

Dropping the case against the Fortnum protesters is not as interesting as their charges of aggravated trespass. This is yet another threat to the freedom to protest

One repercussion from a stream of protests against the Government over the last few months has been the number of arrests and prosecutions of those involved. [David Mead](#) looks at the increasing use of criminal sanctions for civil actions, and how this may have a chilling effect on those wishing to maintain their right to protest.



The [dropping of charges](#) last week against a hundred or so of the protesters arrested outside Fortnum and Masons in March has prompted a fair degree of comment and quite frenzied responses at the extremes on various blogs. No surprises there. I should declare an interest, of sorts: one of my posts on *The Guardian's* [Liberty Central](#) site is currently prompting fury, as are several others, at the linking of that group to two other protesters who have faced the criminal justice system these past two weeks: Francis Fernie and, more likely well-known, Charlie Gilmour.

Credit: Dominic (Creative Commons)

The point that I and others have been making is that excessive sentences for these admittedly violent protesters, as well as the reception of those sentences, runs the risk of chilling free speech and protest. As one respondent has set out four times to four articles, it is true that the [average sentence for violent disorder](#) is 15.9 months so Gilmour's sentence of 16 months was spot on (though he'd have expected a discount for a guilty plea) but it is equally true that some of those Rangers fans [caught up in the UEFA Cup Final riots in Manchester](#) in 2008 were sentenced to six months for throwing bottles at the police, not dissimilar to Fernie's stick throwing. It does seem eminently reasonable to argue that had this pair been caught up and lost it on a Saturday night in Norwich, it is unlikely they'd be looking at spending 12 months and 16 months inside.



Let's leave that discussion to run and run. I am as much interested in the actual offence that those inside Fortnum and Masons (largely members of UK Uncut) have been charged with – [aggravated trespass](#). It was introduced in 1994 in the Criminal Justice and Public Order Act (CJPOA), along with new offences to control raves and powers, backed by criminal sanction, to move on travellers occupying farmers' fields. Aggravated trespass – though Hansard does not record it as such – can clearly be seen as introducing a criminal mechanism to deal with hunt saboteurs trespassing on land intending to obstruct or disrupt someone else's lawful activity. No longer did the Master of the Hunt have to wait until there was actual violence or more obvious crimes before calling the police and neither was the trespassing a matter solely between the landowning farmer and the saboteurs – where in any event the only remedy would be an injunction or civil damages.

The introduction of aggravated trespass – alongside the crime of taking part in a trespassory assembly, also contained in the CJPOA – marks a new trend in the criminal law, as it applies to protesters and others alike: the criminalisation of what had hitherto been merely civil wrongs. We can see this elsewhere too: the ASBO regime. Breach of an ASBO, a civil order, is in itself a crime so anyone – including protesters – faces possible prison for doing something – being harassing – that is not itself a crime, and in cases where the order itself might have been granted on civil evidence which would not have withstood more rigorous scrutiny in the Crown Court.

This blurring of the lines between civil law regulation and criminal – or public – regulation is all the more marked and worrying in reverse, especially the increased use of anti-harassment injunctions to control and to constrain protests and protesters. Similarly, we are starting to see the beginnings here of the US SLAPP-phenomenon (strategic lawsuits against public participation) where corporate targets of protests and complaints resort to instituting libel suits to silence critics. In January 2011, [The Guardian reported](#) that law

firm Carter-Ruck had written to the Soil Association, arguing that its objections to an intensive pig-farm, for up to 25,000 animals, raised during the planning permission stage, were libellous. Lord Melchett the Soil Association's policy director made clear the chilling effect. "Your first thought is, these are incredibly rich and powerful people; we have no assets, we will have to back down, not because we think we are wrong but because we don't have the resources. It's taken a lot of time to feel we can risk standing up to them". There are clear concerns for transparency and accountability where regulation is privatised, as well as the cost problems caused where protesters are subject to civil actions rather than prosecution, where legal aid would be available, and other issues consequent on the transfer of the enforcement costs from the state to those targeted.

The fact that someone must actually have committed civil trespass to be found guilty of the crime of aggravated trespass is also a concern, for it goes to the knowledge and powers of the police. In most cases, it will be obvious to an officer, as she ponders arresting some protesters for aggravated trespass, that they are indeed trespassing but it might not always be so simple. Alongside an encyclopaedic knowledge of criminal offences, can we really expect officers to know the constituent elements of the tort of trespass? Though landlords own their land, their tenants "possess" it – something subtly but crucially different – and so are able to authorise protests on it over the head of any objections from the landlord ... but will a harassed officer know that, and will they bow to an incandescent landlord and arrest for aggravated trespass? This may seem like an arcane exam point (and it has been), but it is fundamentally important that officers should only be able to arrest – to interfere with our liberty – when their knowledge of the law is such as to allow them to make informed judgements about the scope of their powers. It seems unlikely that Wittington, Fortnum's owners, consented to UK Uncut being there (though we could query the role of any representations by staff?) It is too late for an effective right of protest if criminal charges are thrown out some months later when distant memories of first year tort re-awaken in the minds of CPS lawyers. The police will have done nothing wrong – they can always arrest on reasonable suspicion not only that X committed the crime but that a crime has in fact been committed, even if it transpires it has not. That is problematic.

Aggravated trespass is problematic in other ways too. It is a bit of a catch-all, criminalising mere presence on someone else's land, admittedly while intending to disrupt or obstruct. It therefore captures protesters who do not obstruct or disrupt but who simply stand in someone else's field with that intention; it moves us closer to criminalising states of mind, not actions other than (here) the act of civil trespass. The [courts have even held](#) that the offence is made out when it is not possible actually to cause disruption or obstruction, perhaps because the intended target does not appear that day. Arrests are likely to rise, not fall, as we realise there are increasingly fewer places where we are relatively free to protest. As public land is sold off, under a variety of governmental schemes and wheezes – plans to sell off Forestry Commission land, anyone? – then the use to which aggravated trespass, capable of applying to almost any protester on someone else's land, can be put will expand. This is the real loss of democratic space, and we delude ourselves if we think that privately-owned web domains can fill the vacuum.

There is one glimmer of hope on the horizon. Tom Watson MP has [tabled an amendment](#) to the Protection of Freedoms Bill currently before the House – as indeed has [Carolyn Lucas](#) to repeal that part of the CJPOA creating the offence of aggravated trespass – calling for a limited right of access to quasi-public land for the purpose of protest and free speech. It will be back before the Commons some time in the next session, though its chances of success are as slight as knighthood for Andy Coulson.