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'Legitimate' Protest in European Human Rights Law: A Critical Reconstruction

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ABSTRACT

This article studies the construction of 'legitimate' protest in European human rights law. It uses the jurisprudence of the European Court of Human Rights to understand and evaluate what kinds of protest the Court legitimises, and what kinds it does not. The conceptual map consists of three ideas: responsibility, disruption, and offence. It is argued that these three fundamental strands come together to construct the Court's account of 'legitimate' protest. This account is also reconstructed through a critical evaluation of the Court's justifications, enabling us to interrogate the Court's judgments and criticise them for inadequately protecting the right to protest. It concludes with observations about what the findings mean for the protection of human rights and democracy, positing that the Court offers only limited or no protection to protestors who do not fit a certain model, which is a threat to democracy.

Keywords: Right to protest, ECHR, freedom of expression, freedom of assembly, democracy

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I. INTRODUCTION

We have been living through an age of pandemic, but also of protest. From the global Black Lives Matter (BLM) protests to women's rights demonstrations in Poland challenging the tightening of anti-abortion laws, people took to the streets. All of this occurred in the middle of an unprecedented global pandemic which posed new threats to the health and safety of protestors and gave new opportunities to governments to crack down on dissent. Although there is nothing new about protests, these raised some novel questions and sparked renewed debate on old ones. Should BLM protestors be allowed to topple racist statues? Should women's rights activists be allowed to protest during a public health emergency?

This article is an attempt to understand how European human rights law answers these questions, and to interrogate those answers. In particular, it seeks to study how the jurisprudence constructs 'legitimate' protest and punishes 'illegitimate' protest. Why European human rights law? First, the European Convention on Human Rights (ECHR) legal order has a rich body of jurisprudence going back decades on this topic. Second, the European Court of Human Rights (ECtHR) is an international human rights court, so unlike domestic law it can show the 'bigger picture', and since its *raison d'être* is protection of human rights, it is expected to provide the highest possible protection for rights.

In theory, the right to protest is guaranteed under Articles 10[1] and 11.[2] Yet, as a discussion of the case law will show, "[i]t is not so much a right to protest, rather a *fight* to protest, because … the law is weighted against the protestor."[3] Preliminarily, it must be noted that both

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[1] Freedom of expression:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[2] Freedom of assembly and association:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

[3] John Cooper QC, 'The Right to Protest?' (Speech at 25 Bedford Row) <https://www.25bedfordrow.com/cms/document/The_Fight_to_Protest___John_Cooper_QC.pdf> accessed 23 November 2020 (emphasis added).

these rights are qualified rights and can be limited in light of public safety, protection of health or morals, rights and freedoms of others, etc. Article 11 additionally only protects peaceful assembly, and thus any protest not adjudged to be 'peaceful' is outside its scope. Evidently, these concepts are not self-explanatory, and much depends on how they are interpreted.

Further, the level of protection the ECtHR offers to protestors will seem inconsistent with its position on political expression more generally. The Court has justifiably "afforded a very high level of protection to political speech"[4] and scrutinises restrictions on such speech carefully.[5] It has said in *Wingrove v United Kingdom*[6] that "there is little scope … for restrictions on political speech or on debate of questions of public interest". One would thus expect it to protect protest, which is also a form of political expression, as enthusiastically. However, as this article shows, this is not the case. Moreover, while the jurisprudence on free speech shows that politicians are free to use exaggerated and provocative language to make their point,[7] the case law on protest does not extend the same privilege to the people. This deprives citizens of a voice beyond the ballot, and only protects politicians, who are more likely to be elites. These points will be analysed further below.

This article will show that the ECtHR's idea of 'legitimate' protest consists of three strands, which will be reconstructed through a critical evaluation of the Court's justifications. The three concepts that form the substantive framework are responsibility, disruption, and offence. All three are interrelated and overlapping in some respects. Together, they explain and give an account of the Court's vision. The logic of all three concepts is distinct and may be contradictory. For example, in some cases on responsibility and disruption, the Court carefully emphasises that it is condemning the *act* (such as blocking roads) and not the speech. In contrast, in cases where the Court has protected 'offensive' protests, it has stated that the method and the message are inherently linked. Yet, all three are united by one underlying idea condoned by the Court—protests should not cause too much inconvenience. As John Cooper QC has said, "[t]here is, of course, still a right to protest … just as long as it is … not so noisy and inconvenient as to get in the way of the powerful."[8]

The purpose here is not simply to tell a story, but to question and critique how the Court defines these concepts and applies them. For instance, there is a responsibility to not engage in violent protest, but how should violence be construed? Would a broad definition of violence

4 Erica Howard, 'Gratuitously Offensive Speech and the Political Debate' (2016) 6 EHRLR 636.
5 ibid 636.
6 *Wingrove v United Kingdom* App no 17419/90 (ECHR, 25 November 1996).
7 Howard (n 4) 637.
8 Cooper (n 3).

limit the kinds of permissible protest? What does this mean for human rights and democracy? The following sections ask and attempt to answer such questions.

II. RESPONSIBILITY

The first theme in the characterisation of 'legitimate' protest is that of responsibility. While the duty is usually on the guarantor (the State) to ensure that rights are upheld, the Court has emphasised the duties of rights-bearers as well. The text of Article 10 itself says that its exercise "carries with it duties and responsibilities", so this finds textual support. Thus, the responsibility to act or refrain from acting in a certain way can be conceptualised as a duty imposed on the actor. This is fundamentally different from how the protestors may view their actions themselves—they may feel the responsibility *to* protest, which could then justify certain means. However, the protestors' perspective is not the one the law adopts, and this tension will be seen below. It imputes responsibilities *on* them: towards other citizens, fellow protestors, towards oneself, and even property. It will be argued that the extent to which the Applicant acts 'responsibly', according to the Court's understanding, influences whether a violation of their Convention rights is found. Further, how the Court constructs an account of a 'responsible' protestor will be critically examined.

A. TIME, PLACE, MANNER

One aspect of responsibility is time, place, and manner restrictions on protests. The Court has reiterated that some regulation is permissible for the maintenance of public order, but this cannot be used to stifle dissent.[9] The most important judgment on this is *Navalnyy v Russia*,[10] one of the very few Grand Chamber cases on this topic. Mr Navalnyy is a political activist and opposition leader. He brought an application to Strasbourg relating to consistent attempts by the government to restrict his political activity.

In *Navalnyy*, the Court laid down principles to be followed in assessing the right to protest under Article 11 which merit close scrutiny. It first noted that notification/authorisation procedures for protests cannot be an end in themselves. However, they are justified in general, if they do not "encroach upon the essence of the right"[11] and the purpose is to guarantee the smooth conduct of assemblies. This does not seem problematic at first, especially since there is

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9 This is becoming crucial in today's political climate, when governments are imposing extensive restrictions and using sanctions when these exact procedures are not followed.

10 *Navalnyy v Russia* App nos 29580/12, 36847/12, 11252/13, 12317/13, 43746/14 (ECHR, 15 November 2018).

11 ibid at [100].

an exception for spontaneous demonstrations. However, the Court did not elaborate on the "essence" of Article 11, and a vague concept such as this enables wide discretion and could lead to serious interferences with the freedom of assembly, legitimised by the Court itself. Furthermore, the ECtHR carved this exception narrowly, to only include spontaneous demonstrations in *special circumstances*, hollowing it out since the Court can decide what constitutes a legitimate reason to demonstrate spontaneously. Here, on the occasions where the Applicant was protesting, the Court emphasised that the gatherings were peaceful and caused hardly any disturbance, so they should have been tolerated. Yet, it immediately restricted this:

> The intentional failure […] to abide by these rules and the structuring of a demonstration, or of part of it, in such a way as to cause disruption to ordinary life and other activities to a degree exceeding that which is inevitable in the circumstances constitutes conduct which cannot enjoy the same privileged protection … as political speech or debate on questions of public interest or the peaceful manifestation of opinions on such matters. On the contrary … Contracting States enjoy a wide margin […].[12]

This highlights the dual responsibility the Court attributes to protestors: they must not intentionally break the notification rules, and they should not cause disruption that is more than what is inevitable. The fact that *this* kind of assembly does not attract the same protection that other kinds do, and the fact that States have a wide margin of appreciation when it comes to this, shows that the Court is carving out a category of illegitimate protest: *intentionally unlawful* and *unnecessarily disruptive*. Disruption will be discussed below; however, for now it must be noted that some kinds of protest are inherently disruptive, and that is their point. The Court saying that this does not attract the same protection as political speech limits freedom of assembly to only some 'acceptable' assemblies. This is troubling since protest is also a form of political expression, warranting a narrow margin. Moreover, saying that it does not deserve the same privileged protection as *peaceful* expression is even more concerning—it seems as though the Court is saying that non-violent but disruptive forms of protest are not peaceful.[13] Since Article 11 only protects peaceful assembly, this excludes them from protection.

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12 ibid at [156].

13 See Helen Fenwick and Gavin Phillipson, 'Direct Action, Convention Values, and the Human Rights Act' (2001) 31 Legal Studies 535.

Furthermore, the issue with the position on spontaneous assemblies becomes clearer from *Éva Molnár v Hungary*.[14] Here, demonstrators started to protest against the statutory destruction of ballots. The Court reiterated that the absence of prior notification can never be a legitimate basis for crowd dispersal. However, it then evaluated whether the special circumstances under which the notification requirement can be set aside were present. First, it noted that the election result was released two months earlier and had been objectively established. Second, if the demonstrators wished to express solidarity with other protestors, the Court was not persuaded that this could not happen with prior notification.

The first objection is logical since it casts doubt on the spontaneity. However, interestingly, the Court added that the election results had been objectively established. Should the factual basis of the topic matter? For instance, can an assembly be 'illegitimate' in the eyes of the Court if the facts are contested, and the assembly is held by vaccine or climate change sceptics? Although there is overwhelming scientific consensus on these issues, making them objectively established, to say that these gatherings are not as protected as others comes close to content-based restrictions.[15] Perhaps there is a responsibility to protest only when the message has some factual basis. Moreover, it is concerning that the Court stated that expressing solidarity with another protest is not spontaneous. Fulfilling the notification requirements may take a few days, even weeks, and the momentum may die by then. This shows why the special circumstances element is problematic—it allows the Court to adjudicate which spontaneous assembly is legitimate and which is not, and this decides the responsibility of the organisers to fulfil the notification requirement. Thus, not only is there a responsibility to follow procedures, but this also varies based on the nature of the protest.

Non-spontaneous assemblies are similarly restricted. In an earlier Chamber decision, *Lashmankin and Others v Russia*,[16] the Court defended the right to choose the time, place, and manner of protesting, especially when these are important to the participants. However, this should be within the limits of restrictions under Article 11 paragraph 2 and there is a wide margin. Thus, the *right* to choose the time, place, and manner also entails the *responsibility* to put up with certain restrictions and deference towards national authorities. The line between a legitimate and an illegitimate assembly can thus be drawn by the government, with the Court adopting a light-touch review. Mead has therefore argued for a narrow margin to protect

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14 *Éva Molnár v Hungary* App no 10346/05 (ECHR, 7 October 2008).

15 See Helen Fenwick, 'The Right to Protest, the Human Rights Act, and the Margin of Appreciation' (1999) 62 MLR 491.

16 *Lashmankin and Others v Russia* App nos 57818/09 and 14 others (ECHR, 7 February 2017).

political speech and democracy when peaceful communicative action is concerned.[17] This is consistent with the free speech jurisprudence of the ECtHR.

B. REPREHENSIBLE CONDUCT

Following on the 'legitimate' manner of protests, the category of "reprehensible conduct" offers interesting insight. This category has been constructed by the Court, but since there is no definition in the case law, it is a malleable concept. It will be argued here that the understanding of "reprehensible conduct" should be limited to violence, defined as bodily harm to individuals, to ensure that freedom of assembly is adequately protected. An early discussion of reprehensible conduct can be seen in *Ezelin v France*,[18] a Chamber judgment from 1991. The Applicant, a lawyer, took part in a protest where the police claimed the protestors shouted slogans, painted 'offensive' graffiti, and turned violent. Disciplinary sanctions were imposed on him by the Bar. The Court found a violation of Article 11; there was no evidence that *he himself* made threats or daubed graffiti, and

> [F]reedom to take part in a peaceful assembly […] is of such importance that it cannot be restricted in any way […] *so long as the person concerned does not himself commit any reprehensible act* [...].[19]

This shows an element of individual responsibility in the Court's reasoning, focusing on what the protestor did. It also means that there is a category of acts that are reprehensible, showing normative condemnation of such behaviour, and making the method of protest illegitimate. Although the Court does not explicitly clarify whether it considers the painting of graffiti to be reprehensible, disassociating the Applicant from the act shows some disapproval, and conversely, approval of the Applicant as a 'responsible' protestor. It may be asked whether painting political slogans on public property is worthy of being deemed reprehensible, since it does not hurt individuals and can be a form of political expression. However, for now, the relationship between individual responsibility, reprehensible conduct, and the illegitimacy of protest is important for further consideration.

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

18 *Ezelin v France* App no 11800/85 (ECHR, 26 April 1991).

19 ibid at [53] (emphasis added).

The leading case on this is *Kudrevičius and Others v Lithuania*,[20] a controversial Grand Chamber case in which Lithuanian farmers protested against the fall in wholesale prices and a lack of subsidies by blocking three major roads. The District Court found them guilty of incitement to or participation in rioting, concluding that their actions had to be characterised as a riot, and they were given custodial sentences. The Court unanimously found no violation of Article 11. First, the judgment clarified that this was not a violent assembly, since vehicles had been used to block highways, not to cause bodily harm. Yet, secondly, it noted that disruption of traffic was intentional to attract attention and that "purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of … Article 11."[21] Third, it focused on the means used which had "shown a severe lack of respect"[22] for others by restricting public life to a greater extent than freedom of assembly should normally do. Finally, these actions were taken in a context where they were already given permission to demonstrate elsewhere, there were ongoing negotiations, and courts remained an alternative. Therefore, these acts constituted "reprehensible acts" which may justify criminal penalties.

This case is significant for what the Court said, but also what it did not say. It did not discuss the fact that domestic courts convicted the farmers of rioting, which is *by definition* violent, a claim dismissed by the Court itself. Furthermore, it stated comparative European Union (EU) law in *Schmidberger*,[23] where a motorway was blocked by protestors and the European Court of Justice (ECJ) found in favour of the right to protest, without discussing it. What it did say is even more problematic. In characterising disruption of traffic as "reprehensible conduct", the Court went beyond what the Convention says—Article 11 only protects non-violent assembly, but there is no value judgment on the use of other means. Commentators have similarly argued that the Court broadened the definition of "reprehensible acts" beyond acts such as violence and included the much less severe act of creating roadblocks, dangerously widening the scope for intervention, which leads to the "criminalisation of social protest".[24]

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20 *Kudrevičius and Others v Lithuania* App no 37553/05 (ECHR, 15 October 2015).

21 ibid at [97]. See further discussion on this in the next section.

22 ibid at [131].

23 Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* ECLI:EU:C:2003:333.

24 Ella Rutter and Jasmine Rayée, "'Do You Hear the People Sing?": *Kudrevičius v Lithuania* and the Problematic Expansion of Principles that Mute Assemblies' (*Strasbourg Observers*, 2 December 2015) <https://strasbourgobservers.com/2015/12/02/do-you-hear-the-people-sing-kudrevicius-v-lithuania-and-the-problematic-expansion-of-principles-that-mute-assemblies/> accessed 16 January 2021.

Further, to say that these means show disregard for the lives of others equates a traffic-free commute with a human right. Here, the right to protest is competing against lesser interests, themselves not worthy of protection as rights, which defeat it.[25] Traffic, an (often minor) inconvenience, is equated with, and trumps, a human right. It can be argued that sometimes the competing interests are rights themselves, such as the right to health being engaged if ambulances are unable to pass. However, the argument here is for *a* right to disruptive protest, not an absolute one. The facts of this case do not show instances of ambulances being blocked. The Court primarily relied on the delays and disruption experienced by trucks and other vehicles, which is inadequate for a blanket prohibition of roadblocks.

Moreover, the Court's analysis of alternatives was ahistorical and apolitical. The protest was organised in the first place since negotiations were not working, one reason for which could be the imbalance of power between the State and farmers,[26] who do not have the resources and influence that corporations do. Fenwick has also argued that such methods may provide the only avenue available to marginalised groups if they wish to participate in democracy, since the democratic process is exclusionary.[27] Suggesting that bringing legal action was a viable alternative is also questionable, since litigation is an option in nearly every case, so there would be no need for protests. The protest route can arguably be more accessible and effective than courts.

Nevertheless, *Kudrevičius* remains a key case. What it tells us about responsibility and the legitimacy of protest is significant. The emphasis is less on individual responsibility and more on the collective responsibility of demonstrators. They have responsibilities towards fellow citizens and must not restrict public life to a greater extent than one should 'normally' do. Here, the Court is delineating what a legitimate amount of restriction of ordinary life is, which makes it normal.[28] This is not based on frequency, since roadblocks are not extraordinary, but on a *normative* understanding of where the line needs to be drawn. Further, paradoxically, protestors must engage with other means available to them (negotiations or litigation) and not intentionally disrupt the lives of others to attract attention. The Court was not sympathetic to the argument that the blockade was needed as a last resort, or even as a political act coexisting

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25 Mead (n 17) 95.

26 The 2020-2021 farmers' protest in India, which lasted over a year, and culminated in the repeal of the farm laws which were being opposed, shows the radical potential of protests in giving a voice to those at the periphery of electoral politics and in achieving political goals.

27 Fenwick (n 15) 493.

28 It must be noted that a vision of 'ordinary life' is also being constructed here.

with negotiations. Thus, these are important lessons in which responsibilities must be followed for a protest to be 'legitimate' at Strasbourg.

Violence is supposed to be the clearest case of reprehensible conduct, but the way in which it has been defined is questionable. *Razvozzhayev v Russia and Ukraine*[29] offers a good starting point. In this case, the Applicants were convicted of organising mass disorder during a demonstration. The Court held that since the first Applicant intentionally led some individuals to break through the police cordon, and this triggered clashes, his conduct fell outside the notion of peaceful assembly. His application was therefore dismissed as incompatible with the Convention. This raises several questions. First, can breaking the police cordon be fairly labelled as a violent act? It disobeys police orders and may even create disorder, but it does not necessarily cause bodily harm. Additionally, the Applicant did not have violent intentions.[30] However, this is not how the Court saw the notion of violence here, diverging from *Kudrevičius*.

Second, it appears as though the Court is suggesting that the first Applicant's actions were not peaceful since they led to *others* following suit, which triggered clashes. However, this contradicts what the Court said in *Ezelin* about individual responsibility, which implied that assemblies are not violent, people are.[31] A case could be made for incitement to violence, or leading others to engage in violence, but this was not considered. The minority opinion[32] further highlighted that the clashes had occurred due to the accumulation of many people and crowd control measures by the police. Crucially, they opined that the mere fact that someone "contributed to the onset of clashes" does not necessarily exclude that the person acted peacefully—context is important. However, on the majority's reading, a demonstrator has the responsibility to not act in a way that may motivate others to cause disorder. This is a broad reading of the responsibility of demonstrators (and they must carefully evaluate their actions and their effects), an even broader reading of the meaning of violence, and a narrow reading of the responsibility of the police.[33]

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29 *Razvozzhayev v Russia and Ukraine and Udaltsov v Russia* App nos 75734/12 and 2 others (ECHR, 19 November 2019).

30 Beril Önder, "Peaceful assembly' and the question of applicability of Article 11' (*Strasbourg Observers*, 17 January 2020) <https://strasbourgobservers.com/2020/01/17/peaceful-assembly-and-the-question-of-applicability-of-article-11/> accessed 17 January 2021.

31 Mead (n 17) 68.

32 *Razvozzhayev* (n 29) Opinion of Judges Lemmens, Yudikivska, and Keller.

33 Contrast this with how the Court justifies the means used by the police during protests, which has gained much attention after the recent BLM protests. In *Primov and Others v Russia* App no 17391/06 (ECHR, 12 June 2014), the Court allowed "the use of special equipment and even firearms," even if some police officers acted contrary to the rules, in response to a roadblock. Similarly, in *Oya Ataman v Turkey* App no 74552/01 (ECHR, 5 December 2006), the Court condoned the use of tear gas, even though it can lead to various medical complications and serious illnesses. In this case it was used merely because of a failure to disperse. This shows how easy it is to

Finally, interesting insight is offered by the relationship between property rights and "reprehensible conduct". *Taranenko v Russia*[34] is a case concerning public property, where violating property rights was seen as reprehensible conduct by the Court. Including a responsibility to respect property rights further expands the category of reprehensible conduct, making more kinds of protest 'illegitimate'. *Appleby v United Kingdom*[35] further gives an idea of how the Court views the relationship between private property and reprehensible conduct, although the ECtHR did not use the term. This case involved a town centre owned by a private company, where the Applicant and others set up stands, displayed posters, and collected signatures. The Court found no violation of Article 10 regarding their removal. It held that freedom of expression had to be balanced with property rights. However, in light of shrinking public space (privatisation of land that was once publicly owned[36]), the nature of the town centre as quasi-public (not entirely private like someone's garden), and the fact that the local authority had used it to promote political proposals (and thus the selective stifling of speech), the State's positive obligations should have been triggered to facilitate the right to protest. Sanderson has further shown how the State is directly responsible—although ordinary management had passed, responsibility for the administration of fundamental freedoms had not, since there were no hands able to take this burden.[37] Yet, as Judge Maruste's Partially Dissenting Opinion said: "the property rights of the owners … were unnecessarily given priority over … freedom of expression and assembly"[38]—even though holding these as equals in abstract terms is erroneous[39] in the first place. Finally, there is scope for potential misuse of rights by powerful private parties,[40] who can limit the forum and topics of discussion.[41] This disproportionately affects the marginalised, who cannot seek alternatives such as the media.[42]

The above cases show the priority attached to property over protest. Dissent must be respectful of the property rights of the State and corporations, and interference with them can dilute the legitimacy of the protest. Thus, there is a responsibility to maintain property rights.

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justify the use of force, even lethal means, by police officers, while the demonstrators must strictly adhere to their responsibilities related to peaceful assembly.

34 *Taranenko v Russia* App no 19554/05 (ECHR, 15 May 2014).

35 *Appleby v United Kingdom* App no 44306/98 (ECHR, 6 May 2003).

36 David Mead, 'Strasbourg Succumbs to the Temptation "to Make a God of the Right to Property": Peaceful Protest on Private Land and the Ramifications of *Appleby v UK*' (2003) 8 Journal of Civil Liberties 98.

37 MA Sanderson, 'Free Speech in Public Places: The Privatisation of Human Rights in *Appleby v UK*' (2004) 15 King's Law Journal 159.

38 *Appleby* (n 35) Partly Dissenting Opinion of Judge Maruste.

39 Mead (n 36) 103.

40 ibid 107–108.

41 Jacob Rowbottom, *Democracy Distorted* (Cambridge University Press 2010).

42 David Mead, 'A Chill Through the Back Door? The Privatised Regulation of Peaceful Protest' (2013) Public Law 100.

One can justifiably ask, "if almost all land is privately owned, where would demonstrators go?"[43] Furthermore, what happens if the protest is against property rights itself? There is no jurisprudence on this, but it is possible that, following the discussion above, the Court would say that protestors can take their disagreement elsewhere and express themselves without interfering with the property rights they oppose.

C. PATERNALISM

The final theme is that of paternalism, or restrictions that are allegedly in the interests of the protestors themselves. It will be contended here that the vision of an autonomous protestor is being supplanted by that of the responsible protestor, who exercises their autonomy in a particular way. In *Cissé v France*,[44] undocumented migrants occupied a church to draw attention to the difficulties they were facing, but they were evacuated. Finding no violation of Article 11, the Court held that although the protest was peaceful, after two months it resulted in the deterioration of the hunger strikers' health and sanitary conditions. The paternalism is clear—protestors have a responsibility towards *themselves*, to protect their own health and well-being. The fact that they are autonomous actors who can weigh the health risks associated with different methods of political participation is not considered. There is also something Orwellian about the fact that the dissidents' own welfare is used to justify curbing their freedom. It further rules out analogous methods of protest, such as situations in which the weather becomes unfavourable, which may make the protestors ill. Moreover, this logic can be (and has been) used to curtail protests during the pandemic, in the interests of the protestors' own health and safety, taking away their agency to assess the risks themselves. Interestingly, in *Cissé*, the Court could have also concluded that the State must ensure that the protestors are either well fed or that their demands are discussed, since it has positive obligations regardless of people's immigration status. Instead, it condoned their detention, deportation, and imprisonment—all in the name of a responsibility to oneself.

Austin v United Kingdom[45] is less straightforward. In this Grand Chamber case, the police used kettling[46] on anti-globalisation demonstrators. No announcement was made to the crowd when the cordon was first put in place. Eventually the weather became cold, no food or water was provided, and there was no access to toilets or shelter either. The High Court judge

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43 Mead (n 17) 74.
44 *Cissé v France* App no 51346/99 (ECHR, 9 April 2002).
45 *Austin v United Kingdom* App nos 39692/09, 40713/09, and 41008/09 (ECHR, 15 March 2012).
46 Kettling refers to containment within a police cordon.

concluded that apart from a real risk of injury and property damage, there were risks from crushing and trampling. The ECtHR held that there was no deprivation of liberty under Article 5. The measure was imposed to isolate and contain a large crowd in volatile and dangerous conditions. There was no alternative measure—this was the least intrusive and most effective.

Here, the Court saw an unruly crowd that needed to be 'managed', instead of a large-scale demonstration in which freedom of expression and assembly had to be protected. This again highlights the dichotomy of a responsible versus autonomous protestor. The demonstrators were prevented from protesting because they would hurt *fellow* demonstrators, a paternalistic understanding of the collective. Further, Oreb has argued that it is difficult to state conclusively whether Austin was safer inside or outside the cordon,[47] questioning whether kettling was for the demonstrators' own protection. Moreover, most demonstrators were not violent, and the violence that did occur could have been in response to the cordon itself, becoming a self-fulfilling prophecy: the police kettle demonstrators, who become violent, which is then used to detain them further. Crucially, the cordon was put up based on 'intelligence' of protestors having violent intentions, since previous anti-capitalist protests had led to a breakdown in public order. Not only does this show that the cordon was not in response to *actual* violence, it also suggests content-based restrictions. Ultimately, *Austin* shows that the responsibility of *some* demonstrators towards others can be used to curtail the liberty of *all*. However, if the Court's "reprehensible conduct" jurisprudence is applied, then only those who engage in violence should be kept in a cordon,[48] instead of effectively bringing the demonstration to an end.

Hence, it can be seen from the above discussion that the Court's construction of the 'responsible' protestor is also rooted in paternalism—the autonomy of the actor is curtailed, allegedly in their own interests, or in the interests of their fellow demonstrators. Certain forms of protest are consequently illegitimate in Strasbourg jurisprudence, not because they harm or affect *others*, but because they apparently harm the protestors themselves.

This section has shown three ways in which the case law has constructed the idea of responsibility. Following these makes a protest 'legitimate' in Strasbourg jurisprudence. We can also see an idea of the 'responsible' protestor emerging from these—one who does not

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47 Naomi Oreb, 'Case Comment: The Legality of 'Kettling' after *Austin*' (2013) 76 MLR 735.

48 David Mead, 'The Right to Protest Contained by Strasbourg: An Analysis of *Austin v. UK* & The Constitutional Pluralist Issues It Throws Up' (*UK Constitutional Law Association*, 16 March 2012) <https://ukconstitutionallaw.org/2012/03/16/david-mead-the-right-to-protest-contained-by-strasbourg-an-analysis-of-austin-v-uk-the-constitutional-pluralist-issues-it-throws-up/> accessed 25 January 2021.

cause too much inconvenience to others. This idea is also prominent in the Court's understanding of disruptive protest, discussed next.

III. DISRUPTION

The second idea in the construction of 'legitimate' protest in Strasbourg jurisprudence is that of disruption. In some sense, the right to protest can be conceptualised as the right to disrupt, since all protests are disruptive in a way—they disrupt the world as we know it.[49] More specifically, forms of direct action *aim* to disrupt—either to attract attention by disrupting the day-to-day functioning of society,[50] or by directly stopping an activity that is seen as unjust (for example, occupying an arms factory to prevent the arms from reaching warzones). This brings the right to protest in tension with other interests, such as economic or security-related interests.

The ECtHR, however, has largely not been sympathetic to disruptive protest. Although it has said that a certain level of disruption is inevitable and the authorities must show a degree of tolerance,[51] the actual level of disruption tolerated in the jurisprudence is minimal. The Court has often seen disruption as a reasonable justification for curtailing the right to protest. Mead's content study of the case law has also shown that where any form of obstructive activity has been engaged in, even if minor, restrictions have been upheld.[52] Although the Court stresses that the condemnation is limited to the means adopted,[53] it is very difficult to separate the subject matter of the protest (that is, political expression) from its form, which becomes evident from the discussion below.

It will be argued here that if a protest is disruptive according to the Court, it is within Strasbourg's constructed category of 'illegitimate' protest. How the Court delineates the boundary between the kind or amount of disruption that should be tolerated and that which should not, as well as what the underlying conception of the 'ideal' protestor is, will also be examined.

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49 Shepherd Mpofu, 'Disruption as a Communicative Strategy: The Case of #FeesMustFall and #RhodesMustFall Students' Protests in South Africa' (2017) 9 Journal of African Media Studies 351.

50 ibid 354.

51 *Kuznetsov v Russia* App no 10877/04 (ECHR, 23 October 2008).

52 David Mead, 'The Right to Peaceful Protest under the European Convention on Human Rights – a Content Study of Strasbourg Case Law' (2007) 4 EHRLR 345.

53 *CS v Federal Republic of Germany* App no 13858/88 (ECHR, 6 March 1989).

A. INTENTIONAL DISRUPTION

One way to understand the construction of disruption as 'illegitimate' protest in the case law is to look at the focus on intention. The Grand Chamber judgment in *Kudrevičius*,[54] discussed previously, is noteworthy here. Blocking roads is inherently disruptive, it stops traffic and may cause some upheaval. How the Court understood and assessed disruption offers another lens to view the judgment. First, the Court said that disruption, in this case, was not a side-effect, but *intentional* action to attract attention and to push the government. This means that although some unintentional disruption can be tolerated, using it as a *tool* makes the protest illegitimate. Contrast this with the Chamber judgment in this case, which said that a certain level of disruption is inevitable and should be tolerated. There seem to be two different visions of disruption here. One is based on threshold—disruption could be minimal or serious, with the former being permissible. The other focuses on intention—the legitimacy of disruptive protest depends on whether the protestors intended it to be as such. The Grand Chamber refers to both when it condemns "intentional serious disruption",[55] but it is unclear if it needs to be cumulative or if either is enough. If intention is enough on its own, then this effectively eliminates disruptive protest from the protection of the Convention, unless it is an unintentional side-effect. Crucially, disruption is often a means to an end—to raise awareness about an issue, to motivate people to act, to get the government's attention, or to get media coverage. In all these cases, it is *intentional*, even though the protestors do not want to harm those whose activities are disrupted.

Second, the Court declared that "conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the *core* of … Article 11."[56] However, the concept of the "core" or "essence" of a right is undefined and underexplained, thus remaining essentially pragmatic and unprincipled.[57] In the context of EU fundamental rights, it has also been criticised as arbitrary and meaningless for adopting an "I know it when I see it" logic.[58] As such, it remains an uncertain concept. Yet, if the Court's assertion of disruption not being at the core of Article 11 is taken seriously, it implies a

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54 *Kudrevičius* (n 20).

55 ibid at [73].

56 ibid at [97] (emphasis added).

57 Sébastien Van Drooghenbroeck and Cecilia Rizcallah, 'The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?' (2019) 20 German Law Journal 904.

58 Mark Dawson, Orla Lynskey, and Elise Muir, 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?' (2019) 20 German Law Journal 763.

deprioritisation[59] of disruptive protest, placing it outside a sacrosanct core.[60] What is essential to a right and what is peripheral is not obvious, and it involves normative choices. For instance, commercial expression is less protected than political expression, but the justification is that freedom of expression exists to protect democracy, not economic interests. No such principled explanation is offered in *Kudrevičius*, even if the merits of the methodological approach are presupposed. Consequently, to say that one method (that of disruption) is not as central to freedom of assembly, is to cast doubt on its legitimacy as a method of protest—as abnormal or unnecessary, even reprehensible.

Finally, in justifying the custodial sentence, the Court emphasised that such "inconvenience does not seem disproportionate when compared to the serious disruption of public order provoked."[61] It reached this conclusion following a wide margin, due to a focus on disruption, as opposed to the political aspect of the protest, which should have led to a narrow margin. Justifying a custodial sentence in response to "serious disruption" to traffic is concerning, and it shows the extent to which disruptive protest is seen as illegitimate: reprehensible enough to justify *imprisonment*.

B. DISORDER

Another trend has been the equation of disruption with disorder. *Steel and Others v United Kingdom*[62] is a paradigmatic case. Here, the Applicants undertook various disruptive forms of protest. The first Applicant took part in a protest against a grouse shoot by attempting to obstruct and distract those taking part. The second Applicant took part in a protest against the building of an extension to a motorway by breaking into the construction site and climbing on trees and machinery.[63] Here, the Court recognised that physically impeding activities constitutes expression under Article 10. However, it noted that regard must be had to the "risk of disorder arising from the persistent obstruction … as [the shooters] attempted to carry out their lawful pastime."[64] There are two noteworthy things here. First, the Court characterised direct action as somewhat inherently disorderly. It may be worth asking how obstructing a shoot can lead to disorder. This was a non-violent protest in which the demonstrators sought to prevent an activity

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59 Van Drooghenbroeck and Rizcallah (n 57) 906.

60 Pierre Thielbörger, 'The "Essence" of International Human Rights' (2019) 20 German Law Journal 924.

61 *Kudrevičius* (n 20) at [178].

62 *Steel and Others v United Kingdom* App nos 67/1997/851/1058 (ECHR, 23 September 1998).

63 Although this case is from 1998, it is of immense contemporary relevance. For example, environmental activists opposing the building of the HS2 rail link recently occupied tunnels in London Euston and were removed by the police, which is analogous to the factual matrix in *Steel*.

64 *Steel and Others* (n 62) at [103].

they found morally objectionable. What the risk of disorder was, and how it would manifest itself, was not discussed. It has been contended that disorder has often been used to mean mere inconvenience or annoyance.[65] This seems convincing, as the logical link between obstructing a shoot and an outbreak of violence (or other forms of disorder) is tenuous here, unless there were some special circumstances (contrary to the facts). Nevertheless, based on the Court's understanding, since preventing disorder is a legitimate aim for restricting rights, this *form* of protest is seen as illegitimate due to its alleged propensity to cause disorder. Further, the threshold for a protest being characterised as disruptive is quite low, and proving a connection based on disorder (defined as the absence of order, turmoil, civil disturbance, or chaos[66]) is not required.

Second, emphasis was laid on the fact that lawful activities were being disrupted, contrasted with the unlawful activity of obstructing them, and thus breaking the law to prevent a lawful activity is cast as illegitimate. However, this emphasis on legality can be questioned. 'Illegal protest' can be effective, since it makes for sensational news and would be covered by elite-controlled media.[67] It can also make it difficult for a system or activity to function.[68] Moreover, some reframing is needed: this was a peaceful protest on a political issue, and on the other side of the balance was a hobby practiced by some. In these circumstances, stripping both the activities of their context and only evaluating them based on their legality, on the assumption that the hunters "were doing nothing (legally) wrong", means exaggerating the claim they have. This is another instance of the argument that has been made previously, that protest is pitted against lesser claims, which ultimately outweigh human rights. After all, if the Court is "defending the rights of hunters … over the rights of free expression or demonstration it ought, at the very least, admit as such."[69] Fenwick and Phillipson, however, have argued that personal autonomy is threatened when an individual's freedom to choose to take part in morally controversial activities, such as hunting, is curtailed through the imposition of others' views. They have also argued that the hunters' freedom of association is at stake.[70] However, this reasoning overlooks the fact that the protestors' autonomy is *also* at stake. As discussed above, the reason political speech is more valued and highly protected when compared to commercial

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65 Mead (n 17) 90–91.

66 ibid.

67 Kimberly Brownlee, 'Protest and Punishment: The Dialogue between Civil Disobedients and the Law' in Michael Freeman and Ross Harrison (eds), *Law and Philosophy* (Oxford University Press 2007).

68 ibid 263. It must be noted that if the right to disruptive protest is protected too, it would no longer be illegal. However, the disruptive nature of the protest is still likely to garner media attention.

69 David Mead, 'The Human Rights Act – A Panacea for Peaceful Public Protest?' (1998) 3 Journal of Civil Liberties 206.

70 Fenwick and Phillipson (n 13) 545.

speech, or here, an individual's recreational activity, is due to its roots in democracy. Thus, the autonomy of protestors should outweigh that of hunters.

This idea of disruption that the majority favoured was also challenged by the dissenting judges.[71] They questioned if disrupting the shoot to defend animal rights was as dangerous as the majority made it seem. This is especially important since the connection with disorder is not self-evident, and a fundamental freedom is being weighed against a pastime. Nevertheless, this case shows that the ECtHR is unwilling to protect more obstructive and disruptive forms of protest.[72] Thus, very few Strasbourg cases succeed when they are outside the paradigm of peaceful demonstrations and processions.[73] This can be seen as the archetype of 'legitimate' protest, and the further the protestors deviate from it, the more the restrictions on their protest are justified for the Court.

C. LEGITIMACY OF NON-DISRUPTIVENESS

The final set of cases show how the Court has bolstered the legitimacy of certain kinds of protest by characterising them in opposition to disruptive protest, which makes them 'worthy' of protection. Thus, even though the Court found violations in the cases discussed below, it did so by distinguishing them from other, 'illegitimate' forms of protest.

Solo demonstrations, a matter of discussion in *Novikova and Others v Russia*,[74] offer interesting insight here. The Court held that solo demonstrations fall under Article 10. Noting that they are a form of political expression, and that here the demonstrators merely held posters, the Court found that the actions of the police were disproportionate due to multiple factors, and the one relevant for our discussion is "swift termination". The Court stressed that there was only one participant, so prior notification would not have enabled the authorities to take measures to minimise disruption. Further, the ECtHR emphasised that the events were peaceful, and that there was no violence or obstruction of traffic. Thus, an attempt was made to characterise solo protests as harmless and causing no disruption—an attempt to lend legitimacy to them and characterise the demonstrators as 'ideal' protestors. The corollary of this would be

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71 According to them, "[w]hat is not … debatable is that to detain for forty-four hours and then sentence to twenty-eight days' imprisonment a person who, albeit in an extreme manner, jumped up and down in front of a member of the shoot to prevent him from killing a feathered friend is so manifestly extreme, particularly in a country known for its fondness for animals ..." (Joint Partly Dissenting Opinion of Judges Valticos and Makarczyk).

72 Mead (n 52) 356–357.

73 ibid 359.

74 *Novikova and Others v Russia* App nos 25501/07, 57569/11, 80153/12, 5790/13, and 35015/13 (ECHR, 26 April 2016).

that a protest that is disruptive of traffic, for instance, would not enjoy the same protection. If a solo protest involved standing on a zebra crossing with a poster, stopping the flow of traffic to bring the attention of drivers to an issue, it could have been construed differently. Notably, the threshold for disruption of traffic may well be below the kind of scenario in *Kudrevičius*.[75] A single person obstructing traffic may also be characterised as 'disruptive' protest.

Similarly, *Mariya Alekhina and Others v Russia*[76] also illustrates how 'legitimate' protest is cast in opposition to disruption. This case will be discussed in depth in later, but briefly, the facts involved members of a feminist band Pussy Riot performing songs with political messages in a cathedral. One of the factors the Court emphasised in assessing their application under Article 10 was the fact that they did not disrupt any religious services—conduct characterising 'ideal' protestors. Thus, as in *Novikova*, the claim of the protestors was strengthened by disassociating them from an 'illegitimate' form of protest (that is, disrupting services in the cathedral). Had they started their performance in the middle of a service, interrupting the ordinary functioning of the place of worship, the Court could have been less sympathetic.

This section has discussed the construction of disruption as an attribute that makes protest 'illegitimate' at Strasbourg. It has shown how an attempt has often been made to divorce the *means* of disruption from the political *message* in the reasoning of the Court. The ECtHR often reminds the protestors that there were other, non-disruptive, means available. As Mpofu has argued, this can be understood as a plea to protest within the confines of the law, which can be shorthand for protesting on the margins and not disturbing the status quo.[77] This can be seen in the case law as well—so long as the protest does not cause too much inconvenience it is protected, since some disruption is inevitable, but not when it gets too disruptive. Thus, what is protected is only the right to protest in a certain, limited way. This is further seen in the next section on offence, where the means are questioned not only for causing some tangible inconvenience, but mere intangible offence, and the content also comes under scrutiny.

IV. OFFENCE

The final concept in the construction of 'legitimate' protest is offence. The Court has firmly said that if disagreement were enough to prohibit certain kinds of protest, then "society would be … deprived of the opportunity of hearing differing views on any question which offends

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75 As stated previously, in *Kudrevičius*, vehicles were used to block major roads for a sustained period.
76 *Mariya Alekhina and Others v Russia* App no 38004/12 (ECHR, 17 July 2018).
77 Mpofu (n 49) 360.

the … majority."[78] Following this, mere 'dislike' or 'offence' is not enough to muzzle freedom of expression, and a diversity of views is celebrated as intrinsic to democracy. Moreover, there is a positive reason to protect offensive protest: offensiveness can serve as a "pre-political gateway to future civic engagement"[79] and is a "worthy political tool … to publicise neglected political issues."[80] This is particularly important for minorities, since the majority usually has the power to define offence.[81] Thus, the argument from democracy and minority rights both support a defence of offensive protest.

It will be argued that although a 'right to offend' is protected under the right to protest, and thus the offensiveness of a protest does not render it 'illegitimate', this is applied inconsistently, which raises a deeper question of what an 'offensive' protest is, and how much offence is too much.

A. 'RIGHT TO OFFEND'

In a series of cases on freedom of expression, the ECtHR has reiterated that speech or expressive acts can "offend, shock, or disturb"[82] and still be protected. This has led Fenwick to conclude that the content of a protest rarely excludes it from protection.[83] An early example of this is the 1988 case of *Plattform Ärzte für das Leben v Austria*.[84] Here, counterdemonstrators had shouted and thrown eggs and grass at demonstrators. The Court, under Article 11, unequivocally said that although a demonstration may "annoy or give offence,"[85] the demonstrators must be allowed to protest without fear, otherwise they (and others) will be deterred from expressing their views. A violation was not found on the facts, but this principle is significant.

More recently, it was reaffirmed in *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*,[86] where assemblies commemorating certain historical events important to the Macedonian minority in Bulgaria were banned. The demonstrators were accused of

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78 *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* App nos 29221/95 and 29225/95 (ECHR, 2 October 2001) [107].

79 Ian Reilly and Megan Boler, 'The Rally to Restore Sanity, Pre-Politicization and The Future of Politics' (2014) 7 Communication, Culture, & Critique 435.

80 Anne Graefer, Allaina Kilby, and Inger-Lise Kalviknes Bore, 'Unruly Women and Carnivalesque Countercontrol: Offensive Humour in Mediated Social Protest' (2019) 43 Journal of Communication Inquiry 171.

81 Marietta Kesting, 'Changing Visual Politics in South Africa: Old and New Modes of Exclusion, Protest, and Offence' in Anne Graefer (ed), *Media and the Politics of Offence* (Palgrave Macmillan 2019).

82 *Handyside v United Kingdom* App no 5493/72 (ECHR, 4 November 1976).

83 Fenwick (n 15) 496.

84 *Plattform Ärzte für das Leben v Austria* App no 10126/82 (ECHR, 21 June 1988).

85 ibid at [32].

86 *Stankov* (n 78).

separatism and challenging Bulgaria's territorial integrity. The Court found a violation of Article 11, and one reason was that no matter how "shocking and unacceptable"[87] certain words or views may be, a total ban endangers democracy. This is a robust defence of unpopular minority opinions. The Court also made the link with democracy explicit: democracy allows disagreement and debate, hence suppressing 'offensive' ideas threatens it. Thus, propagating an 'offensive' message does not make a demonstration 'illegitimate' in the jurisprudence.

Not only are 'offensive' ideas protected, 'offensive' methods are protected as well. *Fáber v Hungary*,[88] for instance, was about a controversial symbol. It involved a counterdemonstrator waving a "provocative" flag, which the government saw as threatening public peace since it could have led to hostile incidents. The Court firmly stated that the "provocative" nature of the flag, that is, the offence caused by it, constituted freedom of expression and was not enough to justify intervention. Further, it noted that mere display of the flag was not capable of disturbing public order or hampering the demonstrators' freedom of assembly. Crucially, it held that "ill-feelings" or "outrage" cannot represent a pressing social need—a move firmly in favour of 'offensive' methods of protest.

This has also been applied to the manner of expressing dissent in *Stern Taulats and Roura Capellera v Spain*,[89] where the Applicants had set fire to a photograph of the royal couple during an anti-monarchist and separatist demonstration. They were charged with the offence of insulting the Crown and sentenced to 15 months' imprisonment. The Strasbourg Court found a violation of Article 10. It noted that the factors referred to by the Constitutional Court were clearly related to the Applicants' political criticism—the effigy of the King represented the monarch as the Head of the State, while the use of fire and turning the photo upside down symbolised rejection. Thus, the "provocative" events were used to attract media attention and went no further than recourse to a certain permissible degree of provocation to transmit a critical message. This is interesting, since the Court suggested that the category of 'offensive' speech in a protest is acceptable only to a *limited extent*, not *categorically*. This will become relevant while discussing other cases, where perhaps the offensiveness went beyond the 'permissible limit'. For now, it is evident that not only is the 'offensive' content of the protest protected, the method of expressing it is also not enough to make a protest 'illegitimate' for the Court.

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87 ibid at [97].

88 *Fáber v Hungary* App no 40721/08 (ECHR, 24 July 2012).

89 *Stern Taulats and Roura Capellera v Spain* App nos 51168/15 and 51186/15 (ECHR, 13 March 2018). NB the full judgment was only available in French, so the official summary of the Court (available in English) was relied on.

Thus, preliminarily, it can be said that 'offensive' protest is protected at Strasbourg to facilitate freedom of expression, minority views, and democratic discourse. Following this, it falls under the category of 'legitimate' protest. However, there may be limits to this, since protection is a matter of degree.

B. TOO OFFENSIVE?

Based on the above discussion, it seems that 'offensive' protest is well protected at Strasbourg. However, the story is more complicated. Other cases show that either the Court has been inconsistent in protecting such protest, or the way in which offence is understood in the jurisprudence is limited, severely restricting the scope of the 'right to offend'. It will be argued that the latter offers a better explanation, and although the Court has been strongly in favour of *some* kinds of 'offensive' protest, others are *too offensive* to merit such protection.

The first category of cases is one where no violation of Convention rights was found, and the reasoning of the Court explicitly stated that this was based on the provocative nature of the protest. *Sinkova v Ukraine*[90] illustrates this. Here, the Applicant fried eggs over the Eternal Flame at the Tomb of the Unknown Soldier. This was filmed and posted online with a message about the wastage of natural gas. She was charged and found guilty of desecration of the tomb. Invoking Article 10, the Applicant submitted that she was protesting against the wasteful use of natural gas and tried to draw attention to the fact that the funds used to maintain eternal flames could instead improve the living standards of war veterans. The Court disagreed. First, it said that she was prosecuted "only" for frying eggs, not the "rather sarcastic and provocative" video.[91] Thus, the conviction was due to her conduct and not for her views. However, this strips the performance of all meaning and context,[92] dismissing it as senseless provocation,[93] whereas it was arguably a part of, and central to, the political message. This is particularly true in the age of social media, where such provocative videos tend to 'go viral' and reach a mass audience, thus sparking debate about the issue. Overlooking these nuances, however, the Court singled out the 'offensive' means as a form of 'illegitimate' protest.

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90 *Sinkova v Ukraine* App no 39496/11 (ECHR, 27 February 2018).

91 ibid at [107].

92 Ronan Ó Fathaigh and Dirk Voorhoof, 'Article 10 ECHR and Expressive Conduct' (2019) 24 Communications Law 62.

93 Andra Matei, 'Art on Trial: Freedom of Artistic Expression and the European Court of Human Rights' (*SSRN*, 5 February 2020) <https://ssrn.com/abstract=3186599> accessed 5 March 2021.

Second, the Court emphasised the fact that she had many "suitable opportunities"[94] to express her views or participate in "genuine protests"[95] without breaking the law and insulting the memory of soldiers. This again shows contempt for her protest for being offensive, and stresses that there were inoffensive ways to make the point. The use of terms such as "suitable" and "genuine" suggests that the Court saw these qualities as those that characterise 'legitimate' protest, qualities that the Applicant's protest did not share. The minority challenged this—for them, although "extremely provocative", the right to offend, shock, or disturb is a part of Article 10.[96] Thus, the satirical nature of the protest, featuring exaggeration and distortion of reality to provoke and agitate, had to be considered.[97]

Ó Fathaigh and Voorhoof have argued that the aim of protecting the soldiers' memory should not have outweighed freedom of expression—this was a political performance, concerned a matter of public interest, did not involve violence, and had no intention to insult.[98] However, it can also be argued that mere offence should be filtered out at the legitimate aim stage, instead of being balanced. Möller has argued that for a goal to be legitimate, it must be autonomy-related, and ethical dislike (or offence) must not be accorded weight as 'legitimate' in a political community committed to personal freedom.[99] Letsas has also made a similar argument in the context of expression that offends religious feelings. He has contended that there is no right to not be offended, since offence has no independent moral value. To justify state intervention in response to individual offence is in fact the imposition of one view of the good life.[100] Following this, adopting the Court's view means sacrificing freedom of speech to the protection of the feelings of others.[101]

The second category is where a violation has been found, but only due to the imposition of harsh penalties. In these cases, the Court admitted that the outcome may have been different in the absence of strict punishment, and thus these are not cases where 'offensive' protest is being protected. In *Shvydka v Ukraine*,[102] for instance, the Applicant approached a wreath laid by the President and detached part of the ribbon bearing the words "the President of Ukraine V.F. Yanukovych". This was meant to express her disagreement with his policies. She was

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94 *Sinkova* (n 90) at [110].
95 ibid.
96 *Sinkova* (n 90), Joint Partly Dissenting Opinion of Judges Yudkivska, Motoc, and Paczolay.
97 ibid.
98 Ó Fathaigh and Voorhoof (n 92) 65.
99 Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012).
100 George Letsas, 'Is there a right not to be offended in one's religious beliefs?' in Lorenzo Zucca and Camil Ungureanu (eds) *Law, State, and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2012).
101 Matei (n 93) 2.
102 *Shvydka v Ukraine* App no 17888/12 (ECHR, 30 October 2014).

charged with petty hooliganism, convicted, and sentenced to ten days' administrative detention. Although the Court accepted that her acts constituted political expression, it held that the offence of petty hooliganism was not "manifestly inapplicable" to it, since it concerned "offensive behaviour disturbing political order."[103] For the ECtHR, her protest fell under this since she had "resorted to a provocative gesture likely to disturb or insult."[104] A violation was only found due to the imposition of the harshest sanction. Thus, even a minor act such as detaching a ribbon can be construed as 'offensive' and one that disturbs order, which means that the Court saw her protest as 'illegitimate' in some ways. Judge de Gaetano, however, thought that nothing could justify the conclusion that detaching part of a ribbon amounts to offensive behaviour.[105] The argument made here, however, goes further: *even* if it was offensive, it should be protected.

Finally, *Mariya Alekhina*[106] reiterates this. This case was previously discussed in relation to disruption, now the focus will be on offence. The facts are as follows: the Applicants, members of a Russian feminist punk band named Pussy Riot, performed a song which had political messages relating to criticism of President Putin and the support given to him by the Church; as well as supporting LGBT rights, feminism, and the right to protest, on the altar of Moscow's Christ the Saviour Cathedral. They were charged with the aggravated offence of hooliganism motivated by religious hatred. The District Court found them guilty and gave them prison sentences. The reasons included using "obscene language and insulting words", "showing disrespect for society", etc. Thus, their prosecution was based on feelings of religious offence, reiterated by the government's submissions to the ECtHR regarding the duty to not be "gratuitously offensive" towards religion. As Orlova has highlighted, this is because framing the issue as one of religious speech engages a wide margin.[107] As argued earlier, protest is a form of political expression, which should be highly protected in a democratic society. Protest has an element of action that speech does not, but it still falls under the umbrella of freedom of expression. The action is also a part of the expression—it is political. This should justify a narrow margin.

The Court found a violation of Article 10. It first noted that this was artistic and political expression. However, it again engaged the 'rights' of believers, but whether the right to not be

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103 ibid at [39].
104 ibid.
105 ibid, Separate Opinion of Judge de Gaetano.
106 *Mariya Alekhina and Others* (n 76).
107 Alexandra V Orlova, 'Pluralism, Democracy, and the Conflict Within: Challenging the State's Narrative by Artistic Forms of Protest' (2019) 27 University of Miami International and Comparative Law Review 1.

offended is a legitimate aim has been challenged above. Following this, it considered the performance as having violated the accepted rules of conduct in a place of worship, principally justifying the imposition of certain sanctions. Thus, a violation was only found due to their imprisonment, and the Court legitimised sanctions for engaging in 'offensive' protest. Importance was given to the sanctity of the religious place, without acknowledging why the venue was chosen—the Applicants had submitted that the Patriarch of the Russian Orthodox Church had used the venue for criticising demonstrations against Putin and announcing support for him. Moreover, Kananovich has stressed that the Church has generally legitimised and stabilised the Russian political regime.[108] Instead, by focusing on the religious aspects of the performance, the women were dismissed as "immoral sinners", not deserving protection.[109] The Court seemed to see protest in a place of worship as *inherently* offensive, and thereby illegitimate.[110] One may ask then, what happens if the point of the protest is to criticise what religion or its representatives stand for vis-à-vis women's rights, LGBT rights, etc., and to raise awareness among believers? Protests are not just against governments, but against *all* power structures. *Mariya Alekhina* suggests that these issues need to be debated outside places of worship, since their presence inside these sacred spaces can invite sanctions.

How can we explain these cases? One explanation is that the Court has simply been inconsistent: it has protected 'offensive' protest in some cases and not in others. This would mean that such protest remains within the category of 'legitimate' protest, but the Court has gotten the answer wrong sometimes. However, the sheer number of cases where this has happened[111] suggests that it is a pattern, not an aberration. Another, more nuanced approach, is that to understand this divergence in the jurisprudence we need to ask how the category of 'offensive' protest is constructed in the first place. In *Stern Taulats*, the Court indicated that there is a *permissible* degree of provocation, and perhaps in the other cases the method or message was too offensive—particularly when religious feelings are involved, as in *Mariya Alekhina*. Therefore, a trend similar to the disruption jurisprudence can be seen—offence is protected, but *only to a limited extent*. There are 'legitimate' kinds of offensive protest and 'illegitimate' kinds. Where the boundary is drawn is unclear, since burning a photo is permissible (*Stern Taulats*) but detaching a ribbon (*Shvydka*) is not. Criminal sanctions aside,

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[108] Volha Kananovich, '"Execute Not Pardon": The Pussy Riot Case, Political Speech, and Blasphemy in Russian Law' (2015) 20 Communication Law and Policy 343.

[109] Alexandra V Orlova, 'Russian Politics of Masculinity and the Decay of Feminism: The Role of Dissent in Creating New Local Norms' (2018) 25 William & Mary Journal of Race, Gender, and Social Justice 59.

[110] As Judge Elósegui said in his Partly Dissenting Opinion, "Article 10 does not protect the invasion of churches."

[111] See *Murat Vural v Turkey* App no 9540/07 (ECHR, 21 October 2014) and *Mătăsaru v the Republic of Moldova* App nos 69714/16 and 71685/16 (ECHR, 15 January 2019).

a lot may turn on the degree of permissible offensiveness, which is determined by the State that is the subject of the protest itself. Thus, if there is a 'right to offend' at Strasbourg, it is considerably limited. The 'ideal' protestor can theoretically engage in a somewhat 'offensive' protest and still be protected but should be careful to not be 'too offensive'. In practice, given the uncertainty regarding what would be protected, protestors would refrain from offensiveness altogether—a chilling effect on protest and free speech.

This section has shown how 'offensive' protest is both legitimate and illegitimate in Strasbourg jurisprudence, depending on how offensive the Court may deem the protest, and what it defines as offensiveness. It contrasted the 'right to offend' championed in some cases with others where the protest was seen as too provocative to be protected.

V. CONCLUSION

The idea of 'legitimate' protest in European human rights law thus lies at the intersection of the Court's understanding of responsibility, disruption, and offence. This article has used these concepts to construct a narrative about the jurisprudence, its underlying assumptions, and normative commitments. It has also critically evaluated the Court's account, since the aim was to reform as much as it was to understand.

It has also shown how, underlying the account of 'legitimate' protest in Strasbourg jurisprudence, is a vision of the 'ideal' protestor. They are a responsible protestor who, for instance, follows time, place, and manner restrictions set by the State, even if it significantly limits the protest. Moreover, they do not engage in any kind of disruptive protest, even if peaceful, since it may be construed as causing disorder. Finally, they are not too offensive or provocative in hurting the feelings of the majority or those in power. So long as individuals conform with this vision, the Court defends their rights. The more they depart from this, the more likely it is that the Court would not find a violation of their rights.

We now have some answers to the questions that were posed in the beginning. For example, when we ask if a women's rights protest will be allowed during the pandemic, ECHR law could answer in the negative, since the protestor has responsibilities towards themselves and their fellow protestors. This, however, does not tell us if it *should* be allowed. Following the analysis above, if this imputed responsibility is rooted in paternalism—and paternalism is generally contrary to autonomy, which we value—we might say that it should be allowed, at least under some conditions. Further, if the toppling of racist statues is construed as 'disruptive' (and we have seen how low the threshold for this is), or 'offensive' to the majority or the State,

then the Court would not rule in favour of the protestors. Yet, we could ask if this *really* causes any disruption at all, and who or what is being disrupted. Equally, we could ask if racist symbols are not more offensive to us as a society than tearing down statues, or alternatively, if this is not what the 'right to offend' entails.

What does all of this tell us? A recurring theme in the analysis of the jurisprudence has been the fact that the Court offers only limited or no protection to protestors who do not fit a certain model. There is a substantial degree of deference towards the State, following a wide margin, and the Court does not ask too many questions. This is concerning, since our human rights are being inadequately protected. Moreover, since political expression is being curtailed, democracy is imperilled. Democratic theorists have often noted that what we see today is only an "illusion of democracy",[112] since decisions are made behind closed doors by unaccountable agents.[113] Further, authoritarianism is rising in Europe under the guise of 'illiberal democracy'. In this regard, protests signify people's resistance to the status quo. These are not extra-democratic, they are a crucial (and sometimes the only) way of "challenging established privileges and shaking the existing institutions."[114]

Thus, restricting protests undermines an integral part of democracy—one that acts as a bridge between representative institutions and those they (seek to) represent. The argument becomes more pressing if we ask who can get elected through the mainstream democratic channels and who remains on the outside—a point that has been made throughout this article with regard to marginalised groups. The undocumented migrants in *Cissé*, for instance, do not have the political power that others do, they have to occupy a church to be heard.

Some may agree with the analysis above but argue that it is only certain kinds of protest which are not being protected, so democracy is not under threat. However, the roadblocks and occupations described in this article are "languages of the unheard."[115] D'Arcy has argued that "militant protest" is often good for democracy when it challenges the power of elites, gives a voice to the directly affected, enhances their power, and is sensitive to democratic values.[116] Other reasons why such protests may be the only avenue available have been discussed above. Therefore, an attack on the right to protest is an attack on democracy itself, and disruptive and offensive protests must be protected if we are to take democracy seriously.

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112 Robin Celikates, Regina Kreide, and Tilo Wesche (eds), *Transformations of Democracy: Crisis, Protest, and Legitimation* (Rowman & Littlefield Publishers 2015).
113 ibid 1.
114 ibid 2.
115 Stephen D'Arcy, *Languages of the Unheard: Why Militant Protest is Good for Democracy* (Zed Books 2014).
116 ibid 19–21.

This is not to say that there is no hope for a progressive jurisprudence. There are also trends within the jurisprudence (for instance, some protection of the 'right to offend') that can be leveraged to challenge other principles and judgments. The privileged protection given to political speech can also be used to give analogous protection to political protest. It is not uncommon to see the Court change its outlook. Thus, engagement with trends in the jurisprudence and the discourse on critique and reform must be kept alive.