35, 162

²¹⁷ Seymour, R. (2013). n.26

²¹⁸ M Lyon n.35, 162

²¹⁹ *Ibid*

²²⁰ G Gall. (2016). Injunctions as a Legal Weapon in Collective Industrial Disputes in Britain 2010-2014. *British Journal of Industrial Relations*. 54 (2), 327-349.

balance of convenience test²²¹ makes it highly likely that an injunction will be granted, particularly where the wider public interest is considered – as it was in the *BA Case*.²²² Even if interdict might be overturned on appeal²²³ the effectiveness of industrial action is often dependent upon the timeliness of the action and maintaining the support of the membership. Both of these factors may be impacted by the time and expense of either re-balloting or appealing the interdict. The Carr Review only refers to injunctions (the English equivalent to interdict) in the context of remedies where workers, or unions, engage in the ‘extreme’ conduct, it does not consider them as employer tactics.

2.4 Responses to the Review

In light of the ultimately scaled-down nature of the Review, it has been suggested that it was a missed opportunity to update the law governing industrial action.²²⁴ At the same time, however, the Review has been much criticised for reading as little more than a series of allegations,²²⁵ since it lacked evidence, and relied instead upon contributors to frame its scope and content. Carr himself acknowledged the lack of evidence,²²⁶ in part blaming the TUC and noting that some employers were reluctant to participate, concerned by the political nature of the Review and that it might damage their own employee relations.²²⁷

Some responses to the Review were less concerned by this lack of evidence, and more so by how the Review has been used. The TUC condemned it as a ‘political stunt’²²⁸

²²¹ *American Cyanamid Co v Ethicon Ltd* (1): HL 5 Feb 1975

²²² *British Airways PLC v Unite the Union* [2009] EWHC 3541 (QB)

²²³ Dukes, R. (2011). The Right to Strike under UK Law: Something More Than a Slogan? *NURMT v SERCO, ASLEF v London & Birmingham Railway Ltd.* *Industrial Law Journal*. 40 (3), 302-311

²²⁴ <http://employment.law-ondemand.com/the-carr-report-and-the-future-of-industrial-relations-in-the-uk-an-opportunity-missed/> (Last Accessed 31/01/2019)

²²⁵ Dukes R, and Kountouris. N. n.12, 358.

²²⁶ *The Carr Review* (October 2014) n.4 [1.7]-[1.8]

²²⁷ *Ibid* [3.30]

²²⁸ www.bbc.co.uk/news/av/uk-politics-24978506/francis-m56p666paude-defends-inquiry-into-trade-union-tactics (Last Accessed 22/09/2019)

to give a ‘legal thumbs up’ to anti-union policy in advance of a general election.²²⁹ Certainly, one of the reasons cited by Carr for failing to fully deliver against the terms of reference, was the increasingly politicised environment in which he worked.²³⁰ The publication of the Review’s findings was pre-empted by a series of policy announcements²³¹ on the future of trade union law. Seemingly unconcerned by the Review’s lack of evidence, the Government used it to support both their version of the problem of leverage, or what it called “wider protests”,²³² and their proposed solutions. When consulting on the Trade Union Bill, the Carr Review was treated as evidence²³³ that industrial action often involves extreme, intimidatory tactics, with the potential to damage the economy,²³⁴ from which the public (who are distinguished as ‘non-striking workers’),²³⁵ should be protected.²³⁶ Similarly, the Review was used to justify proposed measures, ranging from requiring a picket supervisor,²³⁷ to a requirement to publicise plans for industrial action, including protest activity.²³⁸ As the Carr Review did not offer any recommendations for reform the Government was able to selectively apply its findings as though it were evidence to legitimise a perceived problem in industrial action and justify proposed solutions. For example, ACPO’s submissions, despite their response that the law was ‘generally effective’²³⁹ were used to justify the introduction of, amongst others, the picketing supervisor.²⁴⁰ All this without properly acknowledging the lack of evidence which Carr had been careful to explain early on in the Review.²⁴¹

²²⁹ Ibid

²³⁰ *The Carr Review* (October 2014) n.4 [3.37]

²³¹ Seyal, R. (2014). *Union law review frozen after barrister objects to ministerial statements*. Available at: <https://www.theguardian.com/politics/2014/aug/05/union-law-review-barrister-bruce-carr-minister>. (Last accessed 21/09/2019.)

²³² Department for Business, Innovation and Skills (BIS) *The Trade Union Bill: Tackling Intimidation of Non-Striking Workers* (July 2015) BIS/15/415, 4-5
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445439/BIS-15-415-tackling-intimidation-of-non-striking-workers.pdf (Last Accessed: 20/09/219)

²³³ Ford.M, and Novitz. T. n.13, 30

²³⁴ *BIS Tackling Intimidation of Non-Striking Workers*, 2015 n.232, 4-5

²³⁵ *ibid*

²³⁶ Conservative Party Manifesto, Conservative Party ‘*Strong Leadership, a Clear, Economic Plan, a Brighter More Secure Future*’ (2015) available at <https://www.conservatives.com/manifesto2015> (last accessed 20/09/2019)

²³⁷ *BIS Tackling Intimidation of Non-Striking Workers*, 2015, n.232, [14]

²³⁸ *Ibid* [24]

²³⁹ *The Carr Review* (October 2014) n.4 [3.37] in Dukes, R and Kountouris, N. n.12, 358

²⁴⁰ *BIS Tackling Intimidation of Non-Striking Workers*, 2015 n.232 [35]

²⁴¹ *The Carr Review* (October 2014) n.4 [1.7]- [1.8]

While the Carr Review may have been a missed opportunity to gather evidence and put forward sensible proposals for reform, it certainly proved itself valuable to the Government. It was used to legitimise the Government's interpretation of a perceived problem, and justify a range of measures despite the lack of either recommendations to that effect, or supporting evidence.

2.5 Conclusion

The high-profile Grangemouth dispute brought the term 'leverage' to prominence as a description of the trade union's tactics. The presentation of those tactics in the media, and by the Government, provided an opportunity for politically palatable intervention to impose further restrictions on industrial action. It did so on the grounds that industrial action involves the use of extreme, damaging tactics, which represents a gap in the legal framework. That intervention started with the commissioning of the Carr Review to continue to direct the narrative which had surrounded the union's tactics during the Grangemouth dispute.

The full title of Carr's review – 'The Carr Report: The Independent Review of the Law Governing Industrial Disputes' – then, seems somewhat insincere: for being neither independent, nor really a review of the law governing industrial disputes. Neither Bruce Carr, nor the contributors to whom he deferred, can be regarded as 'independent'. And the review which the Government requested appears to concern only very limited forms of industrial action – characterised as 'leverage' and 'extreme' – and excluded much of the law of industrial action.

While it might be unfair to describe the findings of the Carr Review as a foregone conclusion, it is fair to say, I think, that they were unsurprising. The Government's choice of author and terms of reference suggest that the Review was designed to demonstrate the argument that industrial action is increasingly extreme and disruptive.

Bruce Carr QC had already tested that argument in court,²⁴² and the terms of reference were limited to extreme tactics. In part as a result of these limited terms of reference, and partially as a result of Carr's reliance on the views of contributors to define the parameters of the Review, its content was similarly limited, and suggested a prevalence of extreme tactics in industrial action. It further suggested that particular tactics are extreme by virtue of their industrial context.

The suggestion, in other words, was that the ability of organised labour to engage in tactics, like protests activity, represented a gap in the legal framework. Thus, the Review presented a disruptive and damaging version of industrial action, which, arguably, mirrored the Government's view. It was then used in turn by the Government to legitimise their legislative interventions and justify them as solutions to the problem they presented as one of leverage and other extreme union tactics.

²⁴² British Airways PLC v Unite the Union [2009] EWHC 3541 (QB)

3. Chapter 3. The Trade Union Act 2016: Leverage, Law and Policy

Leverage campaigning, and the use of protest activity as a key component of it, developed by reason of a restrictive legal framework and a severely limited right to strike. The assumption of those participating in leverage was that the activity involved was prima facie lawful without any need to have recourse to the statutory immunities provided for in the TULRCA. In the Carr Review, and accompanying Government rhetoric, the Government appears to have presented this as a gap in the legal framework. The Government's response, I argue here, was to seek to legislate to bring that protest activity within the purview of the TULRCA, and thereby restrict labour's right to peaceful protest.

This chapter is concerned with the policy agenda underpinning the TUA – and with the terms of the Act itself. The first two parts of the chapter concern policy. There, I firstly consider the traditional ideology of the Conservative Government in their treatment of trade unionism and industrial action. Secondly, I consider the specific policy objectives of the TUA, addressing the question here of how far the traditional ideology is reflected in those objectives. In the second half of this chapter, I consider the enacted provisions and assess them against the policy aims of the Government. I thereby demonstrate that the TUA was designed to restrict the capacity of organised labour to use protest activity in industrial disputes by subjecting it to the onerous restrictions of the TULRCA.

3.1 Conservative Ideology

According to Davies and Freedland, Conservative policy from 1979-1997 was implemented in a series of initiatives with the cumulative effect²⁴³ of, amongst others, the reduction of trade union power.²⁴⁴ This involved the reversal of corporatism, or

²⁴³ Davies, P. and Freedland, M. n.116, 426

²⁴⁴ Ibid, 436-441

removal of trade unions from the corridors of power,²⁴⁵ the empowering of employers to resist trade unions²⁴⁶ – by providing sanctions against trade unions, and attacks on expressions of solidarity.²⁴⁷

Academic commentary on labour legislation and public policy since 2010 suggests that there is a great deal of consistency between the reforms of 1979-1997 and those enacted by the Cameron and May Governments. In respect of economic, neo-liberal, policies Hepple described the Conservative-Liberal Democratic Coalition (2010-2015) reforms as “back to the future”.²⁴⁸ Citing Wedderburn’s critique of the legislation of the 1980s, Hepple emphasised the extent to which the Coalition Government had relied on ‘evidence’ which was much more anecdotal.²⁴⁹ A similar critique could arguably be levied at the Government’s selective use of the Carr Review – which itself was distinctly anecdotal for its reliance on submissions of contributors.

It is similarly true that many of the justifications for the reforms to employment law during the 1980’s are re-stated in the themes of ‘fairness’ and ‘democracy’ which were advanced by the Government to justify the TUA.²⁵⁰ Further, one of the “unique capacities” of the state is the narration of an authoritative interpretation of an industrial relations crisis”.²⁵¹ The creation of a sense of crisis around leverage evident in the Government’s response to the Grangemouth dispute, and commissioning of the Carr Review²⁵² could be likened to reactions to the high-profile industrial action which dominated the 1980’s.²⁵³ Arguably, this anti-trade union, and an anti-collective industrial action rhetoric underpinning the reforms of the 1980’s, is similarly evident in the policy documents that preceded the TUA.

²⁴⁵ Ibid, 427

²⁴⁶ Ibid

²⁴⁷ Ibid, 428

²⁴⁸ Hepple (2013) 42 (3) Back to the Future; Employment Law Under the Coalition Government *Industrial Law Journal* 203-221

²⁴⁹ Ibid

²⁵⁰ Dukes, R and Kountouris, N. n.12 337-362

²⁵¹ Howell. C. (2007) n.108, 36-37

²⁵² see also chapter 2

²⁵³ Howell. C (2007) n.108

For example, in 2015, prior to the commissioning of the Carr Review, the right-wing Think Tank, ‘Policy Exchange’ published a research note entitled ‘Modernising Industrial Relations’.²⁵⁴ It made a number of recommendations for reform to address the perceived “...shift in the balance of power to unions”.²⁵⁵ The paper identified this shift in: the simple-majority voting system,²⁵⁶ the broadening ‘agenda’ of industrial action²⁵⁷ – such as recruitment, funding and collective bargaining²⁵⁸ – and that the means of industrial action are changing, citing ‘Unions initiating new types of legal action’.²⁵⁹ Although not termed as such, the research paper has arguably therein identified the development of leverage campaigning.

This perception of increasing union power is also reflected in an anti-union, or anti-strike rhetoric narrative evident in both the political sphere and the mainstream media. This narrative generally suggests that either; powerful trade unions, and their leaders, bully members into taking industrial action for political ends, or striking workers, and their leaders, are inconsiderate of the public affected by their industrial action. For example, one of the MPs, calling for anti-strike laws was Boris Johnson who, writing in 2010, argued that “there should be a law against the Tube strike militants wrecking your lives”.²⁶⁰ Similarly, an article in *The Express* described the union leaders involved in the Southern Rail strikes as “swaggering union bully boys who must be brought to heel”, and called for the removal of the statutory immunity.²⁶¹ Following the alternative narrative, in another article in *The Express*, Theresa May’s spokesperson condemned strikes by Southern Rail, Royal Mail and BA in 2016 as having in common a “shared contempt for ordinary people trying to go about their

²⁵⁴ E. Holmes, A. Lilico and T. Flanagan, *Modernising Industrial Relations* (Policy Exchange, 2010) Available at <https://conservativehome.blogs.com/files/modernising-industrial-relations-draft-090910.pdf> (last accessed: 20/09/2019)

²⁵⁵ *Ibid*, 3

²⁵⁶ *Ibid*, 2

²⁵⁷ *Ibid*, 5

²⁵⁸ *Ibid*, 18

²⁵⁹ *Ibid*, 5

²⁶⁰ Johnson, B. (2010). *There should be a law against these Tube strike militants wrecking your lives*. Available: telegraph.co.uk/politics/0/should-law-against-tube-strike-militants-wrecking-lives/. (Last accessed 22/09/2019.)

²⁶¹ Mckinstry, L. (2016). *Swaggering union bully boys must be brought to a heel, blasts Leo McKinstry*. Available: <https://www.express.co.uk/comment/columnists/leo-mckinstry/745007/Southern-rail-strike-union-bully-boys-stopped-Leo-McKinstry>. (Last accessed 21/09/2019.)

daily lives”.²⁶² This differentiating between workers and consumers, or non-striking workers as the Government referred to them²⁶³, seeks to drive a ‘civic wedge’²⁶⁴ between them and thereby suppress powerful coalitions of interest,²⁶⁵ and to reduce the solidarity amongst them, which is often evident in leverage campaigns.

The Conservative ideology of the 1980’s – which, in its fundamental opposition to trade unionism, sought to restrict trade unions access to collective action – is also evident in the rhetoric of the Government which introduced the TUA. The Conservative Government in 2015 similarly characterised industrial action as dangerous and disruptive. However, taking the themes identified by Davies and Freedland as a starting point, Bogg goes further suggesting that the reforms of the TUA present a “much more authoritarian form of Conservatism”,²⁶⁶ in the TUA’s broader determination to “stifle dissent”,²⁶⁷ and solidarity amongst striking workers and consumers.²⁶⁸ I argue that much like their predecessors in the 1980’s that policy objective, given effect by provisions of the TUA, is to attack expressions of solidarity, and empower employers to resist those expressions by restricting labour’s access to, and the effectiveness of their, protests in industrial action.

3.2 Specific Policy Objectives

When the then Secretary of State for Business, Innovation and Skills, Sajid Javid MP, introduced the Trade Union Bill to the House of Commons, he described it as follows: “simply the latest stage in the long journey of modernisation and reform [which would]...put power back in the hands of the mass membership, bring much-needed sunlight to dark corners of the movement, and protect the rights of everyone in

²⁶² Beckett, A. (2011). *Industrial action British unions must defend their right to strike – and become better at it*. Available: <https://www.theguardian.com/commentisfree/2017/jan/09/british-unions-defend-right-to-strike>. (Last accessed 21/09/2019).

²⁶³ BIS *Tackling Intimidation of Non-Striking Workers*, 2015 n.228

²⁶⁴ A Bogg. n.15, 311

²⁶⁵ Ibid

²⁶⁶ Ibid

²⁶⁷ Ibid

²⁶⁸ Ibid

this country – those who are union members... and those hard-working men and women who are hit hardest by industrial action”.²⁶⁹ This introduction neatly summarises the ‘fairness’ and ‘democracy’ justifications advanced by the Government.²⁷⁰ By reviewing the policy documents which informed the Bill, however, including the specific policy objectives outlined in two Consultations, Parliamentary debates, and other influential think tank policy work, I argue in this part of the chapter that there was a public policy of restricting the trade unions industrial power, by restricting the ability of labour to protest.

The 2015 Conservative Manifesto, consistent with the anti-union, anti-strike, and dissent stifling rhetoric, put forward a number of proposed reforms to “protect you from disruptive, undemocratic industrial action”.²⁷¹ Further proposals were made in two Consultations; ‘Tackling Intimidation of Non-Striking Workers’,²⁷² and ‘Ballot Thresholds in Important Public Services’.²⁷³ In ‘Tackling Intimidation of Non-Striking Workers’, the Government outlined its version of the problem in relation to picketing and protest activity. In respect of picketing, the Government emphasised the use of intimidating behaviour, including aggressive language, approaching and following individuals, and evidence of assault of individuals not participating in the picket line.²⁷⁴ It also suggested that this was not limited to the physical picket line as photos of individuals crossing the picket line were posted online as a form of “public shaming”.²⁷⁵ The Consultation also identified ‘wider protests’, defined as “new forms of protest” used to “further industrial disputes” which are outside the scope of the TULRCA,²⁷⁶ as a key area of risk of intimidation. Heavily influenced by the Policy Exchange research note ‘Modernising Industrial Relations’,²⁷⁷ the Consultation on ‘Balloting Thresholds in Important Public Services’ argued that the disruptive nature

²⁶⁹ HC Hansard 14/09/2015 Vol 599 S Javid col 761 Available: <https://hansard.parliament.uk/commons/2015-09-14/debates/150914600001/TradeUnionBill> (last accessed: 22/09/2019)

²⁷⁰ Dukes, R and Kountouris, N. n.12 337-362

²⁷¹ *Conservative Party Manifesto* (2015) n.236, 18

²⁷² BIS *Tackling Intimidation of Non-Striking Workers*, 2015 n.232

²⁷³ Department for Business Innovation and Skills (BIS) *The Trade Union Bill: Consultation on Ballot Thresholds in Important Public Services* (July 2015) BIS/15/418

²⁷⁴ BIS *Tackling Intimidation of Non-Striking Workers*, 2015 n.232 [4]

²⁷⁵ *Ibid*

²⁷⁶ *Ibid* [5]

²⁷⁷ E. Holmes, A. Lilico and T. Flanagan, *Modernising Industrial Relations* n.254, 1, 4-6

of industrial action necessitated a stronger and clearer mandate than was provided by the simple-majority system of the TULRCA prior to 2016.²⁷⁸

Turning first to the perceived problem of intimidation or harassment of non-striking workers, the Government proposed reforms to the law governing picketing, and reforms to regulate ‘wider protests’. In relation to the picket line, the Consultation proposed the creation of the role of picket supervisor. It also proposed that the role-holder should be a trade union official, member, and/or familiar with the *Code of Practice on Picketing (The Code of Practice)*, readily identifiable by wearing an armband or bandage, and should be issued with a letter of authorisation to be shown to police, and employers on demand.²⁷⁹ It was further proposed that all picketing participants should similarly be subject to identification requirements,²⁸⁰ and that a new criminal offence of intimidation on the picket line should be created.²⁸¹ In addressing the ‘wider protests’, or “protests related to picketing”,²⁸² the proposals for reform included a requirement that unions notify the employer, police and certification officer of their intended tactics.²⁸³ That notification would be in the form of a document detailing where and when a protest might take place,²⁸⁴ and confirming that members had been informed of the strategy.²⁸⁵ The proposed notification would also include whether banners and social media would be used.²⁸⁶

In the Consultation the Government acknowledged that none of these proposed reforms could ensure intimidation would not occur, but maintained that they would ensure more effective policing and encourage responsible picketing.²⁸⁷ In my opinion, however, they are better understood as having been directed at the ability of labour to protest. For example, the role of the picket supervisor – without whom the picketing

²⁷⁸ Department for Business Energy and Skills (BIS) *The Trade Union Bill: Government Response to the Consultation on Ballot Thresholds in Important Public Services* (July 2015) BIS/16/15

²⁷⁹ BIS *Tackling Intimidation of Non-Striking Workers*, 2015 n.232 [14]

²⁸⁰ Ibid, 9 (question 3)

²⁸¹ Ibid, 10

²⁸² Ibid, [25]-[29]

²⁸³ Ibid [24]

²⁸⁴ Ibid

²⁸⁵ Ibid, [25]

²⁸⁶ Ibid

²⁸⁷ Ibid.

would be unlawful – is likely to cause practical problems of finding and, or training, volunteers who are sufficiently familiar with the *Code of Practice*, and willing to provide details in the letter.²⁸⁸ These concerns would be exacerbated if all individuals were subject to identification requirements and it would likely discourage individuals from participating.²⁸⁹ Given that criminal activity on picket lines is already regulated by the criminal law, it is unclear how a new offence would be better placed to restrain criminal conduct. Rather, it is designed to create a risk of criminal prosecution and thus a disincentive to picket. The publication of plans is unlikely to have any effect on conduct, but is likely to afford considerable opportunity for employers to mitigate the effects of industrial action. By being aware of the strategy, they would have opportunity to take practical operational measures to mitigate its effectiveness, or apply for an interim interdict to restrain it. Thus, there is a mismatch between the problems asserted by the Government – namely conduct in the form of intimidation and harassment – and the proposed solutions. Those solutions have little impact on intimidation whilst discouraging participation in industrial action, mitigating the effectiveness of it, and providing opportunities for employers to prevent it all together.

Turning secondly to the perceived problem of weak ballot mandates, there, a similar mismatch is apparent in the proposals contained in ‘Ballot Thresholds in Important Public Services’.²⁹⁰ Lifting text almost directly from the ‘Modernising Industrial Relations’²⁹¹ research note, the 2015 Conservative Manifesto committed the Government to the introduction of ballot turnout thresholds for industrial action,²⁹² and an additional 40% in favour requirement where that action concerned “essential public services”.²⁹³ The Consultation suggested the need for the additional threshold in the following sectors: health, fire, education, transport services, border security and nuclear decommissioning. Notably, these were described in the Consultation as “important public services”,²⁹⁴ rather than the ‘essential services’, to which the

²⁸⁸ Dukes, R and Kountouris, N. n.12, 360

²⁸⁹ Ibid.

²⁹⁰ BIS *Consultation on Ballot Thresholds in Important Public Services* (July 2015) n.273

²⁹¹ E. Holmes, A. Lilico and T. Flanagan, *Modernising Industrial Relations* n.254

²⁹² *Conservative Party Manifesto* (2015) n.236, 18-19

²⁹³ Ibid

²⁹⁴ BIS *Consultation on Ballot Thresholds in Important Public Services* (July 2015) n.273

Manifesto referred, and recognised by international law.²⁹⁵ The choice of these sectors was justified on the basis that industrial action in these sectors has a disruptive impact on the daily lives of people not connected with the strike, and on the economy. The ‘disruptive effect on daily lives’ argument was particularly important in justifying the extension of the thresholds to both the education and transport sectors. The Government argued that “strike action which closes schools can create significant inconvenience, and sometimes a financial burden, for parents who need to look after their child and are consequently unable to go to work...”²⁹⁶ Similarly, it was argued that industrial action in the education and transport sectors causes an “economic burden and knock-on effects for business continuity planning for those workplaces whose staff cannot get to work”.²⁹⁷ Further, concern for commuters, people travelling for business, and supply chains²⁹⁸ justified the inclusion of transport and education in the list of sectors to be subject to the additional 40% threshold. On that basis the Government argued “it is only fair to ask unions to ensure they have a strong mandate from their members before strikes go ahead”.²⁹⁹

A strong mandate, according to the Government, is a “clear, positive, decision based on a ballot in which at least half the workforce has voted”.³⁰⁰ The Manifesto also contained a commitment to ensuring that “strikes cannot be called on the ballots conducted years before”.³⁰¹ In pursuit of this clear, strong, current mandate the Government put forward two proposals. Firstly, it proposed the promised balloting thresholds. Secondly, in line with the argument contained in *Modernising Industrial Relations*, that employees should know what they’re voting for,³⁰² it proposed a requirement that the union publicise its plans.³⁰³

²⁹⁵ ILO Digest on Freedom of Association, 5th rev edn (Geneva: ILO, 2006) at [583]. [Draft] Industrial Action (Important Public Services) Regulations 2016: Government Response to Consultation on Thresholds (January 2016), Annex B. in Dukes, R and Kountouris, N. n.12, 346

²⁹⁶ BIS *Consultation on Ballot Thresholds in Important Public Services* (July 2015) n.273, 8

²⁹⁷ *Ibid*

²⁹⁸ *Ibid* 9-11

²⁹⁹ BIS *Government Response to Consultation on Ballot Thresholds in Important Public Services* n.278 Ministerial Foreword p.3

³⁰⁰ *Conservative Party Manifesto* (2015) n.236, 18

³⁰¹ *Ibid*, 19

³⁰² E. Holmes, A. Lilico and T. Flanagan, *Modernising Industrial Relations* n.254, 35

³⁰³ BIS *Consultation on Tackling Intimidation of Non-Striking* n.232 [24]

The balloting thresholds and publication of plans proposals fail to appreciate the democratic nature of trade unions and the existence of statutory rules to prevent union leaders disciplining members who do not act in accordance with the union's instructions.³⁰⁴ Similarly, they do not meet the stated democratic aim of an improved mandate. This was highlighted in Parliament when numerous MPs raised the inconsistency between the Government's arguments – that ballot thresholds were designed to improve voter turnout – whilst initially refusing to entertain electronic voting methods, which could achieve this aim.³⁰⁵ The actual effect of the balloting thresholds is to restrict opportunities for any industrial action by making a vote in favour more difficult to achieve.³⁰⁶ And the actual effect of the publication of plans would be to provide employers with the information and opportunity to restrain or mitigate the action.

The perceived need to reduce trade union power has been evident in Conservative ideology since the reforms of the 1980's. Its ongoing influence is clear in the research note 'Modernising Industrial Relations'³⁰⁷ and was reflected in the proposals of the two Consultations – some of which closely mirrored the proposals of the research note. Despite asserting that the proposals sought to improve the fairness and democracy of industrial action, by addressing the perceived problems of intimidatory behaviour in protests and disruptive industrial action taking place without a sufficiently strong mandate, the proposed reforms are not consistent with these aims. Rather, much like the 1980's efforts at attacking expressions of solidarity and empowering employers to resist trade unions, the reforms proposed by the Government in 2015, would impose procedural burdens and create practical problems designed to prevent industrial action. They do so either by discouraging participation or by making it harder to authorise, irrespective of the conduct. In short, the proposals suggest that it is the opportunity to engage in industrial action and the capacity of

³⁰⁴ Dukes, R and Kountouris, N. n.12, 348-349

³⁰⁵ See for example, HC Hansard 14/09/2015 Vol 599 C Lucas Col761 Available: <https://hansard.parliament.uk/commons/2015-09-14/debates/1509146000001/TradeUnionBill> (Last Accessed: 20/09/2019)

³⁰⁶ Creighton, B, Denvir, C, Johnstone, R, McCrystal, S, Orchiston, A. Pre-Strike Ballots and Collective Bargaining: The Impact of Quorum and Ballot Mode Requirements on Access to Lawful Industrial Action, *Journal of industrial Relations*, Advanced publication. Available: <https://doi.org/10.1093/indlaw/dwy022>.

³⁰⁷ E. Holmes, A. Lilico and T. Flanagan, *Modernising Industrial Relations* n.254

labour to protest which is of concern to the Government rather than the stated aims of improving fairness and democracy. As such the proposals should be seen as efforts at subjecting protest activity to greater regulation, and thereby preventing and, or, mitigating the effectiveness of this expression of solidarity.

3.3 The Trade Union Act 2016

Despite Sajid Javid's claim that the public had voted for the Trade Union Bill by virtue of the Conservative Government's 2015 electoral victory,³⁰⁸ with the exception of the Balloting thresholds, the Conservative Manifesto of that year contained very little detail on the means by which they intended to "protect you from industrial action".³⁰⁹ If the TUA contains those means, it notably does not contain many of the proposals consulted upon,³¹⁰ and instead consists of provisions which were neither Manifesto commitments, nor specifically consulted upon. It is therefore useful to consider the enacted provisions in some detail. Although justified by a need for 'fairness' and 'democracy', by assessing the relevant provisions it is clear that the enacted provisions are designed to give effect to the underlying policy of reducing trade union power by reducing their capacity to engage in industrial action, and more specifically, the leverage tactic of protests.

3.3.1 Relevant Provisions

Sections 2 and 3 of the TUA amend section 226 of the TULRCA to require that a lawful ballot must have achieved a turnout of 50% of those entitled to vote.³¹¹ Further, where the action relates to those normally engaged in the provisions 'important public

³⁰⁸ HC Hansard 14/9/2015 Vol 599 S Javid Col 761

³⁰⁹ *Conservative Party Manifesto* (2015) n.236, 18

³¹⁰ BIS *Government Response to Consultation on Ballot Thresholds in Important Public Services* n.278 and Department for Business Energy and Skills (BIS) *The Trade Union Bill: Government Response to Consultation on Tackling Intimidation of Non-Striking Workers* (November 2015) BIS/15/621

³¹¹ TUA s2

services' the vote in favour by those entitled to vote must be 40%.³¹² Although initially the Government proposed that this should apply to all employees in these sectors, including ancillary workers,³¹³ following the consultation process the section was amended to apply only to those *normally engaged* in the provision of those important public services, and not ancillary to it.³¹⁴ Sections 6 and 7 amend the notification requirements to take account of this.³¹⁵

Section 5 amends the requirements of the ballot paper, which, in addition to the pre-existing requirements, is also required to include three pieces of information; a summary of the dispute,³¹⁶ the type, or types, of action to be undertaken,³¹⁷ and the period, or periods, during which that action is expected to take place.³¹⁸ Although initially the Bill required a “reasonably detailed indication”³¹⁹ of the matters at issue, this was amended to require only a summary³²⁰, leaving the other two requirements intact. Arguably these amendments bear a strong resemblance to the proposal to require publication of plans, albeit with less extensive, specific requirements.

Section 8 increases the notification for industrial action to 14 days. Finally, s234A, amended by s9 TUA, leaves the mandate for industrial action valid for 6 months, although this was amended by the House of Lords to allow unions and employers to agree otherwise without exceeding nine months.³²¹ Any action after that period would require another ballot. Although not expressly assessed in this thesis these amendments are particularly important when read in conjunction with the section 5 amendments, given that their effect is to severely restrict the time during which a union can be said to have lawfully taken action. It has been suggested that this might

³¹² TUA s3

³¹³ TU Bill s2 Inserting s2(2B) (b)

³¹⁴ TUA s3(2), inserting ss(2B) to s226 TULRCA, my emphasis

³¹⁵ TUA s6 and 7

³¹⁶ TULRCA s229 (2B)

³¹⁷ TULRCA s229 (2C)

³¹⁸ TULRCA s229 (2D)

³¹⁹ TUB s4(1)

³²⁰ Parliament, *Lords Amendments to the Trade Union Bill* (2016), Amendments to HL Bill 74, cause 4. Available at: <https://publications.parliament.uk/pa/bills/cbill/2015-2016/0165/16165.1-7.html> (last accessed: 20/09/2019)

³²¹ *Ibid*

have the effect of discouraging union's from negotiating as their opportunities for action are reduced with every day.³²²

Despite the wide-ranging proposal relating to picketing and protest activity in the Consultation on 'Tackling Intimidation', only the picket supervisor role, and its associated obligations, formed part of the enacted TUA. The enacted provision creating that role largely replicated the Consultation proposals, with the minor alterations to remove the obligation to wear an armband or badge (although retaining an obligation to wear something to make herself readily identifiable)³²³ and the obligation to show the letter of authorisation to the Police.³²⁴

3.3.2 Assessment of the Provisions

Prima facie the pre-industrial action provisions introduced by the TUA do not specifically discriminate in respect of any 'type' of industrial action planned – other than perhaps picketing. Similarly, the specific proposals relating to “wider protests”³²⁵ were not included in the TUA – this might suggest that the provisions were not motivated by a concern to restrict protests and that the TUA should not be understood as a response to the development of leverage campaigning and use of protest activity. However, such a conclusion would fail to appreciate the background to the provisions (outlined in the previous section and reinforced in the forthcoming analysis) and assumes that the provisions are pursuant to their stated aims. In fact, an assessment of the relevant provisions reveals that not only do the provisions fail to achieve their stated 'fairness' or 'democratic' aims, but it also demonstrates that they are designed to restrict the undertaking of industrial action, and particularly the use of protest activity.

³²² Carr, B. (2016). *Will the Trade Union Bill help or hinder industrial relations?* Available: https://www.devereuxchambers.co.uk/assets/docs/news/trade_union_bill_bc_1222016.pdf. (Last accessed 24/09/2019.)

³²³ TULRCA s220A (8)

³²⁴ BIS *Consultation on Tackling Intimidation of Non-Striking Workers* n.232 [14]

³²⁵ Ibid [5]-[11]

Subjecting all industrial action to a ballot threshold is likely to restrict the capacity of organised labour to engage in any industrial action.³²⁶ However, the additional turnout requirement for important public services is focused on restricting industrial action in six specific sectors. The choice of sectors has been noted for deviating from the “essential services”³²⁷ which were included in the 2015 Manifesto pledge, to the more broadly defined “important public services”,³²⁸ but it is also notable for the association of these sectors with high-profile industrial action.

For example, disputes in the fire services and transport sectors were cited by the Carr Review as including examples of ‘extreme tactics’ in industrial disputes.³²⁹ Recent instances of high-profile, disruptive, industrial action were used as evidence of the need to intervene in these sectors as the Bill was scrutinised. In the second reading of the Trade Union Bill in the House of Lords Baroness Neville-Rolfe outlined the rationale behind the Bill arguing that “... It is not fair that a strike in the education sector in 2014 organised by the National Union of Teachers was held on the support of just 22% of its members. Similarly, in 2014 a strike among NHS workers was called by Unite on the basis of the support of just 12% of members”³³⁰. In a similar argument, responding to a suggestion that employers were not interested in the Bill, the Conservative Peer Lord Dobbs asked whether “he [Lord Monks] had ridden on the London Tube recently during one of the endless strikes”³³¹ – suggesting that the industrial action by workers for the London Underground necessitated the legislation. Given that the balloting constituency has already been the subject of substantial litigation,³³² resulting in interim interdicts to restrain it, it is likely that establishing the balloting constituency in these sectors, and complying with notification requirements, will be made more complex as a result of the TUA.

³²⁶ Creighton, B et al. n. 306, 54-55

³²⁷ *Conservative Party Manifesto* (2015) n.236, 18

³²⁸ TUA s.3 inserting ss(2A)- (2F) to s226 TULRCA

³²⁹ *The Carr Review* (October 2014) n.4 33-38, 39-44, and 65-69

³³⁰ House of Lords (HL) Hansard, (11/01/2016). Vol 768, Baroness Neville-Rolfe col 12-13 Available at: <https://publications.parliament.uk/pa/ld201516/ldhansrd/index/160111.html#contents> (last accessed 20/09/2019)

³³¹ *Ibid*

³³² for example, *P v National Union of School Masters* [2003] IRLR 307

It has been suggested that unions might seek to draw constituencies to avoid the additional threshold by suggesting that they are not normally engaged in the provision of important public services, or that they are ancillary to that provision.³³³ However, if unions were to seek to categorise workers in this way, they would be restricted by litigation such as *EDF Energy v NURMT*³³⁴ which requires detailed categories of job descriptions to allow the employer to “readily to deduce...the total number, categories and workplaces of the employees concerned”.³³⁵ Whilst these provisions should be read in light of the *RMT v Serco*³³⁶ judgement – which requires that the information be as accurate as was reasonably practicable given the information in possession of the union at the time³³⁷ – equally they should be read in conjunction with the introduction of compulsory membership records,³³⁸ and guidance for compliance issued by the Government.³³⁹ The guidance clearly highlights that it is “for a union to consider the practical application of the legislative requirements...”³⁴⁰ and reiterates, what was suggested by Justice Blake in *EDF Energy v NURMT*³⁴¹: that the purpose of the information requirements is to allow the employer to readily deduce the categories and numbers of employees involved.³⁴² This may suggest an expectation of increased accuracy when categorising workers and affording entitlement to vote. Employers seeking to have industrial action restrained may argue that the union failed to accurately afford entitlement to vote, and subsequently failed to accurately inform the employer of affected workers where the 40% threshold should have applied. It is therefore likely that this provision will afford opportunities for litigation, and interim relief. Notably, these opportunities, exist in sectors, such as education and transport, which are closely associated with powerful unions and high-profile, disruptive,

³³³ Bogg, A. n.15

³³⁴ *EDF Energy v NURMT* [2009] EWHC 2852 (QB)

³³⁵ TULRCA ss226A (2C)

³³⁶ *RMT v Serco* [2011] EWCA Civ 226

³³⁷ [2011] EWCA Civ 226, [75]

³³⁸ Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 ss40-43 inserting ss24ZA-24C TULRCA. See also Ford, M and Novitz, T n.13, 6

³³⁹ Department for Business, Energy and Industrial Strategy (BEIS) *Important Public Services Regulations 2017; Guidance on the Regulations* Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583582/Annex_A_Draft_40_guidance.pdf (January 2017) [14] (Last Accessed 22/09/2019)

³⁴⁰ *Ibid*

³⁴¹ [2009] EWHC 2852 (QB)

³⁴² *Ibid* [13]

industrial action. This suggests that the provisions are intended to restrict industrial action, and protest activity.

Arguably, the amendments to the voting paper, amount to a re-stating, or re-working, of the proposal to require unions to publish their plans.³⁴³ Under the TUA the ballot paper, which the employer has sight of in advance of the ballot,³⁴⁴ is required to contain information relating to the tactics – namely a summary of the issue, or issues,³⁴⁵ the types of action to be specified,³⁴⁶ and the dates it is expected to take place.³⁴⁷ Under the TUA the employer is also to receive 14 days notice (or 7 if agreed) of any industrial action.³⁴⁸ Meaning that the employer will be aware of the union’s tactics considerably in advance of any action.³⁴⁹ It should therefore be subject to many of the same criticisms as the publication of plans proposal: particularly, that it affords employers the opportunity to mitigate the undertaking, and effectiveness, of the action by virtue of that prior notice. Both the research note ‘Modernising Industrial Relations’ and the Consultation suggested that the proposal to require the publication of plans might increase democratic accountability. However, it was noted during the House of Lords debate this it would likely “confuse membership more” and make it harder to settle disputes if members did not feel that *all*³⁵⁰ of the stated issues had been resolved.³⁵¹ This, it was suggested in the House of Lords, makes the amendments to the voting papers a “recipe for litigation”.³⁵² It is more likely that this section was intended to make industrial action more difficult and less effective by providing the employer with the information, and ample opportunity, to mitigate or restrain it.

Similarly, the TUA focuses on the tactic of picketing with the role of the picket supervisor, which carries a number of requirements; to be present or readily

³⁴³ see BIS *Consultation on Tackling Intimidation of Non-Striking Workers* n.232 [24]

³⁴⁴ TULRCA s226A

³⁴⁵ TUA s5(1) inserting s229(2B) TULRCA

³⁴⁶ Ibid inserting s229(2C) TULRCA

³⁴⁷ Ibid inserting s229(2D) TULRCA

³⁴⁸ S8 TUA amending s234A TULRCA

³⁴⁹ Based on several assumptions about intended start date for the action, how quickly the union informs of the results of the ballot, and that the ballot uses second class post the employer could be aware of unions intended tactics for 33 days prior to the action.

³⁵⁰ my emphasis

³⁵¹ HL Hansard 10/02/2016 Vol 768 Lord Oates col.2248

³⁵² Ibid. col 2249

contactable to attend picketing, to be identifiable, and to carry a letter of authorisation³⁵³, which are in addition to existing requirements of the TULRCA and *Code of Practice on Lawful Picketing*. The regulation of picketing is not new. Prior to the passing of the CPPA 1875³⁵⁴ it was considered watching and besetting,³⁵⁵ and today s220 provides immunity from liability in delict to peaceful picketing. However, the requirement to have a picket supervisor, who meets the additional obligations applies to all picketing irrespective of the peacefulness or purpose of it. Further, the discriminatory nature of the role – regulating only picketing by unions over trade disputes³⁵⁶ – focuses restrictions on the most immediately recognisable form of labour protest: the picket line. It should therefore be understood as a response to the *ability of workers and unions* to protest. If picketing is specifically different to a protest (as was established in *Thames Cleaning Support Services v United Voices of the World*³⁵⁷ – a case concerning both picketing and protest which is discussed in detail in the next chapter) unions may be incentivised to engage in action, such as protests. They may be so incentivised on the basis that the protest does not attract the restrictions of picketing, and would not require a picket supervisor, far less one who is familiar with the *Code of Practice on Picketing*, contactable, and identifiable.³⁵⁸

Despite their universal application, the focus of provisions, like those amending s229 and to picketing, suggests that they are intended to restrict protest activity. They do so by creating substantial pre-action burdens relating to the union's tactics, and creating additional obligations for lawful picketing. Those pre-action burdens have a disproportionate impact on sectors associated with high-profile industrial action and protest activity, and the picketing amendments render it much more practically difficult to lawfully engage in the traditional protest of picketing. Thus, the creation of those pre-action procedural burdens and heavy regulation of picketing makes it more

³⁵³ TUA s10 inserting s220A TULRCA

³⁵⁴ Brodie, D (2003). *A History of British Labour Law 1867-1945*. Edinburgh: Hart Publishing . 9.

³⁵⁵ Criminal Law Amendment Act 1871 s1(3)

³⁵⁶ Ewing, K.D and The TUC *The Trade Union Bill: TUC Submission to ILO Committee of Experts* (August 2015), 58 available; https://www.parliament.uk/documents/joint-committees/human-rights/Submission_from_TUC.pdf (last accessed 22/09/2019)

³⁵⁷ *Thames Cleaning and Support Services Ltd v United Voices of the World* [2016] EWHC 1310 (QB)

³⁵⁸ TULRCA s220A (2)-(8)

difficult for the union to undertake, and much easier for the employer to mitigate or restrain, industrial action.

3.4 Conclusion

When set against the traditional Conservative perspective of trade unionism, and methods for reducing union's industrial power, alongside a policy agenda of reducing trade union power, the underlying objective of the TUA is clear. It is inconsistent with the stated aims of 'fairness' and 'democracy' and designed specifically to reduce the capacity of organised labour to protest. It does so through provisions which specifically target sectors associated with high-profile industrial action, and protest activity. Those provisions are designed to act as a disincentive to individual participation and to provide employers with the opportunity to mitigate or prevent industrial action which features protest activity.

I have argued there is an intrinsic link between the restrictiveness of the legal environment, and the development of leverage campaigns, whereby unions are incentivised to engage in tactics, like protest, which are lawful and avoid those restrictions. It is unsurprising, then, that one of the criticism levied against the TUA is that, far from 'solving' the perceived problems with 'wider protests', unions will be incentivised to engage in the activity, rather than traditional industrial action or picketing.³⁵⁹ Although it is rather more surprising that amongst those critics is Bruce Carr QC³⁶⁰ whose report was used to justify the TUA.

The criticism, that the TUA incentivises protest, assumes that leverage campaigns, and protest activity, avoid the procedural requirements and practical compliance problems imposed by the TULRCA, as amended.³⁶¹ However, as I have demonstrated the TUA

³⁵⁹ Ford, M and Novitz, T. n.13, 297-298.

³⁶⁰ Carr. B n.321

³⁶¹ Ibid

is designed to bring protest activity within the purview of the TULRCA. In the next chapter, I examine the implications of the argument that unions will increasingly engage in protest activity, which the TUA is designed to regulate, for the lawfulness of industrial action and protest activity by labour.

4. Chapter 4. The Implications for Industrial Action

If the TUA proves to incentivise protest activity over industrial action, as has been predicted,³⁶² might we expect to see an increase in employer attempts to use the law to prevent or mitigate the effectiveness of protest – just as interim interdicts are so often used to prevent or mitigate the effectiveness of industrial action?³⁶³ The amendments introduced by the TUA to the rules regulating pre-action ballot papers and picketing shift the focus of the tests of the lawfulness of industrial action from the reason for which it was undertaken (as is encapsulated in the so-called golden formula), towards what the union proposes to do and when: the *tactics*. How might judges faced with employer's requests to restrain industrial action and protest activity interpret the lawfulness of industrial action and the tactic of protesting now?

In this chapter, I consider the grounds on which employers may seek interim relief to mitigate or prevent industrial action. I do so from two potential sources of liability: non-compliance with the amended TULRCA, and the delict of conspiracy to injure by unlawful means (also referred to as unlawful means conspiracy). I argue, firstly, that there are provisions in the TULRCA which may be interpreted as capable of restraining industrial action in the case of the union's use of protest activity; secondly, that the line of judicial reasoning developing in respect of delictual liability is also capable of restraining leverage protests. These developments significantly undermine the assumptions on which the lawfulness of leverage protests has been based. They suggest that protest activity by labour in an industrial relations context may be unlawful and subject to restraint, irrespective of rights conferred by Articles 10 and 11 ECHR.

³⁶² See both Ford and Novitz n.13, 297-298, And Carr, B. n.322

³⁶³ Gall, G. (2016) n.220, 327-349

4.1 Interpreting the Trade Union Act

The TUA amends the TULRCA and thereby appends its requirements to the golden formula. As such, any failure to comply with the new rules may expose the union to liability in delict from which it would otherwise be ‘immune’ and provides employers with the opportunity to seek interim relief on the grounds that the proposed industrial action is unlawful. An assessment of the newly introduced requirements of the ballot paper³⁶⁴ and to the law of picketing³⁶⁵ indicates that they contain a number of interpretive problems which employers may exploit in pursuit of interim relief to restrain, what they would argue is, unlawful industrial action.

4.1.1 Additional requirements of the Ballot Paper

Under the TUA, s229 TULRCA contains three additional requirements of a lawful pre-action ballot paper: to provide a summary of the matter or matters at issue³⁶⁶, to specify the type or types of industrial action to be undertaken³⁶⁷, and to indicate the dates on which that action is expected to take place³⁶⁸. These subsections place substantial emphasis on the union’s intended tactics. By examining each subsection, and how the courts might interpret them, individually and in the context of the burgeoning law of industrial action, the conclusion can be drawn that it is likely that the amendments to s229 may be interpreted strictly to render proposed action unlawful, irrespective of the fact that the union’s *purpose* is to further a trade dispute.

The statutory immunity conferred by s219 TULRCA applies only to action which is undertaken in contemplation or furtherance of a trade dispute – which relates “wholly or mainly”³⁶⁹ to the one or more of the trade matters prescribed by s244(a)-(g)

³⁶⁴ TUA s5

³⁶⁵ TUA s10

³⁶⁶ TULRCA s229 (2B)

³⁶⁷ TULRCA s229 (2C)

³⁶⁸ TULRCA s229 (2D)

³⁶⁹ TULRCA s219, s244

TULRCA. The interpretive problem that the s229(2B) amendment – to require a summary of the matter, or matter at issue – causes may be illustrated by the concerns expressed by Lord Lea of Corondall and Lord Oates as the Bill was scrutinised. They suggested that unions may be inclined to include the “kitchen sink”³⁷⁰ to avoid inadvertently taking action over a matter not summarised on the ballot paper.³⁷¹ Alternatively, the union may not provide a sufficiently detailed summary, since the Act gives little guidance as to the level of detail required. In either case the content of that summary may render the action invalid: a summary which is too expansive may fall out with the categories of s244(a)-(g), or into one of the categories specifically excluded from protection,³⁷² alternatively, it may indicate a political dispute.³⁷³ That last possibility might be particularly important given that leverage campaigns often have a more politicised rhetoric.³⁷⁴ Since the wording on a ballot paper has been found to be probative of a trade dispute,³⁷⁵ it seems likely that this subsection will be useful to employers. In pursuit of interim interdict, they may argue either that the summary is evidence that the action is not wholly or mainly connected with a trade dispute, or that the summary is insufficiently detailed to comply with the Act.

S229 (2D), which requires that the ballot paper provides an indication as to the period, or periods, during which action is expected to take place, has already been the subject of litigation concerning the level of specificity required by the Act. In 2016 Thomas Cook, in *Thomas Cook Airlines Ltd v British Airline Pilots Association (Thomas Cook)*³⁷⁶ argued that the time periods indicated on the ballot papers failed to meet the specificity required by the legislation on one of two grounds. Either, the ballot paper was insufficiently detailed,³⁷⁷ or it did not reflect the very detailed and more specific, actual expectations of the union.³⁷⁸ In that case it was held that the specificity was no greater than the Act required – i.e. an indication, rather than specific dates, which the

³⁷⁰ Lord Lea in HL, 10/02/2016, Vol 768, col 2248 and Lord Oates in HL, Hansard 10/02/2016 Vol 768, col 2248

³⁷¹ Ibid. That quote referred to the Bill as it was prior to an amendment changing its requirements from a “reasonably detailed indication” to a “summary” however a similar critique may still apply.

³⁷² TULRCA ss222-225

³⁷³ *Mercury Communications v Scott-Garner* [1984] I.C.R. 74

³⁷⁴ See also Chapter One.

³⁷⁵ *Wandsworth LBC v NASUWT* [1994] ICR 81

³⁷⁶ [2017] EWHC 2253 (QB)

³⁷⁷ [2017] EWHC 2253 (QB), [12]

³⁷⁸ Ibid [19]

union had complied with.³⁷⁹ However, this highlights the importance of the wording of each subsection, and the potential of each one to require greater levels of detail, allowing employers to seek relief on the grounds that the union can be accused of failing to be sufficiently specific.

Where s229(2B) required a *summary*, S229(2C) requires the type, or types, of action to be *specified*, and s229(2D) requires an *indication* as to the dates, each subsection therefore indicates different levels of specificity. The *Thomas Cook* decision suggests that each section might therefore be interpreted to require different degrees of specificity, and s229(2C) seems to attract the greatest degree of specificity.

In respect of leverage protests, this is particularly important when considered alongside the lack of guidance as to what is meant by “type or types” of industrial action short of a strike. Could unions engaging in leverage protests be obliged to outline their plan to do so on the ballot paper under s229(2C), and if so, how might this give rise to liability?

The requirement to distinguish between industrial action, and action short of a strike on a ballot paper,³⁸⁰ long pre-dates the TUA, which suggests that s229(2C) calls for something more detailed. However, where strike action, for the purposes of s229(2) is clearly defined in the legislation, as “any concerted stoppage of work”,³⁸¹ industrial action short of a strike is not. S229(2A) states that for the purposes of subsection (2) – which outlines how the ballot question should be framed – an over-time ban and call-out ban constitute industrial action short of a strike,³⁸² and the explanatory notes similarly refer to these examples.³⁸³ Not only is it unclear whether these examples

³⁷⁹ Ibid [23]

³⁸⁰ TULRCA s229(2)

³⁸¹ TULRCA s246

³⁸² TULRCA s229(2A)

³⁸³ BIS *Trade Union Act 2016: Explanatory Notes* (2016) c.15 available:

http://www.legislation.gov.uk/ukpga/2016/15/pdfs/ukpgaen_20160015_en.pdf (Last Accessed 22/09/2019)

would also apply to s229(2C), but they are not terms of art,³⁸⁴ and the legislation does not suggest that this an exhaustive, prescribed list. Arguably, in light of this lack of specificity, and in light of the policy of restricting union's access to protest activity which arguably underpinned the TUA,³⁸⁵ s229(2C) could be interpreted as requiring the union to specify plans to protest, as a "type" of industrial action, on the ballot paper. The implication of this may be to render industrial action which includes protest activity unlawful. If a union engages in protest activity which is not specified on the ballot paper, then that ballot paper, and any subsequent industrial action, would be unlawful. If the union does specify the protest activity, but it takes place in manner which can be argued to be different to that specified on the ballot paper, the action could also still be unlawful, according to the level of specificity held to be required by the Act.

Although interdicts of this kind, based on technical breaches of the TULRCA, have often been over-turned on appeal,³⁸⁶ there is a substantial body of case law which indicates that, at first instance, there is a willingness on the part of the courts to issue an interim interdict.³⁸⁷ It would seem likely then that these amendments could similarly be interpreted to give rise to interim relief for non-compliance, or insufficient compliance, with subsections which appear to be more concerned with the union's tactics than their purpose.

4.1.2 The Picket Supervisor

Picketing is generally regarded as attracting a low-incidence of legal challenges.³⁸⁸ It has even been suggested that this is because the activity is so ineffective that it is

³⁸⁴ HC Hansard, 22 October 2015, col 247–8 per Jo Stevens MP in *Dukes, R and Kountouris, N.* n.12, 354

³⁸⁵ See Chapter 3 for the policy underpinning the TUA.

³⁸⁶ *Dukes, R.* (2011). The Right to Strike under UK Law: Something More Than a Slogan? *NURMT v SERCO, ASLEF v London & Birmingham Railway Ltd.* *Industrial Law Journal.* 40 (3), 302-311

³⁸⁷ (*Network Rail; EDF Energy Powerlink Ltd v National Union of Rail, Maritime and Transport Workers* [2009] EWHC 2852 (QB); *Milford Haven Port Authority v Unite the Union* [2010] EWHC 501(QB); *British Airways Plc v Unite the Union* [2009] EWHC 3541(QB)). Cited in *Dukes, R.* n.3

³⁸⁸ *Gall* (2006) n.220, 195-196

simply not worth the employer's resources to seek to restrain it.³⁸⁹ However, the development of leverage campaigning and the introduction, by the TUA, of the role of the picket supervisor,³⁹⁰ may reverse that trend. S10 of the TUA inserts s220A to the TULRCA, and as such the protections for peaceful picketing conferred by s220 do not apply unless the requirements of s220A(2)-(8) are complied with.³⁹¹ Under s220A TULRCA, then, in order for peaceful picketing to be lawful, it will require to be supervised by the picket supervisor, who must be present, or readily contactable,³⁹² and identifiable.³⁹³ The additional requirements of the role include: informing the police of the picket supervisors name, location of the picketing, and contact information,³⁹⁴ and carrying a letter stating that the picketing is approved by the union.³⁹⁵ While the TUC was concerned that the role might give rise to liability for non-compliance,³⁹⁶ arguably even compliance with the amendments might not be enough to protect the picketing. When the role and responsibilities are read in conjunction with s20 TULRCA, concerning union vicarious liability, might it be that, particularly in light of the development of leverage protests, the role-holder may render the union liable for unlawful picketing?

The legislation does not offer any guidance as to the authority or responsibilities of the role-holder, however, the updated *Code of Practice on Picketing* does give some indications, and one of the requirements of the role is that the individual be “familiar with any provisions of a code of practice issued under s203 that deal with picketing”.³⁹⁷ According to the *Code of Practice on Picketing*, the “other main functions”³⁹⁸ of the picket supervisor include: “ensuring pickets understand the law and are aware of the provisions”,³⁹⁹ and “controlling numbers to avoid giving rise to fear and resentment amongst those seeking to cross the picket line”.⁴⁰⁰ This should be

³⁸⁹ Ibid in Dukes. n.12, 360

³⁹⁰ TUA s10 inserting s220A to the TULRCA

³⁹¹ TULRCA s220A(1)

³⁹² TULRCA s220A(7)(a) or (b)

³⁹³ TULRCA s220A (8)

³⁹⁴ TULRCA s220A (4) (a), (b), and (c)

³⁹⁵ TULRCA s220A (5)

³⁹⁶ Ewing, K.D and The TUC *The Trade Union Bill: TUC Submission to ILO Committee of Experts* (August 2015) n.356

³⁹⁷ TULRCA S220A(3)

³⁹⁸ The Department for Business, Energy and Industrial Strategy, (March 2017) *Code of Practice on Picketing*

³⁹⁹ Ibid

⁴⁰⁰ Ibid .61

read in conjunction with section E subsection 55, of the *Code of Practice on Picketing*, which states that “anyone seeking to demonstrate support for those in dispute should keep well away from any picket line so as not to create a risk of a breach of the peace, and, or, other criminal acts”.⁴⁰¹ Taken together, it appears that the role of the picket supervisor is to effectively police, and quash, demonstrations of solidarity, in the form of protests, like those common to leverage campaigns.

It is important then to consider what this could mean for the union in terms of liability where the picket supervisor fails to adequately control the numbers which might result from demonstrations becoming entangled with pickets. Under s20 TULRCA unions may be vicariously liable for the actions of their members where the conduct is “authorised or endorsed”⁴⁰² by any other official of the union (whether employed by it or not).⁴⁰³ It is not clear from the legislation whether the picket supervisor herself might be capable of ‘authorising or endorsing’, however it has been found that this extends to shop stewards.⁴⁰⁴

That finding, in *Gate Gourmet v TGWU*,⁴⁰⁵ was based on the argument that “various union officials...have been present at the pickets, on sufficient days to mean there is a clear arguable case that the union...fully appreciated and understood the types of unlawful activity which were being routinely perpetrated...”⁴⁰⁶ The requirement that the picket supervisor have familiarity with the *Code of Practice*⁴⁰⁷ might indicate that the position itself is likely to be interpreted as capable of authorising or endorsing (according to the logic of the *Gate Gourmet v TGWU*⁴⁰⁸ decision). Alternatively, given the knowledge requirement and difficulties in finding or training volunteers,⁴⁰⁹ it is likely that the role will be fulfilled by shop stewards, who it is already established

⁴⁰¹ Ibid E55

⁴⁰² TULRCA s20(2)(c)

⁴⁰³ Ibid

⁴⁰⁴ [2005] EWHC 1889 (QB), [18]

⁴⁰⁵ Ibid

⁴⁰⁶ Ibid, [23]

⁴⁰⁷ TULRCA s220A (3)

⁴⁰⁸ [2005] IRLR 881, [23]

⁴⁰⁹ Dukes, R and Kountouris, N. n.12, 359-360

are capable of authorising or endorsing conduct, giving rise to union vicarious liability.⁴¹⁰

Thus, not only might the role of the picket supervisor, if not sufficiently complied with, give rise to liability, (as was the concern of the TUC), but even where the requirements of the role are met, the role-holder herself might render the union liable for unlawful acts. This is particularly important in light of the leverage campaign strategy of making use of protest activity, and the requirement of the picket supervisor to control numbers and keep demonstrations and picketing separate. An employer might argue that a demonstration or protest, taking place in close proximity to a picket line renders that picketing unlawful, and the liable union also liable for the demonstration on the grounds that the picket supervisor authorised or endorsed it. Of course the union could repudiate⁴¹¹ that it endorses the demonstration by written notice⁴¹² without delay⁴¹³, in accordance with the provisions of s21 TULRCA. That subsection includes a statement warning members that “Your union has repudiated the call (or calls) for industrial action to which this notice relates and will give no support to unofficial industrial action taken in response to it (or them). If you are dismissed while taking unofficial industrial action, you will have no right to complain of unfair dismissal.”⁴¹⁴ Even if the union could formally repudiate the action to protect itself from liability, s21(5) goes on to prevent the executive, president or general secretary from “behaving in a manner which is inconsistent with the purported repudiation”.⁴¹⁵ Thus if the union is to repudiate liability for acts which its shop stewards, or possibly picket supervisor, have authorised or endorsed – including for example demonstrations which become entangled with pickets – it does by exposing its members to the significant risk of dismissal without recourse to an unfair dismissal claim, and effectively quashes the solidarity being expressed.

⁴¹⁰ *Gate Gourmet v TGWU* [2005] IRLR 881

⁴¹¹ TULRCA s21

⁴¹² TULRCA s21(2)(a)

⁴¹³ TULRCA s21 (2)(b)

⁴¹⁴ TULRCA s21(3)

⁴¹⁵ TULRCA s21(5)

The TUA provisions in s5 and s10, are clearly directed at the tactics of the union and the capacity of it to engage in protest activity. Further, both – particularly when read in conjunction with other provisions – may be interpreted to present opportunities for employers to seek interim interdict to prevent or restrain the activity. They should, in theory, then engage the protections conferred by Articles 10 and 11 of the ECHR.⁴¹⁶ However, as was suggested in chapter one, and has been argued by Ewing and Hendy, the industrial context of the legislation may render its provisions more vulnerable to a judicial interpretation that the measures fall within the margin of appreciation.⁴¹⁷

4.2 The Development of an Anti-Leverage Interdict

Part of the strategy underpinning leverage campaigns is the use of protest activity directed at third parties, as it is assumed that these activities are prima facie lawful, for not involving the commission of any delicts, and involve the exercise of rights which are protected by the ECHR. However, some recent litigation concerning protests directed at third parties indicates that the courts are developing a line of reasoning which significantly undermines these assumptions. Having set out the facts of two such cases, and their relevance to a comparison with leverage campaigns, I consider the reasoning of the judges. I argue that the judicial interpretation of such protest activity, as giving rise to liability in the delict of unlawful means conspiracy, amounts to the development of an anti-leverage interdict.

4.2.1 Thames Cleaning and Support Services Ltd v United Voices of the World [2016] EWHC 1310 (QB) (*Thames Cleaning*)

Having undertaken a cleaning contract in 2011 at Wood Street, Thames Cleaning and Support Services Ltd (Thames Cleaning) sought to make changes to working

⁴¹⁶ Ewing, K.D. and Hendy, J QC. (2016). The Trade Union Act 2016 and the Failure of Human Rights. *Industrial Law Journal*. 45 (3), 421.

⁴¹⁷ Ibid.

practices, which involved redundancies. By the time the industrial action was proposed, the dispute had developed into one of redundancies, wages, and union recognition.⁴¹⁸ The union balloted and notified the employer of the ballot under s226A TULRCA.

That notification, which included corporate tenants of Wood Street, advised that “we will also be engaging in regular, disruptive and high profile direct actions at 100 Wood Street, in order to raise awareness amongst the many companies that have offices at 100 Wood Street, about Thames Cleaning’s unfair, unnecessary and unlawful dismissal of over half the cleaners at 100 Wood Street.”⁴¹⁹ The email notification also included links to YouTube videos of previous demonstrations to show “some of our recent demonstrations against unfair redundancies, trade union victimisation and refusal to pay a living wage, amongst other things.”⁴²⁰ Thus, the union proposed to use high-profile protest activity, directed at the customers of the employer, which resembles the kind of leverage activity to which the Trade Union Act was presented as responding, although the activity in question pre-dates the TUA.

Justice Warby refused to continue the interdict initially granted as he described it as an “anti-picketing”⁴²¹ interdict which was “inapt” to restrain the behaviour actually complained of.⁴²² *Thames Cleaning* is therefore one of few attempts by the courts to differentiate the treatment of picketers from that of protestors. However, as is discussed in more detail in the next section, it is also an important case because of Justice Warby’s reasoning. On evidence of the union’s notification, he restrained the protests and asserted that he did so without infringing upon Convention rights.

⁴¹⁸ *Thames Cleaning and Support Services Ltd v United Voices of the World* [2016] EWHC 1310 (QB)

⁴¹⁹ [2016] EWHC 1310 (QB), [13]

⁴²⁰ *Ibid*

⁴²¹ *Ibid*, [39], [42]

⁴²² *Ibid*, [54]

This case pre-dates the introduction of the TUA, however, an important consideration here is the union’s “over-notification”.⁴²³ At the time, the union was not obliged to notify the employer of its intended protest activity. However, in light of s299(2C), unions could be required to notify of this activity. Not only is it unclear *whether* s229(2C) requires notification of protest, but – if it does – the nature of that notification is also unclear. At what point would a union’s statutory obligation to notify conflict with this reasoning whereby the nature of that notification is considered to threaten, and particularly where it is considered evidence of liability in delict.

4.2.2 Ineos Upstream Ltd v Persons Unknown [2017] EWHC 2945 (Ch) (*Ineos*)

This case does not concern an industrial dispute, or a protest in furtherance of one, but was brought by claimants, including Ineos and a number of their suppliers and contractors in the fracking industry.⁴²⁴ They sought to restrain protest activity at a number of Sites on the grounds, inter alia, that the anti-fracking protestors had, in the past, committed criminal acts and that such acts could give rise to, among other things, delictual liability for conspiracy to injure by unlawful means.⁴²⁵ The principal similarity between these protests and with leverage campaigns lies in the targeting of suppliers through the use of high-profile protest activity. According to Justice Morgan, there were two categories of targets of the protests – asserted by the Claimants to be unlawful. Firstly, Ineos Upstream Ltd (Ineos) as an operator in the shale gas industry to which the protestors objected was targeted.⁴²⁶ Secondly, “companies which form part of the supply chain to the operators [in this case Ineos] who carry on shale gas exploration”⁴²⁷ were the direct targets of the protest activity,

⁴²³ Smith, I. (2016). Employment Law Brief. Available: https://www.lexisnexis.com/uk/legal/results/docview/attachRetrieve.do?csi=280276&A=0.531995783020894&ersKey=23_T28129232233&urlEnc=ISO-8859-1&inline=y&smi=26026&componentseq=1&key=5KB8-MG81-DYJD-X49W-. (Last accessed 6/11/2018.)

⁴²⁴ Ineos Upstream Ltd v Persons Unknown [2017] EWHC 2945 (Ch) 38, [3], [21]

⁴²⁵ Ibid, [21]

⁴²⁶ Ibid.

⁴²⁷ Ibid, [22]

with the object of causing “those [supply chain] companies to withdraw from supplying shale gas operators”.⁴²⁸

In considering the likely outcome at trial, the judge dealt quite briefly with the conspiracy to injure. He found “clear evidence”⁴²⁹ of a combination of unlawful acts – namely theft and criminal damage, contravention of s137 of the Highways Act, and contravention of s22A of the Road Traffic Act. He further found that the protestors intended to injure the fracking operator as the protests took place in relation to the premises and vehicles of the operator or of the third-party contractors.⁴³⁰ He argued that the location and duration of the protests was intended to be long enough to have an adverse impact on the activities of the fracking companies.⁴³¹ On that basis, he issued a long-term continuation of interim-interdicts,⁴³² again, the judge asserted that he did so without infringing upon Convention rights.

4.2.3 Judicial Reasoning and Discussion

In both cases, interim interdicts were issued on the basis that a trial court was “more likely than not”⁴³³ to find that the activities might give rise to delictual liability for conspiracy to injure by unlawful means, and so should, in the interim, be restrained. Justice Morgan, in the *Ineos* case, outlined the features of the delict as: a combination, to use unlawful means (which may be criminal or delictual),⁴³⁴ with the intention to injure the claimant and cause them loss.⁴³⁵ In *Thames Cleaning*, the union’s representative was “constrained to accept that if, in order to put pressure on the claimant to concede their demands, the union and Mr Elia were to whip up large numbers of third parties to attend at, or near, Wood Street, with the aim of physically

⁴²⁸ Ibid.

⁴²⁹ Ibid [115]-[116]

⁴³⁰ Ibid [116]

⁴³¹ Ibid [114]

⁴³² <https://www.falcon-chambers.com/news/ineos-upstream-ltd-ors-v-persons-unknown-2017-ewhc-2945-ch> (Last accessed 20/09/2019)

⁴³³ *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253

⁴³⁴ In these cases the Judges referred to the English equivalent of liability in tort.

⁴³⁵ [2017] EWHC 2945 (Ch), [57]

preventing people from getting to work there, or so harassing or intimidating them as to scare them away, they might be liable to be sued for unlawful means conspiracy”.⁴³⁶ Justice Warby, went on to issue an interim interdict which amounted to the imposition of a geographical exclusion zone, within which protest (not picketing) would be unlawful.⁴³⁷ Similarly, in *Ineos*, unlawful means conspiracy was a specific head of claim and Justice Morgan issued, and continued, a number of interim interdicts, of which two are of particular note. One was to restrain trespass (by preventing accessing or remaining on specific land) at some sites. Another, in what has been described as a “supply chain injunction”,⁴³⁸ was to “restrain a combination, with the intent of causing injury to Ineos, where the combination is to commit any of the modes of obstructing access to the highway or use of the highway [which he had referred to in an earlier part of the judgement] ... the access and use in question being by a third party contractor engaged to supply goods or services to Ineos...”⁴³⁹ The imposition of these interdicts, clearly intended to restrain the protest activity which was directed at third parties, effectively suggests that the requisite unlawful means and intent to injure are found in that protest activity.

By reviewing how the UK judges, in these cases, interpreted the protest activity as giving rise to liability in that delict, and comparing their reasoning with that of judges in the US adjudicating over similar litigation, it is possible to demonstrate how the law in the UK is developing an anti-leverage interdict.

A key feature in the reasoning of the judges was the characterisation of the protests, directed at third parties, as disruptive direct action. For example, Justice Warby’s refusal to grant the “anti-picketing” interdict, and decision to grant the interim geographical exclusion zone, turned on his interpretation of the union’s conduct, directed at third parties. He reasoned that what the union had threatened in its notification of an intention to take “regular disruptive high profile direct actions”⁴⁴⁰

⁴³⁶ [2016] EWHC 1310 (QB), [45]

⁴³⁷ *Ibid* [54]

⁴³⁸ <https://www.falcon-chambers.com/news/ineos-upstream-ltd-ors-v-persons-unknown-2017-ewhc-2945-ch> (Last Accessed 20/09/2019)

⁴³⁹ [2017] EWHC 2945 (Ch), [114], [150]-[151]

⁴⁴⁰ [2016] EWHC 1310 (QB), [13], and [43]

was not picketing but “noisy, intimidating, mass protests, at or near Wood Street, by people who had no pre-existing connection with the workers who might be on strike, with the objective of harassing the claimant and embarrassing it into conceding the union’s demands”.⁴⁴¹ This, he reasoned, “went beyond the limits of lawful protest”⁴⁴² because of the physical confrontation at close quarters between the protestors and “those seeking to go about their lawful daily activities”.⁴⁴³ In a similar argument Justice Morgan stated that the protestors were “doing much more than expressing their opinion...they [were] taking direct action against fracking companies to stop their fracking activities”.⁴⁴⁴ This interpretation implies that *these* protests – characterised as ‘direct action’ for their disruption being directed at third parties – go beyond typical lawful protest, and are intended to injure. In this there are some stark similarities with the definitions of ‘leverage campaigning’ offered in the Carr Review. Those definitions had in common an assumption that leverage, or extreme conduct, involved the direction of intimidation, disruption and humiliation at third parties – such as suppliers, customers, shareholders and senior management, to gain concessions.⁴⁴⁵ In the Carr Review the capacity of labour to use these tactics was presented as a gap in the legal framework.⁴⁴⁶

Arguably the reasoning of Justices Warby and Morgan, in finding that the protests might give rise to delictual liability, fills that gap. Justice Warby, rejected the union’s argument that the “real purpose [of the claimant’s request for a geographical exclusion zone] was to spare themselves embarrassment amongst their contractual partners,”⁴⁴⁷ instead suggesting that this, evidenced by their conduct, might give rise to liability in unlawful means conspiracy. As was acknowledged in both cases the fact that the activities were directed at third parties would not preclude the claimants from succeeding in a claim in unlawful means conspiracy. Indeed, they acknowledged that the delict is advantageous to the claimants,⁴⁴⁸ and to employers who are the target of protests directed at their suppliers, because, in order to establish liability in unlawful

⁴⁴¹ Ibid [47]

⁴⁴² Ibid [50]

⁴⁴³ Ibid

⁴⁴⁴ [2017] EWHC 2945 (Ch), [114]

⁴⁴⁵ see also Chapter 2 for examples of the views of contributors cited in the Carr Review.

⁴⁴⁶ see also Chapter 2 for how the Review presented protests as a gap in the law.

⁴⁴⁷ [2016] EWHC 1310 (QB), [56]

⁴⁴⁸ [2017] EWHC 2945 (Ch), [59] and [2016] EWHC 1310 (QB), [47]

means conspiracy, it is sufficient that the claimants were the intended, victims even where acts were directed at third parties. In other words it was sufficient that the claimants were the intended (indirect) victims of the unlawful means.⁴⁴⁹ It therefore appears that by directing activities at third parties this is further evidence of the disruptiveness of the protests, and implies that the union might be liable in unlawful means conspiracy.

‘Direct action’, ‘protest’, and ‘demonstration’, much like ‘leverage’ or ‘extreme conduct’, are hazy terms⁴⁵⁰, which are not clearly defined in law.⁴⁵¹ However, Justices Warby and Morgan have attributed to them quite distinct definitions. Protest apparently concerns the expression of opinion, whereas ‘direct action’ involves the use of disruptive conduct. This then allowed the judges to suggest that the activities of the union (in *Thames Cleaning*) and the ‘persons unknown’ (in *Ineos*) went “beyond lawful protest”,⁴⁵² and that a trial court would “more likely than not”⁴⁵³ find a real and imminent risk of conspiracy to injure by unlawful means.⁴⁵⁴ Consequently, interim interdicts were framed to restrain that conduct which, the Judges asserted, do so without infringing upon the Convention rights.

In *Thames Cleaning*, Justice Warby asserted that the geographical exclusion zone would “set clear boundaries, without destroying the essence of the right to protest, which does not depend on location, and without interfering disproportionately with Article 10 and Article 11 rights”.⁴⁵⁵ In a similar argument Justice Morgan was quite explicit in stating that “the location of the direct action is chosen as the best place to interfere with the activities of the fracking operators rather than (as in Parliament Square or St Paul's Churchyard) the best place to express opinions to the general public”.⁴⁵⁶ He further considered that “it is not open to the Defendants to rely on

⁴⁴⁹ Ibid

⁴⁵⁰ Meade, D. (2010). *Peaceful protest or direct action: where to draw the line* Available at: <https://www.theguardian.com/commentisfree/libertycentral/2010/nov/12/peaceful-demo-or-direct-action>. Last accessed 22/09/2019.

⁴⁵¹ Ibid

⁴⁵² [2016] EWHC 1310 (QB), [50]

⁴⁵³ [2005] 1 AC 253

⁴⁵⁴ [2016] EWHC 1310 (QB), [57] and [2017] EWHC 2945 (Ch), [94]

⁴⁵⁵ Ibid 55

⁴⁵⁶ [2017] EWHC 2945 (Ch), [114]

Articles 10 and 11 in an attempt to justify direct action for the purpose of harming the Claimants with a view to forcing them to give up their lawful business...⁴⁵⁷ Thus, by characterising the activities at issue not as protests – which would be protected by Article 10 and Article 11 ECHR – but as unprotected ‘direct action’, the judges in these cases have drawn an artificial and disingenuous distinction between ‘protests’ and ‘direct action’ with the far-reaching consequence that Articles 10 and 11 are not engaged, leaving the participants unprotected.

The extent to which that distinction is disingenuous is perhaps best illustrated by briefly returning to the US jurisprudence emerging from s8(b)(4)(ii)(B) NLRA, to compare the judicial reasoning in the UK with that of US judges adjudicating over similar litigation. In the US, s8(b)(4)(ii)(B) NLRA prohibits inciting a secondary boycott, as it renders it an unfair labour practice to “threaten, coerce or restrain any person engaged in commerce, or in an industry affecting commerce, where the object is forcing or requiring any person to cease using, selling, handling, transporting, or otherwise, dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person”.⁴⁵⁸ This prohibition of inciting a secondary boycott is effectively a statutory equivalent of the interpretation of the delict of conspiracy to injure by unlawful means offered by Justices Warby and Morgan above: it has the same effect, of rendering actions directed at third parties in disputes unlawful.

The proper course of analysis for US courts presented with the argument that an activity violates s8(b)(4)(ii)(B) is to ask firstly, does the activity violate the terms of the legislation –does it “threaten, coerce or restrain” and secondly, does it constitute picketing?⁴⁵⁹ The courts are also required to interpret statutory provisions in such a way to avoid rendering the statute unconstitutional.⁴⁶⁰ Thus, two related tests have developed: The Speech Plus Doctrine,⁴⁶¹ and the Picketing Test.⁴⁶² According to the

⁴⁵⁷ Ibid. 137

⁴⁵⁸ NLRA s8(b)(4)(ii)(B)

⁴⁵⁹ Eliason, 355 NLRB No. 159

⁴⁶⁰ 485 U.S. 568 (1988)

⁴⁶¹ Bakery and Pastry Drivers and Helpers v Wohl 315 U.S. 769 (1942)

⁴⁶² Rakoczy K. L. n.87 1622-1654.

Speech Plus Doctrine, the First Amendment will only protect speech, and not conduct. According to the Picketing Test, if an activity constitutes picketing it involves coercive conduct which is not protected by the First Amendment. By either test, a finding of ‘more than mere communication’,⁴⁶³ or a mixture of communication and conduct⁴⁶⁴ is fatal to First Amendment protection, and leaves activity directed at third parties vulnerable to liability under s8(b)(4)(ii)(B).

As was discussed in chapter one, the modus operandi of leverage appears to have been developed with an eye to comprehensive campaigns in the US. The application of these tests to tactics of comprehensive campaigns, in part to avoid rendering the statute unconstitutional, has often involved likening the activities to speech, or protest activity, as opposed to picketing. Recently, in *Sheet Metal Workers Local # 15 (Brandon Regional Hospital)*,⁴⁶⁵ following decisions like *DeBartolo II*⁴⁶⁶ that handbilling is protected speech, the D.C Appeal Court disagreed with the Board’s initial analysis that the mock funeral (described as street theatre), violated s8(b)(4)(ii)(B).⁴⁶⁷ In doing-so the Court likened the street theatre to protest activity at abortion clinics, which had been found to be constitutionally protected.⁴⁶⁸ The court argued that whilst the ends of the secondary boycott may have had the “functional equivalent of picketing”,⁴⁶⁹ the means by which it was achieved (the mock funeral) lacked the “coercive character of picketing”.⁴⁷⁰ The Court reversed the ruling on the mock funeral and remanded the case back to the Board to consider whether the inflatable rat, handbilling, or banners would amount to violations. In the meantime in *Eliason* 355 NLRB No. 159 (*Eliason*),⁴⁷¹ the Board, had found that the display of a large inflatable rat balloon lacked coercive conduct to violate s8(b)(4)(ii)(B), and amounted to symbolic, protected speech.⁴⁷² Thus, the Board found that the inflatable

⁴⁶³ *Kentov v Sheet Metal Workers’ Int’l Ass’n Local 15, AFL-CIO* no. 105 – 14126 (2005)

⁴⁶⁴ *Ibid*

⁴⁶⁵ *Sheet Metal Workers Local # 15 (Brandon Regional Hospital)*, 356 NLRB No. 162 (2011)

⁴⁶⁶ *De Bartolo II* 485 U.S. 568 (1988), see also Chapter One.

⁴⁶⁷ *Sheet Metal Workers Local 15 (12-CC-1258, etc al: 356 NLRB No.22.)*

⁴⁶⁸ *Sheet Metal Workers’ Local 15 v NLRB*, 491 F.3d 429 (2007) at [35] following *Madsen v Women’s Health Centre, Inc* 512 U.S. 735, 114, S.Ct. 2516, 129 L.Ed.2d 593 (1994) and *Hill v Colorado*, 530, U.S. 703, 120, S.Ct. 2480, 147 L.Ed.2d 597 (2000)

⁴⁶⁹ *Sheet Metal Workers’ Local 15 v NLRB*, 491 F.3d 429 (2007)

⁴⁷⁰ *Ibid*

⁴⁷¹ *Eliason* 355 NLRB No. 159

⁴⁷² *Ibid*

rat and handbilling at issue in *Brandon Regional Hospital*⁴⁷³ also did not violate the Act as they were neither picketing nor coercive,⁴⁷⁴ and found that they were “expressive activities”⁴⁷⁵ protected by the First Amendment, so not reached by s8(b)(4)(ii)(B).

Although this is far from settled law – with cases continuing to arise and be decided in different ways at different levels⁴⁷⁶ – in the US, when faced with the prospect of ruling that certain types of protest activity are unlawful, the Courts have tended to liken those activities to speech. Doing so allowed the Courts to find that they were protected by the First Amendment, and out with the reach of s8(b)(4)(ii)(B). In other words, the activities could not be restrained, as to do so would infringe upon First Amendment rights.

Despite engaging in a very similar analysis of protest activity – drawing distinctions between protests, or speech involving the expression of opinion, and those which are viewed as involving disruptive, or coercive, conduct – the two jurisdictions have reached very different conclusions. Where in the US that analysis allowed the activity to be likened to protest activity, and so protected by the First Amendment, by comparison in the UK the reasoning appears to have been developed to avoid the protections of the ECHR. By characterising the activity as disruptive direct action, going beyond typical protest and not therefore protected by the Convention rights, the judges reasoned that they could issue interim interdicts without infringing upon Convention rights – even without any unlawful acts actually having taken place. The argument that these protests are qualitatively different from typical protests is disingenuous: it unquestioningly assumes that *all* protest activity which is directed at third parties (other than severely restricted picketing in *Thames Cleaning*) may be

⁴⁷³ 356 NLRB No. 162 (2011).

⁴⁷⁴ *Ibid*, 2.

⁴⁷⁵ *Ibid*

⁴⁷⁶ For example, a recent advice memorandum from the National Labor Relations Board (International Brotherhood of Electrical Workers, local 134 (Summit Design +Build); 13-CC-225655) (12-20-18)) in December 2018 suggested display of a rat balloon might amount to coercive conduct, whilst in *King v Construction & General Building Laborers’ Local 79*, E.D.N.Y. No. 1:19 – civ-03496, Memorandum & Order Issued 7-1-19 similar activities were found not to violate it.

unlawful – which is reinforced by the terms of the interdicts issued. Even where, as is the case with leverage campaigns the purpose is to further a trade dispute by publicising its existence and thereby put at stake the employer’s reputation.

This judicial reasoning marks an important reassertion of the law of delict into the law of industrial action, rendering activities, particularly protests directed at third parties, associated with leverage campaigning unlawful. The requisite unlawfulness is established by a finding of disruptive ‘direct action’ – as distinct from protest. This distinction resembles the US distinction between speech and conduct. However, if the US experience – of finding that protest tactics e.g. use of handbills, banners, street theatre and inflatable rats are protected speech by the First Amendment – teaches us anything, it is that the leverage protests should similarly be treated as protest activity, protected by the Convention rights, and not restrained. However, in the UK, there is evidence of the development of an anti-leverage interdict which is based on the judicial assumption that protest activities directed at third parties are unlawful. Further, there is evidence of both a willingness to restrain the activity, and a real reticence to protect it. Just as the Court, in *Brandon Regional Medical Centre*⁴⁷⁷ in the US, accused the Board of failing to differentiate between the means and ends, a similar criticism could be levied at the UK courts. The employer may well be the intended (indirect) target of the activity, however, the means – of directing protests at third parties – are not unlawful, but ‘jealously protected’ Convention rights.⁴⁷⁸

4.3 Conclusion

Traditionally, the legal framework regulating industrial action in this country distinguished lawful from unlawful action with reference to the trade union’s purpose. According to the golden formula, a trade union would be immune from suit in delict if it had acted ‘in contemplation of furtherance of a trade dispute. In 1980, Lord Scarman counted himself and his colleagues on the bench lucky to be spared the

⁴⁷⁷ *Sheet Metal Workers’ Local 15 v NLRB*, 491 F.3d 429 (2007), [33]

⁴⁷⁸ *Ibid*

‘strange and embarrassing task’ of assessing the nature of the tactics used by trade unions in the course of an industrial dispute in order to determine the lawfulness of their actions.⁴⁷⁹ As a result of the amendments to the law contained in the TUA, and of union and employer responses to those amendments, it seems that judges will increasingly be called upon to do just that.

The comparison drawn in chapter one between the development of leverage in the UK and comprehensive campaigns in the US suggested that union and worker engagement in public protest can be incentivised where the right to take industrial action is continually subjected to increasingly narrowed restrictions. The TUA creates a number of additional restrictions on the right to take industrial action and therefore further incentivises protest activity as an ‘easy’, effective and, assumed lawful, alternative. It seems equally likely then that employers will respond with the “powerful industrial weapon”⁴⁸⁰ of interim interdict, turning to the courts to prevent, or restrain leverage. Contrary to assumptions about the prima facie lawfulness of protest activity, the amended TULRCA and the common law both present opportunities for litigation arguing that the union’s industrial action is unlawful. Through the delict of conspiracy to injure by unlawful means, and by differentiating between ‘protest’, and ‘direct action’, the courts are able to restrain the activity, whilst claiming not to infringe on the Convention Rights. This is indicative of a judiciary which is willing to restrain protest activity – a willingness which is likely to carry into their interpretation of the TUA. However, it also affords employers an opportunity to restrain leverage protest activity under the common law, irrespective of the amended TULRCA. Thus, there is a significantly increased opportunity for, and likelihood of, protest activity and industrial action being restrained by the courts on the basis of their tactics.

⁴⁷⁹ *Express Newspapers Ltd v McShane* [1980] 2 W.L.R 89, 694

⁴⁸⁰ G Gall. n.220, 327-349.

5. General Conclusions

In 2013 Unite the Union was accused of using ‘leverage’ tactics in an industrial dispute with Ineos at the petrochemical refinery in Grangemouth.⁴⁸¹ There, the union engaged in tactics which, amongst others, included high-profile protest activity. It was that activity which attracted the attention of the mainstream media and of the Government, initially in the commissioning of the Carr Review and later in the Trade Union Act 2016, which was arguably designed to render the kinds of activity associated with Grangemouth unlawful. The aim of this thesis has been to assess that legislation, as a response to leverage campaigning, asking firstly if and how it can be understood as a response to leverage, and secondly what are its implications for determining the lawfulness of industrial action. It is concluded that the TUA can, and indeed should, be understood from the perspective that it forms a response to leverage campaigning, and that it leaves unions increasingly vulnerable to litigation, with employers arguing that the protests in furtherance of a trade dispute are unlawful.

Reaching that conclusion required an understanding of what is meant by ‘leverage’, and why it developed, beyond the descriptions offered in the press following Grangemouth, and in the Carr Review. By comparing the UK leverage campaigns with the US experience of comprehensive campaigns it is clear that leverage is not simply the use of protest during industrial disputes but has a strategic underpinning which intrinsically links its development with the legal framework. The comparison drawn in chapter one demonstrates that while the use of protest is a key feature of the leverage campaign, the strategy of leverage is to develop tactics – like protests – which publicise the dispute to influential parties, which are lawful, and which do not derive that lawfulness from compliance with the restrictive law governing industrial action. In the minds of trade unionists like McCluskey, in other words, leverage is a symptom of an increasingly restrictive framework and ought not to be the cause of one.

⁴⁸¹ Dixon, H. n.1

However, this is precisely what happened when the Government sought to introduce legislation which would bring the activity of protesting during industrial disputes within the ambit of the Trade Union and Labour Relations (Consolidation) Act 1992.

Analysis of the Government's policy pronouncements in the wake of the Grangemouth dispute, the Carr Review (as it was commissioned, its content, and its findings), and the views of the Government espoused during the Consultation process, demonstrate quite deliberate efforts at developing a narrative to justify and legitimise legislative intervention to restrict the use of protest activity in industrial disputes. That narrative created a nexus between 'leverage', presented as protest activity during industrial disputes, and extreme conduct. Accordingly, the ability of labour to lawfully engage in that 'extreme' conduct was presented as a gap in the law of industrial action. Thus, the Government was able to justify legislative measures which would restrict labour's access to protest activity – or what Carr called 'protests in furtherance of a trade dispute',⁴⁸² and the Government described as 'wider protests'⁴⁸³ – on the grounds that the industrial context rendered it inherently extreme.

Assessment of the enacted provisions of the TUA similarly demonstrates that they are pursuant to a policy of restricting the capacity of labour to protest. Enacted provisions, such as balloting thresholds,⁴⁸⁴ the obligation to specify tactics on the ballot paper,⁴⁸⁵ and the introduction of the picket supervisor, do not prima facie regulate the use of 'wider protests'. However, by tracing their development – from manifesto pledges and Consultation proposals to enacted legislation – and against the background of the narrative surrounding union's protest activity, it is possible to identify their underlying objective. That objective may be summarised as restricting union's access to protest activity by, in a manner reminiscent of the 1980's, making their lawful use of protests subject to the onerous requirements of the TULRCA, and thereby creating opportunities for employers to seek to have the activity restrained. This point is reinforced by making a tentative prediction as to the judicial interpretation of the

⁴⁸² *The Carr Review* (October 2014) n.4 [5.77]

⁴⁸³ *BIS Consultation on Tackling Intimidation of Non-Striking Workers* (July 2015) n.232 [5]

⁴⁸⁴ TUA s2 and 3

⁴⁸⁵ TUA s229

provisions of the TUA. The TUA may be understood as a response to leverage in its determination to bring the use of protest activity, by unions in industrial disputes, within the confines of the TULRCA, thereby undermining the assumptions of lawfulness upon which the leverage strategy is based.

It follows, then, that the purpose of furthering a trade dispute is sufficient to render the protests in industrial disputes unlawful. This is evident in a review of the likely judicial treatment of both the legislation and protest activity. By reviewing litigation concerning protest activity, which might resemble leverage activity, and by comparing it with the US experience, the thesis identifies a significant deficit in the law. That deficit is not, as Carr and the Government suggested, the ability of labour to protest lawfully, but rather the reticence of the judiciary to protect the unions' right to protest. Comparison with the US also identifies a means of interpreting activities as speech (or protest as the UK judiciary have referred to it), not conduct (referred to in the UK as direct action), and therefore protected under the First Amendment. However, despite engaging in a similar analysis in the UK the distinction has allowed the judiciary to avoid protecting the protest activity. Not only does this not bode well for any future judicial interpretation of the TUA, but it is also indicative of a judiciary which has similarly connected 'leverage' protest – as protests directed at third parties – with extreme conduct which is capable of giving rise to liability in unlawful means conspiracy. Thus, either under the TUA or the common law employers seeking to restrain the protest as unlawful conduct will force the judiciary to engage in the "strange and embarrassing task"⁴⁸⁶ of interpreting the tactics of unions to determine the lawfulness of industrial action.

In answer to Len McCluskey's question 'can unions remain within the law any longer?'⁴⁸⁷ unions engaging in leverage campaigns which include protests, on the basis that they are lawful and out with the scope of the TULRCA, should exercise caution as the activity is increasingly likely to be found to be unlawful. The fact that a protest is undertaken in contemplation or furtherance of a trade dispute is increasingly

⁴⁸⁶ [1979] ICR 210

⁴⁸⁷ McCluskey, L. n.5, 439-449

likely to cause it to be unlawful: either by virtue of the provisions of the TUA, or under the common law. Historically the golden formula delineated the lawfulness of industrial action by reference to that purpose of furthering a trade dispute. However, by regulating protest activity in response to the development of leverage campaigning and bringing it within the restrictions of the TULRCA, the TUA restricts unions' right to protest thereby rendering the golden formula simultaneously the gateway to statutory immunity⁴⁸⁸ and the barrier to lawful protest. This makes it increasingly difficult for unions to lawfully express dissent or exercise industrial power through leverage campaigns.

⁴⁸⁸ Simpson, B. n.105, 475

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