The Mobs Are Out: The Right to Protest on Public Roads

Richard Hart*

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I. INTRODUCTION

Whilst freedom of peaceful assembly has rarely been a matter of much concern to New Zealanders,[1] the December 2000 report of a parliamentary inquiry into the actions of police during protests against the State visit of Chinese President Jiang Zemin may represent a defining moment in this country's brief history of civil dissent. Allegedly acting at the behest of the New Zealand Prime Minister, the police sought to forcibly silence a demonstration that was taking place on a public street, so as to shield the visiting leader from embarrassment.[2] In concluding that such actions "prima facie infringed the fundamental civil rights of many of the protestors",[3] the Justice and Electoral Committee affirmed the importance of the rights to peaceful assembly and expression, rights towards which our law has not always been so tolerant.[4]

However, whilst Police misapprehended not only their own role, but

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1 Paraphrasing Huscroft, "Defamation, Racial Disharmony, and Freedom of Expression" in Huscroft and Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) 171.

2 See, for example, "Legal anger at use of 'PM's private army'", *New Zealand Herald*, Auckland, New Zealand, 15 September 1999, A1; Wall and Armstrong , "State dinner crisis for PM: Chinese furious at Tibet protest", *New Zealand Herald*, Auckland, New Zealand, 15 September 1999, A1; Wall, "Police deny pressure to end protest", *New Zealand Herald*, Auckland, New Zealand, 16 September 1999, A3. Further infringements on the right to free expression and assembly arose during the President's visit, including the rather absurd use of a bus to conceal three protesters from his view. See, for example, Young, "Police in fine tizz over Lee's Protest", *New Zealand Herald*, Auckland, New Zealand, 16 September 1999, A1.

3 Justice and Electoral Committee, *Inquiry into Matters Relating to the Visit of the President of China to New Zealand in 1999: Report of the Committee* (2000) 36; see also Small, "Right to protest freely trampled", *New Zealand Herald*, Auckland, New Zealand, 13 December 2000, A1.

4 For a concise summary of this argument, see Hart, "More Freedom in Public Expression", *New Zealand Herald*, Auckland New Zealand, 15 December 2000, A17.

also the legal and constitutional status of the right to protest on public roads, this latter misapprehension is perhaps understandable given the uncertainty that bedevils this area of the law. Is an otherwise lawful, peaceful and non-obstructive assembly on the highway permitted in law? Or do competing interests such as public order have higher constitutional force?

This article seeks to resolve this uncertainty by examining the right to protest on public roads in New Zealand law. Part II begins with an assessment of the competing interests of freedom of expression and assembly on the one hand, and public order on the other. In considering the plethora of restraints at the disposal of police and administrative officials, it shall be suggested that the existence of a right to protest on public roads depends largely on whether the law regards protest itself as a reasonable use of the highway. An analysis of *Director of Public Prosecutions v Jones,*[5] a recent decision of the House of Lords, concludes that it does, but only marginally. Whilst protest is not necessarily regarded as unlawful, no positive right to protest exists at common law.

Part III examines the current position in New Zealand, suggesting that the right to protest on public roads is a vulnerable one given the traditionally residual character of civil liberties in this country. It will then be proposed that, whilst the New Zealand Bill of Rights Act 1990 ("the Bill of Rights") has not elevated freedom of assembly to constitutional status, the few recent cases decided in this area of the law indicate a willingness on the part of the judiciary to give greater effect to the right when undertaking the balancing exercise that such cases inevitably require. Parts IV and V conclude with some thoughts as to the future status of the right to protest on public roads in the face of the potential corporatisation of the roading network.

II. PUBLIC ROADS, PROTEST RIGHTS AND PRIOR RESTRAINTS

1. Freedom of Expression and Peaceful Assembly

All free and democratic societies recognise the need to allow citizens to peacefully assemble in order to express their views publicly. Whether

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5 [1999] 2 WLR 625.

enshrined in entrenched constitutional documents,[6] thereby placing them "beyond the reach of majorities",[7] or simply affirmed through the incorporation of international human rights obligations into domestic legislation,[8] rights to free expression and assembly are widely perceived as being among the most fundamental of human freedoms. The exercise of such rights is found in the form of public protest, which is justifiable on a number of grounds.

For the individual citizen, protest not only has value in the context of personal self-development,[9] but also provides a means of political participation that is an alternative to voting. This is especially useful in electorates where there is a perceived lack of connection between election outcomes and public policy.[10] For example, the unresponsive nature of the United States' political system explains both that country's comparatively low average electoral turnout and the frequency with which its citizens turn to non-electoral modes of political participation. For interest groups and social movements, particularly those denied of formal access to the political process, street demonstrations constitute part of the tactical repertoire of activities by which group claims are promoted.[11]

For governments, in addition to providing "some index of the breadth and depth of sentiment on a particular issue",[12] protest serves a legitimating function: liberal and illiberal democracies can be distinguished in part by the level of tolerance and protection given to

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6 Most Bills or Charters of Rights guarantee both a right to free assembly and a right to free speech or expression. See, for example, the First Amendment to the Constitution of the United States of America; see also Art 2 of the Canadian Charter of Rights and Freedoms. One of the most recently drafted constitutions, that of the Republic of South Africa, actually grants, by Art17, a right "to demonstrate".

7 Cited by the United States Supreme Court as the purpose of that country's Bill of Rights: *West Virginia State Board of Education v Barnette* 319 US 624 (1943) 638 per Jackson J.

8 For example, the Human Rights Act 1998 (UK) incorporates the European Convention on Human Rights, of which Arts 10 and 11 guarantee free expression and free assembly. Sections 14 and 16 of the New Zealand Bill of Rights Act 1990 give effect to Arts 19 and 21 of the International Covenant on Civil and Political Rights.

9 The freedom to express oneself being an integral aspect of each individual's right to self-development and fulfilment. See Barendt, *Freedom of Speech* (1985) 14.

10 Franklin, "Electoral Participation" in LeDuc, Niemi and Norris (eds) *Comparing Democracies: Elections and Voting in Global Perspective* (1996) 228-231.

11 See Bashevkin, "Interest Groups and Social Movements" in LeDuc, Niemi and Norris, supra note 10, 134-145. Note that some doubt the efficacy and relevance of protest as a means of drawing attention to grievances. However, as one commentator has noted, "[w]riting off demonstrations as mere self-indulgence is one expression of a powerful strand of thought which denigrates collective action and sees civil liberties in terms of atomized individuals": Hewitt, *The Abuse of Power: Civil Liberties in the United Kingdom* (1982) 109.

12 Blasi, "Prior Restraints on Demonstrations" (1969-1970) 68 Michigan LR 1481, 1484.

basic freedoms of speech and assembly.[13] For the wider community, the open exchange of opinions and the liberty to criticise are "necessary conditions for the effective functioning of the process of searching for truth".[14] Such truth is most likely to emerge when political points of view are permitted to compete freely in a 'marketplace of ideas'.[15] Moreover, many of the other freedoms associated with liberal democracy – such as the right to vote, the right to stand for political office, and the right to join trade unions – were "hastened by meetings and marches and protest movements".[16]

However, whilst one can easily conclude that citizens ought to enjoy extensive rights to participate in public protest, it is equally clear that comprehensive protection of such rights "will impose certain burdens on other individuals or groups within the community".[17] Unlike the majority of generally well-protected civil and political freedoms, which only demand self-restraint from interacting with others in a harmful way,[18] the meaningful exercise of rights to free expression and assembly require some form of communication or interaction with the wider public[19] and will be restricted where competing principles have higher constitutional force. Whilst there are a number of statutory exceptions made to the right of free expression outside the ambit of political protest,[20] freedom of

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[13] It is argued that, in the next century, the most problematic states will not be dictatorships, monarchies, or totalitarian regimes; rather, they will be illiberal democracies - countries which, whilst reasonably democratic, lack constitutional liberalism. See Zakaria, "The Rise of Illiberal Democracy" (1997) 76(6) Foreign Policy 22.

[14] Schauer, *Free Speech: A Philosophical Enquiry* (1982) 15. Professor Schauer observes that the so-called "argument from truth" dominates the literature of free speech, from Milton's *Areopagitica* to Mills' *On Liberty*.

[15] Ibid 16. The "marketplace" thesis, advanced in the extrajudicial writings of American judges such as Holmes and Brandeis, is analogous both to the classical economic theories of Adam Smith, and to the use of cross-examination in the adversarial Anglo-American legal system as a means of testing evidence. For a criticism of the marketplace thesis, see Professor Laurence Tribe, cited in Barker and Barker, *Civil Liberties and the Constitution: Cases and Commentaries* (6th ed, 1990) 107: "[e]specially when the wealthy have more access to the most potent media of communication than the poor, how sure can we be that 'free trade in ideas' is likely to generate truth?"

[16] Robertson, *Freedom, the Individual and the Law* (7th ed, 1993) 65.

[17] Loveland, *Constitutional Law: A Critical Introduction* (1996) 562.

[18] Most of the rights affirmed in Part II of the New Zealand Bill of Rights Act 1990 are of this nature: an exception would be the right to vote affirmed in s 12, which arguably requires the state to hold periodic elections.

[19] As Professor Feldman eloquently notes, rights to free expression and protest, if they are to be effectively used, "presuppose that the freedom of other people from annoyance is restricted at least so far as necessary to allow the protester to impart the nature of the protest and invite people to join in protest or discussion": Feldman D, *Civil Liberties and Human Rights in England and Wales* (1993) 784 ("*Civil Liberties*").

[20] In New Zealand, there are a number of statutory provisions restricting free expression. See, for example, the Crimes Act 1961, ss 73-76 (treason), ss 80-85 (sedition), s 78A (wrongful communication of official information), ss 108-112 (perjury), s 124 (distribution of indecent matter),

peaceful assembly is generally limited in the name of public order and, depending on the location of the assembly, road-use or private property rights. These competing interests need to be carefully weighed and a compromise must be found that accommodates the right to protest within a framework of public order, as was recognised by Lord Scarman in his influential report on the Red Lion Square disorders.[21]

It is the task of any legal system to resolve conflicts of interest, and the balance that is struck between protest rights and public order will be indicative of a society's attitude towards the relative value of these different sorts of interests.[22]

2. Public Order Restraints on the Right to Protest

Although the vast majority of protest activities avoid escalation towards violence, the massing of people in the streets can occasionally be "high-pitched, brainless and brutal".[23] A crowd is a collective entity, and "people in crowds do not act with the restraint with which they may act individually".[24] Furthermore, in an era of tabloid television, where commercial imperatives have led to a "depoliticisation" and "morselisation" of journalistic content,[25] exposure to an audience increasingly requires some form of conflict in order to attract media attention.[26] Those who make and enforce the law typically view demonstrations in terms of "the disruption to normal community life, the expense of policing them, and the violence they provoke",[27] and regard the problems posed by protesters as analogous to those posed by vandals, quarrelling neighbours, hooligans and drunks.[28] By framing laws in terms

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s 401 (contempt of court); see also the Defamation Act 1992, the Films, Videos, and Publications Classification Act 1993, the Privacy Act 1993, and the Human Rights Act 1993.

21 The Red Lion Square Disorders of 15 June 1974: Report of an Inquiry by the Rt Hon Lord Justice Scarman, OBE, Cmnd. 5919 (1975) para 5.

22 To paraphrase Feldman, *Civil Liberties*, supra note 19, 782.

23 Robertson, supra note 16.

24 Waddington and Leopold, "Protest, Policing and the Law" (1985) 175 *Conflict Studies* 7.

25 For an account of this process in New Zealand, see Atkinson J, "The State, The Media, and Thin Democracy" in Sharp (ed) *Leap into the Dark: The Changing Role of the State Since 1984* (1994).

26 It may even be possible to justify civil disobedience when the existing law is so blatantly unjust that it becomes "necessary for you to throw your bodies upon the wheels and gears and levers and bring the machine to a grinding halt": Hook, "Social Protest and Civil Obedience" in Murphy (ed) *Civil Disobedience and Violence* (1971) 60 (citing a Berkeley student leader).

27 Hewitt, supra note 11. Wide sections of the public share similar views. Many people fail to distinguish between peaceful and violent demonstrations, and as a result condemn protest activities indiscriminately. See, for example, Etzioni, *Demonstration Democracy* (1970) 9.

28 Bailey, Harris and Jones, *Civil Liberties: Cases and Materials* (4th ed, 1995) 167. Whilst it is arguable whether the police ought to be aware of the political significance of certain types of public disorder, the law must operate in the same way for all.

of maintaining public order, officials are able to justify those that impinge directly on free expression and assembly.[29]

The most fundamental public order concept in the English legal tradition has been that of the king's – or queen's – peace, a regal form of the *mund* or protective power exercised by the head of a household.[30] By the fourteenth century, the king's peace had extended from the immediate surroundings of the royal court out across the country.[31] It was from the king's peace that the general principles of the criminal law "settled into their shape ... in the seventeenth and eighteenth centuries, between the times of Coke and Blackstone".[32] As the basis of public order law, the concept of the peace "has great potential for allowing people to contain other people's scope for protest".[33]

The New Zealand statute book contains a number of public order offences that could in some contexts be characterised as restrictions on the liberty to assemble, primarily: disorderly behaviour,[34] disorderly assembly,[35] obstruction of police,[36] obstruction of the highway,[37] unlawful assembly,[38] and riot.[39] Similarly, the wide power of arrest without warrant contained in section 315(2)(a) of the Crimes Act 1961, which permits a constable to take into custody any person whom he or she finds disturbing the public peace or committing any offence punishable by imprisonment,[40] may be used in such a way as to significantly curtail free protest, as may the section 42 power to prevent a breach of the peace.[41]

In addition to these statutory offences, a right of action in the tort of public nuisance[42] might be available to a local authority,[43] the Attorney-

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29 Ibid.

30 See Feldman, "The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding Over Powers" [1988] Cambridge LJ 101, 103-107 ("The King's Peace").

31 See, generally, Feldman, *Civil Liberties*, supra note 19, 786-789.

32 Allen, *The Queen's Peace* (1953) 33.

33 Feldman, *Civil Liberties*, supra note 19, 787.

34 Summary Offences Act 1981, s 3.

35 Summary Offences Act 1981, s 5A.

36 Summary Offences Act 1981, s 23.

37 Summary Offences Act 1981, s 22.

38 Crimes Act 1961, s 86.

39 Crimes Act 1961, s 87. The sections relating to the reading of the Riot Act were repealed by the Crimes Amendment Act 1987 (No 1).

40 Note that there is no offence of "disturbing the public peace" and any person so arrested must either be charged with a specific offence, or released from custody without charge.

41 The section provides a justification to constables and persons witnessing a breach of the peace to use force to prevent its continuance or renewal.

42 Whilst every public nuisance is a common law crime, these have been eliminated in New Zealand: Crimes Act 1961, s 9. That the tort has been abolished by a side-wind is generally doubted. See Chambers, "Nuisance" in Todd (ed) *The Law of Torts in New Zealand* (2 ed, 1997) para 9.9 ("Nuisance").

General,[44] or an individual who can prove special damage.[45] Most claims today involve activities on the highway,[46] and those who organise street processions and meetings are prima facie liable if those activities lead to an obstruction of the public's right of passage.[47] As for the tort of trespass, it would be rare for a local authority to bring such an action, at least in the absence of physical damage to the road.[48]

Despite the potential threat to freedom of assembly and expression posed by this collection of police powers, offences, and torts, the imposition of prior restraints in the name of preventive justice ought to be of greater concern for civil libertarians. In contrast with subsequent penal sanctions,[49] prior restraints were treated with hostility in many of the earlier commentaries on freedom of the press,[50] and there has been a heavy presumption against their constitutional validity in the United States.[51] That this hostility ought to extend to the imposition of prior restraints on the right to protest is obvious: when sanctions are imposed on demonstrators after a protest, that demonstration will still have achieved its aim of gaining publicity, but if it is prevented from ever taking place at all, this aim may be completely defeated.[52]

In New Zealand, the wide statutory authority given to the District Court to impose conditions on the granting of bail is potentially one such

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43 A local authority may institute proceedings in order to preserve the public health and well-being: Local Government Act 1974, s 595.

44 The Attorney-General will normally act by way of a relator action.

45 The action will not be available where the individual plaintiff "has suffered no different interference from that sustained by any other member of the public": Prosser, "Private Action for Public Nuisance" (1966) 52 Virginia LR 997, 1006. Professor Prosser notes, at 1007, that the requirement of particular damage arose because the plaintiff "could not represent the king, and the vindication of royal rights was properly left to [the king's] duly constituted officers".

46 So much so that it has been suggested that the tort would be better defined in its own terms as one of causing an obstruction or creating a danger on the highway. See Chambers, "Nuisance", supra note 42.

47 *Burden v Rigler* [1911] 1 KB 337.

48 See Chambers, "Trespassing on Land" in Todd (ed), supra note 42, para 8.6.6.

49 The argument has been made that the distinction is little more than one of form, and that the "chilling" effect of prospective penal sanctions may in fact be greater, as the potential defendant faces the twin uncertainties of a possible prosecution and an unpredictable sentence. See Barendt, supra note 9, 115-116.

50 For example, the licensing of books and newspapers was the only form of restriction that Milton thought wrong. See Schauer, supra note 14, 148-149. Blackstone, in volume IV of his *Commentaries*, considered that freedom of the press "consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published": cited in Barendt, ibid 114 (emphasis in original).

51 Barendt, ibid. Note that Blackstone was a large influence on the framers of the Constitution of the United States of America.

52 See Fenwick, *Civil Liberties* (1993) 146-147.

prior restraint,[53] as is the more restricted binding over power vested in the same court. Widely applied in England "against those who have not broken the criminal law",[54] the jurisdiction to bind over to keep the peace or be of good behaviour derives from "the royal prerogative and [from the] administrative arrangements of Saxon and Norman times",[55] and was later reposed in public officials by the Justices of the Peace Act of 1361.[56] This Act does not apply in New Zealand,[57] and it is unlikely[58] that any inherent power exists independently of the carefully defined authority conferred on District Court Judges to bind over to keep the peace.[59]

Protest rights may be further restrained through bylaws prohibiting street meetings and processions without the prior consent of the authority in which the streets are vested.[60] That freedom of assembly can be circumscribed in this manner raises a number of concerns.[61] The administrative officials who control road use may be untrained in the law and the standards they apply may be broad and imprecise.[62] Decisions may be made in private, allowing no opportunity for public scrutiny or even representation on the part of those wishing to demonstrate.[63] Given the time frames involved, there may be no effective right of appeal or judicial review.[64] As a result, the decision-making process may be based on political rather than legal considerations, giving effect to personal

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53 Summary Proceedings Amendment Act (No 2) 1987. Section 50A of the Summary Proceedings Act 1957 permits any District Court Judge, upon the application of the accused, to make an order varying or revoking any condition of bail. This operates as a prior restraint because bail may be granted without conviction of the offence. Therefore, one's rights are restrained before actually having done anything illegal.

54 Williams, "Preventive Justice and the Rule of Law" (1953) 16 MLR 417, 427.

55 Feldman, "The King's Peace", supra note 30, 102. The article contains a useful and thorough discussion of the origins of the power.

56 (34 Edw III, c 1). The Act provided that Justices shall take of those "that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people". See Williams, *Keeping the Peace* (1967) 88. For an account of the current procedure in the United Kingdom, see Feldman, *Civil Liberties*, supra note 19, 838-841. The person to be bound over is required by the court to enter into a recognizance or conditional debt owed to the Crown, and may be required to provide sureties. Whilst a binding over order is theoretically a voluntary undertaking, a person who refuses one may be imprisoned, regardless of the seriousness or triviality of the behaviour that originally brought that person to court.

57 As confirmed by the Imperial Laws Application Act 1988.

58 Brookfield, "Constitutional Law" [1992] NZ Recent LR 231, 245-246, citing the obiter comments of Tipping J in *Karatau v Police* (29 November 1991) unreported, High Court, Christchurch, AP 245/91.

59 Summary Proceedings Act 1957, ss 186-191.

60 The power of local authorities to make bylaws in respect of road use is discussed further in Part IV.

61 In addition to the concern already mentioned, supra note 51 and accompanying text.

62 See Schauer, supra note 14, 150.

63 See Barendt, supra note 9, 119.

64 Ibid 118.

prejudices and animosities, and having little regard for minority rights or the long-range public good. Indeed, local authorities may often have a vested interest in suppressing free expression and assembly.[65]

There are thus a variety of statutory and common law powers available to the police, the judiciary, and the local authorities to restrain or punish the exercise of protest rights in the name of public order. As was concluded in a review of the law relating to freedom of assembly written more than thirty years ago, "the concept of reasonableness is the fulcrum upon which criminal responsibility in this area is balanced".[66] For example, whilst the courts will be concerned with the reasonableness of the local authority when reviewing the validity of a bylaw,[67] or the exercise of a discretionary power,[68] it is the objective reasonableness of the defendant that will be examined in a prosecution for obstruction of the highway,[69] unlawful assembly,[70] disorderly behaviour,[71] or in an action in public nuisance.[72]

Whether there is a right to peacefully protest on public roads therefore depends on whether protest activity is itself a reasonable use of the road. Does an otherwise orderly, non-obstructive assembly on the highway automatically infringe the peace, or is something more required in order to justify the imposition of the various restraints?

3. Is Protest a Reasonable Use of the Highway?

The common law rights of the public in respect of the roads have traditionally been limited to use for the purpose of passing and repassing,[73] or for any other "reasonable and usual" practice.[74] This has

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65 See Schauer, supra note 14, 150.

66 Kilbride and Burns, "Freedom of Movement and Assembly" (1966) 2 NZULR 1, 28. I have drawn on this source for much of the argument advanced in this paragraph.

67 Bylaws Act 1910, s 17. The section provides that if a bylaw contains any provisions that are invalid because, inter alia, they are ultra vires of the local authority, repugnant to the laws of New Zealand, or unreasonable, then the bylaw shall be invalid to the extent of those provisions.

68 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA).

69 *Nagy v Weston* [1965] 1 WLR 280 (QB); *Stewart v Police* [1961] NZLR 680 (SC); *Lowdens v Keaveney* [1903] 2 IR 82 (KB).

70 *Beatty v Gillbanks* (1882) 9 QBD 308, discussed infra note 131.

71 *Police v Christie* [1962] NZLR 1109.

72 *Paprzik v Tauranga District Council* [1992] 3 NZLR 176, 184.

73 It is a "right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance": *Ex parte Lewis* (1888) 21 QBD 191, 197 per Wills J. Other judgments have inferred an intention in those who dedicated the roads to the public that the roads should be used only for passage. See, for example, *R v Cunninghame Graham & Burns* (1888) 16 Cox CC 420, 429-430 per Charles J: "the use of thoroughfares is for people to pass and repass along

been narrowly interpreted in many judgments as restricting the right of public road use to "passage and reasonable *incidental* uses associated with passage".[75] Thus, the courts have indicated that citizens may "meet in the streets and may stop and speak to each other",[76] or may rest or sketch for a reasonable time on the side of a highway,[77] or may park a vehicle for long enough to discharge passengers and goods.[78] Similarly, stopping temporarily on the verge of a highway for the purpose of taking refreshments,[79] and gathering on a corner for the purpose of singing carols,[80] have both received judicial approval as being reasonable uses of the road.

On the other hand, it has been determined that it is an abuse of the right of passage to use the highway solely for the purpose of interfering with a pheasant shoot taking place on neighbouring land,[81] or for observing the performance of racehorses in training,[82] or for selling hot dogs from a parked vehicle.[83] Whilst the judgments have provided some guidelines, they are really no more than commonsense assessments made on a case-by-case basis.

As to whether protest activity is a reasonable use of the highway, the common law has traditionally recognised a distinction between meetings and processions. It has long been the position that "there is no such thing as a right in the public to hold meetings as such in the streets",[84] for to allow otherwise would be "in its nature irreconcilable with the right of free passage".[85] Similarly, there is no right to use the highway for picketing,[86] at least where the picket is not in the furtherance of a trade dispute.[87] Processions, on the other hand, being in effect public meetings

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them. That is the purpose for which they are, as we say, dedicated by the owner of them for the use of the public, and they are not dedicated to the public use for any other purpose that I know of".

74 *Harrison v Duke of Rutland* [1893] 1 QB 142, 146 (CA) per Lord Esher MR.

75 *Director of Public Prosecutions v Jones*, supra note 5, per Lord Slynn of Hadley (emphasis added).

76 *M'Ara v Magistrates of Edinburgh* 1913 SC 1059, 1073 per Lord Dunedin.

77 *Hickman v Maisey* [1900] 1 QB 752, 756 (CA) per A L Smith LJ.

78 *Iveagh v Martin* [1961] 1 QB 232, 273.

79 *Rodgers v Ministry of Transport* [1952] 1 All ER 634 (QBD).

80 *Director of Public Prosecutions v Jones*, supra note 5, 654 per Lord Clyde.

81 *Harrison v Duke of Rutland* [1893] 1 QB 142.

82 *Hickman v Maisey* [1900] 1 QB 752.

83 *Nagy v Weston*, supra note 69.

84 *M'Ara v Magistrates of Edinburgh*, supra note 76, 1073 per Lord Dunedin.

85 *Ex parte Lewis*, supra note 73.

86 Whilst picketing often takes place in the context of industrial action, the term is not limited to trade disputes. Rather, it is frequently used to refer to any stationary demonstration whose aim is to "communicate views or persuade the public or a particular group without threat to public order or property": Carty, "The Legality of Peaceful Picketing on the Highway" [1984] Public Law 600.

87 *Hubbard v Pitt* [1976] QB 142 (CA). The case is perhaps best known for the vigorous dissent of Lord Denning MR at 178: "[h]ere we have to consider the right to demonstrate and the right to protest

in motion,[88] are regarded as prima facie lawful, since participants are merely exercising their right to use the highway for passing and repassing.[89] In New Zealand, this distinction between stationary and moving meetings is largely irrelevant, as in practice "the police exercise the same measures of control over demonstrations as they do over other meetings held in public places".[90]

Of course, the absence of judicial recognition of a positive legal right to assemble on the highway in protest does not necessarily mean that a meeting so held is prima facie unreasonable.[91] This now appears to be the legal position in the United Kingdom, following the decision of the House of Lords in *Director of Public Prosecutions v Jones*.[92]

The defendants, as part of a demonstration for the right of access to Stonehenge, had taken part in a peaceful, non-obstructive gathering near the monument in contravention of an order prohibiting the holding of trespassory assemblies in the area.[93] They were convicted at first instance,

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on matters of public concern. There are rights, which it is in the public interest that individuals should possess; and indeed, that they should exercise without impediment so long as no wrongful act is done. Our history is full of warnings against suppression of these rights .... As long as all is done peaceably and in good order without threats or incitement to violence or obstruction to traffic, [protest] is not prohibited". Note that s 15 of the Trade Union and Labour Relations Act 1974 (UK) contains a limited statutory immunity for peaceful picketing during a trade dispute.

88 Kilbride and Burns, supra note 66, 9.

89 *Lowdens v Keaveney*, supra note 69, per Gibson J: "[p]rima facie a procession, moving along a thoroughfare in a peaceable manner, would not be a nuisance; but it might become so if the right was exercised unreasonably or with reckless disregard of the rights of others". But cf the judgment of Richmond J in *McGill v Garbutt* (1886) 5 NZLR SC 73, who, as noted in Kilbride and Burns, ibid 10, appears to have started from the converse assumption that a procession is prima facie unlawful unless the user is reasonable.

90 McBride, *The New Zealand Civil Rights Handbook* (1980) 230.

91 See, for example, *Beatty v Gillbanks*, supra note 70, discussed infra note 131.

92 Supra note 5.

93 Public Order Act 1986 s 14A (UK), gives the police the power to apply for an order prohibiting for a specified period the holding of trespassory assemblies in a district, on the reasonable belief that the assembly may result in serious disruption to the community, or significant damage to a building or monument of historical, architectural or scientific importance. The defendants at first instance were convicted under s 14B, which makes it an offence to take part in a trespassory assembly knowing it to be prohibited. There is no New Zealand counterpart to this somewhat draconian statute, which was first passed in 1936 partly in response to the threat to peace posed by the followers of Sir Oswald Mosley. The 1936 Act gave the police a wide discretion to impose constraints on public processions, or ban them altogether where it was thought that the imposition of conditions would not be sufficient to prevent serious public disorder. When re-enacted in 1986, it extended these powers to apply to stationary meetings as well as marches. The 1994 amending Act, which inserted ss 14A and 14B into the principal Act, was "consciously directed towards the criminalisation of the activities of a number of marginalised socio-political sub-groups - hunt saboteurs; new age travellers; those seeking to organise or attend raves - and towards the protection of the interests of those with whom the 'rights' of these sub-groups come into conflict": Fitzpatrick and Taylor, "A case of highway robbery?" [1997] NLJ 338, 339. Much of the writing on the right to protest in the United Kingdom naturally focuses on the Act. See, for example, Feldman, *Civil Liberties*, supra note 19, 802-829; Gearty, "Freedom of Assembly and Public Order" in McCrudden and Chambers (eds) *Individual Rights and the Law in Britain* (1994) 42-54.

but succeeded on appeal, the Crown Court finding that no member of the group was "being destructive, violent, disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway".[94]

The Director of Public Prosecutions subsequently appealed to the Divisional Court, which held that the Crown Court had been mistaken about the law.[95] In broad terms, the basis of the Divisional Court's decision was the narrow interpretation of the common law rights position: that "the public's right of access to the public highway is limited to the right to pass and repass, and not to do anything incidental or ancillary to that right".[96] The judgment was criticised as "constituting a further erosion of an already limited freedom",[97] coming down "squarely against the existence of a general right to assemble".[98]

The House of Lords upheld the defendants' appeal, with a majority of three Lords to two.[99] Acknowledging that this was an issue of "fundamental constitutional importance",[100] Lord Irvine, delivering the leading judgment, found that the law recognised "that the right to use the highway goes beyond the minimal right to pass and repass",[101] and that the "*starting-point* [ought to be] that assembly on the highway will not necessarily be unlawful".[102] His Lordship held that:[103]

> [T]he public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public nuisance or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and trespass.

However, whilst all three assenting judges implied that the lower court's interpretation of the law was overly restrictive of commonplace activities

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94 Supra note 5, 627 per Lord Irvine of Lairg LC citing Judge MacLaren Webster QC.

95 McCowan LJ stated, at [1998] QB 563, 570, that the Crown Court had not taken account of the fact that an order had been made under s 14A. As Lord Irvine pointed out, at supra note 5, 628-629, this reasoning is circular - the s 14A order does not operate unless the assembly is trespassory, and one therefore ought not take the order into account when deciding whether or not the assembly is trespassory. For further criticism of this aspect of the Divisional Court's decision, see "Trespassory Assembly" [1997] Crim LR 599, 600.

96 Supra note 5, 629 per Lord Irvine.

97 Fitzpatrick and Taylor, supra note 93, 338.

98 Ibid.

99 Lord Irvine of Lairg LC, Lord Clyde and Lord Hutton allowed the appeal; Lord Slynn of Hadley and Lord Hope of Craighead dissenting.

100 Supra note 5, 627.

101 Ibid, 632. The Lord Chancellor based this finding on, inter alia, a broader interpretation of the judgment given by Lord Esher MR in *Harrison v Duke of Rutland* supra note 81 than that taken by the Divisional Court.

102 Supra note 5, 635 (emphasis in original).

103 Ibid 632-633.

associated with the roads,[104] none of them were prepared to find that there is a general right of assembly on the highway.[105] Lord Clyde, whilst accepting that in principle "a gathering of people at the side of a highway ... may be within the scope of the public's right of access",[106] emphasised that he "would not be prepared to affirm as a matter of generality that there is a right of assembly on any place on a highway at any time".[107] Similarly, Lord Hutton, although noting that earlier authorities "do not exclude a reasonable use of the highway beyond passing and repassing",[108] stressed that he "would not hold that a peaceful and non-obstructive public assembly on a highway is always a reasonable user".[109]

The law has thus been widened, but only marginally. What emerges from the judgment is that whilst there is no positive right in the United Kingdom to protest on public roads, such activities are not in themselves unlawful, and may on occasions amount to a reasonable use of the highway. This leaves the right to protest in a somewhat vulnerable position, obscured by the right to reasonable use of a highway. Is this also the case in New Zealand? Or does the Bill of Rights take the law further, by granting a positive right? If so, does such a right have constitutional status, or has it something less?

III. THE RIGHT TO PROTEST ON PUBLIC ROADS IN NEW ZEALAND LAW

1. The Impact of the Bill of Rights

In the absence of express constitutional guarantees or legislative declarations, civil liberties are merely the residue of freedom left behind after all legal restrictions in society have been taken into account.[110] For such societies, free expression and assembly are not strictly claim rights

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104 For example, Lord Clyde's carol-singing example, mentioned supra note 80.

105 See Lawson-Cruttenden and Crumlich, "Reasonable user of the public highway" [1999] Sol Jnl 432. The authors observe that the judgments are "rooted in the traditional law, which is conservative".

106 Supra note 5, 655.

107 Ibid 654.

108 Ibid 665.

109 Ibid 666. We have yet to see the effect of the Human Rights Act 1998 (UK) in this area.

110 This feature of "English" law was stressed by Dicey in his classic work, *Introduction to the Study of the Law of the Constitution* (10 ed, 1964) ch 6. Fenwick, supra note 52, 2, offers an alternative description: civil liberties in the United Kingdom are "interstitial" in that "they exist only in the interstices of the law".

in the Hohfeldian sense,[111] as there are no positive duties on any organ of the state to allow or facilitate them. Rather, these so-called "rights" are merely liberties,[112] and are exercisable only on the principle that anything is lawful which the law does not expressly forbid.[113]

Of course, it does not necessarily follow that in such societies civil liberties are less well safeguarded than in states with constitutional protection for them. The constitutional documents of some states give only theoretical protection to freedoms at best.[114] Conversely, democracies that lack any form of express civil rights guarantee may be able to rely on certain other mechanisms to ensure that basic liberties are preserved: the political and legislative processes;[115] the functioning of an independent judiciary under a separation of powers;[116] and the impact of international instruments[117] being among the most fundamental.

But, this is to give civil rights merely conventional as opposed to legal status and as a practical long-term guide to the substance of citizen-state relations, such a status may be quite meaningless.[118] Elections can be blunt instruments by which to register disapproval of rights infringements, especially where concerns about such matters are not typically central to the electoral process.[119] Judges sometimes produce unexpected decisions[120] and may on occasions be reluctant to intervene in

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111 See, generally, Hohfeld, *Fundamental Legal Conceptions* (1923).

112 Williams, "The Concept of a Legal Liberty" in Summers (ed) *Essays in Legal Philosophy* (1968) 121. Hohfeld's original term was "privileges". However, it is suggested that, whilst free expression is a "bare" liberty, the right to enter public land contains a duty on others not to interfere with its exercise. On this view, the right to protest in public would be something of a hybrid. See Evans, "What Does it Mean to Say Someone Has a Legal Right?" (1998) 9 Otago LR 301, 304-305.

113 This principle being reinforced by the Crimes Act 1961, s 9.

114 For example, the Constitution of the former Soviet Union contained a charter enshrining certain rights: most would agree that the Soviet peoples were not well served by this document.

115 Most constraints on the potential infringement of civil rights arise out of representative democracy: parliamentarians propose law they believe to be reasonable not only because of their own conception of fair treatment, but because they want to get re-elected. Citizens have the opportunity to redress grievances by voting the government out of office at the next legislative election. There are also defined, public procedures set in place for the passing of legislation.

116 That an independent judiciary interprets the laws enacted by the legislature is a powerful means of protecting civil rights. The courts will presume that Parliament does not intend to take away the common law rights of subjects. See, for example, *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (CA). The common law also protects freedoms through a variety of rules such as those governing police interrogation, and remedies such as habeas corpus.

117 See, for example, the dicta of Cooke P (as he then was) in *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266 (CA).

118 See Loveland, supra note 17, 560.

119 See the editors' conclusion to McCrudden and Chambers (eds) supra note 93, 548-550.

120 See, for example, *Liversidge v Anderson* [1942] AC 206 (HL), the decision of which was criticised by some for bringing the judiciary into disrepute. Recall Stable J's oft-cited comment that the judges were no longer "lions under the throne, but ... mice squeaking under a chair in the Home Office". See Heuston, "*Liversidge v Anderson* in retrospect" (1970) LQR 33, 51.

areas of national security[121] or public order.[122] Most significant is the blunt political reality that in a society where civil liberties are merely residual, a legislature can "at any time forbid activities hitherto permitted, or conversely, permit activities previously forbidden".[123]

Whilst the breadth and range of restrictions on the right to protest in New Zealand law leaves little of Dicey's residual liberty intact,[124] the Bill of Rights theoretically ought to transform these mere freedoms into positive, binding rights. This implies a corresponding duty upon the public actors to whom the statute applies not only to avoid unreasonable interference with them, but also to facilitate their exercise.[125] As regards the right to freedom of peaceful assembly,[126] has this been the case in practice?

The New Zealand courts have not always championed freedom of assembly.[127] Rather, it was generally expected that section 16 of the Bill of Rights ("section 16")[128] would "correct a measure of ambivalence and uncertainty in the common law".[129] The first case to consider the effect of section 16 was *Minto and Cuthbert v Police*,[130] an appeal against

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121 See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

122 See *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26.

123 Loveland, supra note 17, 560. This privilege extends to the executive where the governing party has a clear majority in the legislature. See Mulgan, "The Elective Dictatorship in New Zealand" in Gold (ed) *New Zealand Politics in Perspective* (3 ed, 1992) 513.

124 I owe this nice turn of phrase to Gearty, supra note 93, 54.

125 Note that outside the ambit of the Bill of Rights there is a duty on the state to facilitate free speech in limited circumstances, in the granting of immunities against liability to those who make statements protected by absolute privilege: the most fundamental example being proceedings in the House of Representatives. See Bill of Rights 1688 (Eng), Art 9; Defamation Act 1992, s 13(1).

126 Note that a number of "protest" cases involve individuals acting alone, and therefore deal only with the right to free expression affirmed in s 14 of the Bill of Rights. See, for example, *Police v Geiringer* [1990-92] 1 NZBORR 331 (HC) in which Holland J dismissed an appeal against conviction for disorderly behaviour in a public place, rejecting the appellant's submission that his right to free expression under s 14 ought to secure his acquittal. It was held that the appellant's behaviour in lying down in front of the Minister of Labour's vehicle constituted a restraint on the Minister's right to passage on the highway. As noted by Professor Brookfield, supra note 58, 240-241, one must doubt whether the appellant's behaviour was protected by s 14. See also *Jeffrey v Police* (1994) 11 CRNZ 507 (HC), and *Bracanov v Moss* [1996] 1 NZLR 445 (HC), both of which held that s 14 did not render lawful language that was otherwise unlawful.

127 One of the earliest cases was *McGill v Garbutt* supra note 89, 76 per Richmond J: "[i]t would be intolerable that any body of persons who might choose to associate themselves for the purpose should have the absolute right to parade the streets of a town in such numbers as to themselves might appear suitable by day or by night with flags flying, or torches flaring, drums beating and every other kind of noisy accompaniment; and it is perfectly certain that any such right is wholly unknown to the common law". The Court held that a bylaw prohibiting street processions except by council consent was intra vires the Municipal Corporations Act 1876.

128 The section simply affirms that "[e]veryone has the right to freedom of peaceful assembly."

129 Brookfield, supra note 58, 242-243.

130 [1990-92] 1 NZBORR 208 (HC).

conviction for offences that occurred before the Bill of Rights came into force. The appellants, whilst demonstrating outside a tennis tournament, had been arrested after refusing a police request to move, the officers having formed the view that the protest could provoke a breach of the peace in others.

Counsel for the appellants submitted, inter alia, that the police instruction to the protesters was unreasonable because the possibility of a breach of the peace emanated from irate tennis spectators and passers-by.[131] Suggesting that the police duty to prevent a breach of the peace outweighed the protesters' right to peaceful assembly,[132] Robertson J dismissed the submission on the basis of an established line of authority.[133] The appellants then argued that the test for determining the lawfulness of police instructions ought to be altered in light of section 16. Whilst thinking it unnecessary to decide the issue, Robertson J observed that "it is difficult to apprehend how the law could be changed by an Act which merely 'affirms' ... a right which all counsel agree clearly existed before the Act was passed".[134] His Honour dismissed the appeal, refusing to apply the Bill of Rights retrospectively.

Later judgments reflected a changing judicial attitude towards the right to freedom of assembly, especially in cases involving the purported imposition of prior restraints. In *B L & J A McGinty Ltd v Northern Distribution Union*,[135] the proprietors of a supermarket sought an injunction to prevent a union from holding an informational picket outside their premises. Refusing the injunction, Temm J made specific reference to section 16, noting that "when it comes to public demonstrations it seems to me the Court has to repeat continually that the right of the citizen to demonstrate is one that must be jealously guarded".[136]

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131 This raises the fundamental conceptual question as to how far the police are entitled to restrict lawful protest because of the apprehension of disorderly behaviour by spectators. In *Beatty v Gillbanks* supra note 70, the Divisional Court quashed binding over orders made against members of a Salvation Army parade when their procession had been disrupted by noisy opponents, the so-called 'Skeleton Army'. The Court held that there was no authority for the proposition that a person can be convicted for performing a lawful act in the knowledge that it may cause another to perform an unlawful act. Cf *Duncan v Jones* [1936] 1 KB 218, in which the appellant was convicted for obstructing a police officer who, in apprehension that a breach of the peace would occur, ordered her not to hold a planned public meeting. In his judgment Lord Hewart CJ, at 222, distinguished *Beatty*, describing it as a "somewhat unsatisfactory case".

132 Supra note 130, 213.

133 *Burton v Power* [1940] NZLR 305, in which the New Zealand Supreme Court followed *Duncan v Jones*, supra note 131.

134 Supra note 130, 213.

135 [1992] 1 ERNZ 196 (HC).

136 Ibid 199.

In *Bradford v Police*,[137] the appellant, having been charged with obstruction during a protest connected with the Commonwealth Heads of Government Meeting ("CHOGM") in Auckland, appealed against a bail condition that she not participate in any way in any protest action from the time of her release until the end of CHOGM. Observing that the Bill of Rights made clear that any restraint on the right to protest must be no more than is reasonably necessary, Robertson J ordered that the bail condition be varied so as to apply only to unlawful protest.

2. *Police v Beggs*

The most recent case in which section 16 was considered involved a group of student protesters who had been arrested in Parliament grounds pursuant to section 3(1) of the Trespass Act 1980 ("the Trespass Act"), having refused to comply with several warnings to leave, issued by a delegate of the Speaker of the House.[138] The charges were subsequently dismissed in the District Court, Judge Watson finding that the protest was "well organised and controlled".[139] His Honour ruled that the Speaker was bound to uphold the freedoms affirmed in the Bill of Rights, and could only invoke the Trespass Act if those persons in the exercise of their democratic right to protest did so in a manner which was disorderly, unlawful or interfered with the rights and freedoms of others. The decision was widely praised for giving effect to a "cherished, long-held tenet of democracy",[140] the right to protest being "one of the most precious of individual freedoms".[141]

When the matter came before the High Court on appeal,[142] the Crown argued that section 3 of the Trespass Act permitted an occupier to issue a trespass warning for any reason, and that the lower Court's qualification – that such warnings could only be given if the trespassers were "disorderly" – represented a restriction on the Trespass Act which was contrary to section 4 of the Bill of Rights.

In rejecting this approach, Gendall and Wild JJ held that, in

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137 (1995) 2 HRNZ 405.

138 Under Standing Order 435, the control and administration of the parliamentary buildings and grounds is vested in the Speaker on behalf of the House. As lawful occupant, the Speaker may issue trespass notices: *Police v Walker* [1977] 1 NZLR 355. This power may be delegated to others. See, generally, McGee, *Parliamentary Practice in New Zealand* (2 ed, 1994) 33-43.

139 *Police v Beggs* (10 July 1998) unreported, District Court, Wellington.

140 Editorial, "Right to protest at Parliament cherished", *The Evening Post*, Wellington, New Zealand, 10 July 1998, 4.

141 "Students cheer judge's ruling", *The Press*, Christchurch, New Zealand, 9 July 1998, 8.

142 *Police v Beggs* [1999] 3 NZLR 615.

exercising the rights of the occupier of Parliament grounds, the Speaker acted in exercise of his or her public function. Because the ability to issue a warning under the Trespass Act was the exercise of a statutory right, and had the potential to limit competing rights of assembly and passage, the Speaker could only invoke it when reasonably necessary in the circumstances. In assessing what was reasonable, account had to taken of the size and duration of the assembly,[143] the content of what was being expressed, the rights of the occupier, and the interests of the assembled.[144] Without deciding the matter, their Honours remitted the case back to the District Court recommending that, given the expense of proceeding to a full hearing, the prosecutions be permanently stayed.

The High Court judgment affirmed that section 16 of the Bill of Rights imposes a requirement of reasonableness on the part of any public official invoking the Trespass Act,[145] but in failing to completely vindicate the student protesters,[146] it was by no means a watershed in the slowly evolving jurisprudence of civil rights law in New Zealand. Sadly, this may be the best that we can hope for.

The potential restrictions on the right to protest are still available. The police can still arrest for disturbing the peace. Local authorities can still bring public nuisance actions. The courts can still bind people over to keep the peace. However, as a consequence of the Bill of Rights, the current position is that the freedom to protest may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society.

It would be somewhat naive to suggest that the Bill of Rights ushered in a new era of increased commitment to the fundamental values contained within it – an era in which freedom of assembly and expression are given higher constitutional status than the competing interests of orderliness and free passage on the roads. However, the few recent cases decided in this area have indicated a willingness on the part of the judiciary to give greater effect to these rights when undertaking the balancing exercise that such cases inevitably require. Most significantly, the parliamentary committee charged with investigating the actions of

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143 Ibid 629-630, their Honours citing *Director of Public Prosecutions v Jones*, supra note 5, 633 per Lord Irvine.

144 Supra note 142, 629-631. See Rishworth, "Human Rights" [1999] NZ Law Review 467, who describes the factors set out by the Court as "sensible and well attuned to the relevant interests".

145 The judgment also clarified certain practical matters in relation to the Trespass Act. For example, it was held that, in warning the protesters as a group rather than individually, the police did not breach the Act's notice requirements: it was "sufficient that the warning ... was known and understood by the person charged": supra note 142, 633.

146 This point is made by Price, "Standing up for the right to protest is a fine public service", *New Zealand Herald*, Auckland, New Zealand, 25 June 1999, A11.

police during the Chinese President's visit has now recommended that these rights be regarded as the starting point for police when making operational decisions in response to public demonstrations.[147] Although falling far short of establishing a higher constitutional status for freedom of assembly, such an approach ought to be welcomed, for the right to protest is far too valuable to be left to shrivel in the diminishing gaps between broadly-defined, wide-ranging and arbitrary police and administrative powers.

IV. A NEW RESTRAINT?

Public roads have long occupied a special place in the English legal tradition. By the time of William I, the king's peace, whilst not yet universal, had particularly applied to the four great Roman roads. By the end of the fourteenth century, it had extended to protect all travellers on the highway.[148] Sir Frederick Pollock, in one of his Oxford lectures, noted:[149]

> The very survival of the term "the king's highway" shows that the idea of peculiar legal sanctity clung about highways in popular imagination long after they had ceased to be more under the king's peace than any other English ground.

The rapid growth of London, the expansion of manufacturing and foreign trade, and political incidents such as the union of the English and Scottish Parliaments in 1707, led to an increased demand for roading in the seventeenth and eighteenth centuries.[150] This in turn resulted in a proliferation of enactments and regulatory measures. Between 1700 and 1790, more than two thousand Road Acts were passed: the majority setting up trusts to administer the new system of turnpikes,[151] and amidst

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147 *Report of the Justice and Electoral Committee*, supra note 3, 50.

148 For a detailed account of the development of the king's peace, see Pollock, *Oxford Lectures and other Discourses* (1890) 65-90.

149 Ibid 82-83.

150 Webb and Webb, *English Local Government: The Story of the King's Highway* (1963) 1.

151 Hindley, *A History of Roads* (1971) 60. The author notes, at 61-62, that by the end of the eighteenth century, more than 20,000 miles of British roads were under the supervision of turnpikes. However, these proved to be immensely unpopular: the local parishes received no benefit from the tolls collected, the trusts were empowered to draw upon statute labour without payment, and were even able to appropriate materials from the common land. The general animosity that was directed at the turnpike system is also noted in Bloodgood, *A treatise on roads, their history, character, and utility* (1838) 57: "[t]he first toll was exacted in the reign of Charles II ... [but] proved to be an unpopular measure. The people rose and pulled down the gates, and an armed force was ordered out to maintain the law".

a flurry of local government reform initiated by the Municipal Corporations Act 1835 (UK),[152] the passage of the Highways Act 1862 (UK) allowed parishes to combine into Highways Boards to undertake the duties of maintenance that fell generally upon the "inhabitants at large".[153]

This framework was inevitably transplanted to New Zealand by the enactment of the Municipal Corporations Ordinance 1842, which conferred upon body corporates the powers to, inter alia, carry out road works and make bylaws.[154]

A number of statutes and ordinances dealing with the control of roads and roading boards followed,[155] and these were ultimately consolidated into the monumental Local Government Act 1974 (the "LGA").

Under the LGA, public roads are vested in fee simple in the council of the district in which they are situated,[156] and numerous powers are conferred for their control. Councils are granted the statutory authority to temporarily stop traffic, including pedestrian traffic, on roads during periods of disorder;[157] whilst police are given the power to close roads for such periods as reasonably necessary where public disorder exists or is imminent.[158] Complementing these specific provisions are the more general powers conferred upon councils to make bylaws concerning roads.[159] However, whilst these prior restraints may have a potential 'chilling' effect on freedom of assembly, further local government reforms have been mooted which pose a greater threat to all road users.

Released in December 1998, the reform proposals had their genesis

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152 See Bush, *Local Government and Politics in New Zealand* (2 ed, 1995) 1.

153 See Orlik, *An Introduction to Highway Law* (1993) 30. The author notes that highways were maintainable by the inhabitants at large "unless it could be shown that responsibility had attached to an individual or a corporate body by reason of tenure, enclosure or prescription".

154 See Palmer, *Local Government Law in New Zealand* (2 ed, 1993) 2.

155 Among these were the Road Boards Act 1882, the Town Boards Act 1908, the Counties Act 1956. See Palmer, ibid 3-4.

156 LGA, ss 315, 316, 345-346J. State highways, government roads, and motorways are vested in and controlled by the Crown: Transit New Zealand Act 1989.

157 LGA, s 342, Tenth Schedule.

158 LGA, s 342A, Tenth Schedule.

159 LGA, s 684. See, for example, Wellington City Council Bylaw 17.10.1:
"No person shall without the prior written authority of the Council or the City Traffic Engineer:
(a) Take part, on any road, in any assembly or combine with other persons in such a way as to impede pedestrian or vehicular traffic thereon ... or
(b) Make any public address or organise ... any public meeting, gathering, or demonstration".
Whilst subject to requirements of reasonableness, such bylaws have traditionally been upheld by the courts. See, for example, *Hazelden v McAra* [1948] NZLR 1087 (SC), which concerned a bylaw banning meetings on any street or public reserve except with the prior permission of the Town Clerk. Holding the bylaw to be intra vires the empowering statute, Fair J noted, at 1109, that "[t]here can be no question that the holding of meetings in public places is usually the subject of municipal regulation and control".

in the comprehensive Land Transport Pricing Study,[160] whose initial recommendation of a commercial model involving the private sector "in the provision, management, and funding of roading services"[161] met with much opposition.[162] Whilst now expressly eschewing privatisation,[163] the proposals envisage the formation of commercial roading companies, which their constituent local authorities would wholly own,[164] and which would be required to operate profitably and exhibit a sense of social responsibility.[165]

The reforms propose that local authorities retain ownership of the roading corridor.[166] Road companies would be granted powers to close roads largely similar to those currently available to councils,[167] and police would retain the same authority that currently exists under section 342A of the LGA.[168] The bylaw-making powers of local authorities would not be removed, however their rights in relation to roads would become subject to those of the road companies.[169] Meanwhile, the broad powers of management and control conferred on the road service providers would be largely exercisable "despite any rights in relation to roads applicable under any rule of common law".[170]

Significantly, the road companies would be granted a right of occupation,[171] an interest in land often superior to actual ownership,[172] and one far greater than that currently possessed by local authorities in

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160 Launched in 1992, the Study's findings were released in a series of discussion documents. These were: *The Cost of Roading Infrastructure* (July 1995); *Roading as an Economic Good* (December 1995); *Environmental Externalities* (March 1996); *Safety Externalities* (May 1996); and *National Traffic Database* (April 1996).

161 Ministry of Transport, *Options for the Future: Land Transport Pricing Study* (1997) 48.

162 For an account of this, see De Lacy, "Government throttles back on roading proposals", (1999) 122 (5318) *Merchantile Gazette Business*, 5.

163 "No existing publicly owned roads would become privately owned as a result of Better Transport Better Roads": Ministry of Transport, *Better Transport Better Roads* (1998) 17.

164 Termed "Local Road Companies". The proposals also envisage that Transit New Zealand, the government agency that currently operates state highways, would become a state-owned enterprise called "Transit New Zealand Ltd"; jointly they would be known as "Public Roading Companies", or "Road Service Providers".

165 Roads Bill (discussion draft) cl 24. This clause mirrors s 4 of the State-Owned Enterprises Act 1986, and is indicative of the "publicness" of the roading network. See Taggart, *Corporatisation, Privatisation and Public Law* (1990) 6.

166 Roads Bill, cl 208.

167 Roads Bill, cl 179, Second Schedule.

168 Roads Bill, cl 181: with the exception that the power would be vested in "any constable", as opposed to "a senior member of police" as under the LGA.

169 Roads Bill, cl 210.

170 Roads Bill, cl 151.

171 Roads Bill, cl 207 and 211.

172 It is occupiers rather than owners that can bring proceedings in nuisance and trespass.

respect of the roads.[173] Those with occupation rights have exclusive possession and control of the occupied land,[174] and are able to invoke the Trespass Act, both as a prior restraint,[175] and as a subsequent penal sanction.[176] That public officials have already shown a willingness to exercise this power against protesters indicates the potentially restrictive effect that this provision could have, were it to be enacted.[177] And whilst the election in 1999 of a centre-left coalition government may have temporarily consigned the roading reforms to the legislative "garbage can",[178] it would not take a huge shift in the dominant ideology of this country's political elites in order for the proposals to be revived.

V. CONCLUDING REMARKS: THE MOBS ARE OUT[179]

Whilst in practice New Zealand has a relatively commendable human rights record, recent events have demonstrated that a political ethos that values the short-term maintenance of order over principle is an inadequate guarantor of freedom. The residual character of our civil liberties and the reluctance of the common law to safeguard any use of the highway beyond that of mere passage, left our protest rights vulnerable to executive and legislative whim, and demanded of the courts that they act as "the ultimate guardians of personal liberty".[180]

The latest threat to our freedom to assemble comes not from the competing concerns of public order, but from the private property rights

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173 "There has never been any doubt ... that Parliament has used the word 'vest' in the statutes to make it clear that full ownership is not being conferred": Orlik, supra note 153, 62.

174 For a recent discussion of the nature of occupation rights in the context of public utilities, see *Telecom Auckland Ltd v Auckland City Council* [1999] 1 NZLR 426, 440-441 (CA).

175 Trespass Act 1980, s 4.

176 Trespass Act 1980, s 3. For further analysis on this point, undertaken by Public Access New Zealand – a lobby group formed in 1992 to oppose the privatisation of public lands and waters – see "Analysis of Government's Road Reforms" (1999) <http://www.publicaccessnewzealand.org/files/public_roads_analysis.html> (last modified 23 April 1999).

177 See, for example, *Police v Beggs*, supra note 138 and accompanying text; see also s 8(b) of the Auckland Domain (Temporary Closure for APEC) Act 1999, which grants to the Commissioner of Police the status of occupier of the Domain for the express purpose of exercising the powers contained in the Trespass Act 1980.

178 In which pre-generated policy "solutions" await the discovery of problems by which they might be advanced. See Cohen, March and Olsen, "A garbage can model of organisational choice", (1972) 17 *Administrative Science Quarterly* 1.

179 Lord Denning's highly publicised reaction to the assembly in North London of thousands of trade unionists in support of the right to join a union: cited in Hewitt, supra note 11, 112.

180 *R v Te Kira* [1993] 3 NZLR 257, 275 per Hardie Boys J.

that may be granted to new corporate occupants of the highway. Even if the commercialisation of the roading network somehow avoids the natural slide into privatisation,[181] the roads will still lose something of their common character. That our civic spaces are fundamentally a public good has long been recognised by the very nation that champions private property rights:[182]

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been part of the privileges, immunities, rights, and liberties of citizens.

However, whilst both the Bill of Rights and the work of the Justice and Electoral Committee have added much-needed weight to the freedoms of expression and assembly in the balancing exercise that courts necessarily undertake in cases involving public protest, the proposed transferral of the roading network to a quasi-private body would almost certainly tilt the scales in favour of greater restraint.

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[181] That the corporatisation process of the late 1980s "repackaged state businesses into saleable form and eased the way to privatisation" is now painfully obvious. See Kelsey, *Rolling Back the State: Privatisation of the State in Aotearoa/New Zealand* (1993) 42.

[182] *Hague v CIO* 307 US 496 (1939) 515 per Roberts J.