IDENTIFYING DISORDERLY OR OFFENSIVE CONDUCT: THE SCOPE OF JUDICIAL DISCRETION UNDER SECTION 3D OF THE POLICE OFFENCES ACT 1927

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Introduction

It is vital to the continued existence of any true and viable democracy that every citizen has the opportunity to freely and potentially effectively participate in social and political debate.[1] Thus in a country which has no Bill of Rights or written constitution it is essential that anyone who wishes to protest (for example against the activities of the government of the day) be given a reliable indication as to the lawful limits of his proposed conduct. His "right" to freedom of expression is merely a liberty in the sense that there are areas of conduct within which the individual is free to give expression to his ideas and desires without lawful restraint by government or any other authority or individual. He is free to express his opinions in public only to the extent that he is not lawfully prohibited from so doing. These prohibitions on the individual's freedom of expression need to be clearly expressed.[2] A citizen who is unsure of the legal restraints that have been imposed upon his freedom of expression will be wary of expressing his views in public. In these circumstances it is a misnomer to speak of a "freedom" of expression. This is true in New Zealand of the area of symbolic speech.[3] This form of expression is regulated by a statutory provision drafted to deal with unruly behaviour — section 3D of the Police Offences Act 1927.[4]

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1 For example, Arts. 19 and 20 of the *Universal Declaration of Human Rights* recognise the right of everyone to freedom of opinion and expression and the right of peaceful assembly in order to disseminate these ideas.

2 This is merely one example of the broader principle that there is a need for certainty in the criminal law which was emphasised in the 1966 *Practice Statement* of the House of Lords [1966] 1 W.L.R. 1234.

3 A form of protest whereby the expression of an opinion is accompanied by some form of direct action. E.g., demonstrating against intervention by the United States in the war in Vietnam by burning the United States flag outside the American embassy; or protesting against apartheid in South Africa by running on to the rugby field with placards during a game between the All Blacks and the Springboks.

4 See McBride, "The Policeman's Friend" (1971) 6 V.U.W.L.R. 31 for a thorough history of the section, which is here summarised: The origins of s. 3D can be traced to the Vagrant Act 1866 Amendment Act 1869, s.4 (which was based on the Metropolitan Police Act (U.K.) 1839 s.54(3)), whereby it was an offence to use "threatening abusive or insulting words or behaviour in any public street thoroughfare or p'ace with the intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned." Minor amendment occurred in 1884, but the wording thereafter remained unchanged until the Police Offences Amendment Act 1924. S.2 of that Act repealed s.3(ee) of the Police Offences Act 1908, the consolidating statute, and replaced it with the following: "Every person is liable . . . who (ee) In, or in view of any public place . . . or within the hearing of any person therein, behaves in a riotous, offensive, threatening, insulting or disorderly manner, or uses any threatening, abusive or insulting words, or strikes or fights with any other person." Thus

—Footnote continued next page.

> Every person commits an offence, and is liable to imprisonment for a term not exceeding three months or to a fine not exceeding five hundred dollars, who in or within view of any public place as defined by section 40 hereof,[5] or within the hearing of any person therein, behaves in a riotous, offensive, threatening, insulting, or disorderly manner, or uses any threatening, abusive, or insulting words.

Because of the vague wording of this provision it is capable of being used, and has been used, to stifle the serious expression of political opinion.[6]

Despite these introductory comments designed to demonstrate the breadth and importance of the role played by section 3D in regulating public conduct, it is not the writer's intention in this article to examine the right to protest in New Zealand[7] or to exhaustively examine section 3D.[8] The writer's purpose is to take section 3D as an example of a vaguely worded statutory provision whereby the legislature has conferred upon the judiciary an unfettered discretion; to examine the judicial response,[9] and in particular, having regard to the decision of the House of Lords in *Cozens* v *Brutus,*[10] their endeavours to define or at least set the parameters of disorderly or offensive behaviour; and to analyse the implications of the conferment of such a wide power for the person who suspects that his behaviour may fall within the ambit of the section.

Section 3D is concerned with the borderline between anti-social or over-exuberant behaviour and criminal behaviour. Rather than attempting to define the boundaries of such conduct, the legislature has placed wide discretionary powers in the hands of the police and the courts. Disparate forms of conduct can fall within the section. The power to

the offence of behaving in a disorderly manner was introduced. Of greater significance was the deletion of the breach of the peace requirement, hitherto the basis of the offence. The 1924 wording remained unaltered until 1960, when the Police Offences Amendment Act (No. 2) 1960 repealed s.3(ee) of the Police Offences Act 1927, the consolidating statute, and replaced it with s.3D. In the same year fighting in a public place was made a separate offence (s.3B). The power of arrest without warrant was given to any constable who found any person committing or whom he had good cause to suspect of having committed an offence against the section (s.3D(1) and (2)). The power of arrest is now to be found in s.315 of the Crimes Act 1961.

5 This definition is extremely wide.

6 E.g., *Derbyshire* v *Police* [1967] N.Z.L.R. 391; *Melser v Police* [1967] N.Z.L.R. 437; *Wainwright* v *Police* [1968] N.Z.L.R. 101.

7 For an examination of this area of the law see: Kilbride and Burns, "Freedom of Movement and Assembly in Public Places" (1966) 2 N.Z.U.L.R. 1; Keith (ed.) "The Right to Protest" *V.U.W. Essays on Human Rights* (Wellington, 1968) 49; Palmer, "Freedom of Peaceful Assembly and Association" [1969] N.Z. Recent Law 113; Clark, "Meetings, Processions, Symbolic Speech and the Law" [1972] N.Z.L.J. 209 and 249.

8 This task is performed in an excellent article by McBride, supra, n.4. He divides the section into the various categories of behaviour and types of words and analyses each in turn. In this article the writer intends to examine the two most common offences under the section, behaving in a disorderly or in an offensive manner. (There are no reported decisions in New Zealand on the other types of behaviour.)

9 A number of the decisions are unreported. The article examines all unreported decisions of the Supreme Court subsequent to *Melser* v *Police* [1967] N.Z.L.R. 437 which have been noted in N.Z. Recent Law or N.Z. Current Law.

10 [1973] A.C. 854.

arrest for an offence against section 3D[11] has resulted[12] in the section being used by the police as a most useful and potent weapon for regulating and preventing not only irregular or unusual behaviour[13] but also political demonstrations.[14] Thus the courts are confronted with a diversity of conduct and are vested with the discretion to determine whether the particular behaviour, whilst being of nuisance value, is nevertheless non-criminal, or whether it is sufficiently serious to attract the criminal sanction.[15] Discretions have a useful role to play in ensuring flexibility in the law, and indeed they often lead to justice in an individual case. Nevertheless it is the function of the legislature to determine whether particular forms of behaviour shall be subject to criminal sanction. The courts' function is to interpret the criminal law as codified by the legislature. They should not be forced, because a provision is so vaguely worded and the intention of parliament so uncertain, to assume the role of law draftsmen.

Judicial Discretion: Some General Comments[16]

Legislation such as section 3D, which confers upon the judiciary an unfettered discretion as to whether the conduct falls within the ambit of the provision, can cause numerous difficulties[17] — not the least of which is inconsistency of decision. For example, conduct which is disorderly or offensive to one judge or magistrate may not be so to another despite the fact situation being similar or even identical.[18] This is of course undesirable in that it gives rise to the belief that administration of justice depends not on law but on men. Both the legislature and the judiciary

11 Conferred by the Police Offences Amendment Act (No. 2) 1960, supra, n.4.

12 E.g. in 1959, 989 charges of indecent, riotous or offensive behaviour were laid. In 1962 this had more than doubled to 2346 (Statistics of the N.Z. Justice Department, Government Printer, Wellington). Note: these figures incorporate other offences in addition to those contained in s.3D.

13 E.g. *Kinney* v *Police* [1971] N.Z.L.R. 924; *Osborne* v *Police* unreported, Supreme Court, Dunedin, 17 February 1978 (M.152/77), Chilwell J.; noted [1978] N.Z. Recent Law 260. In the latter case, Chilwell J. expressly disapproved of the use of the section to justify an arrest when the conduct fell more appropriately within another section of the Police Offences Act 1927, where police action could only be initiated by summons — in this instance s.3(o), the offence of casting offensive matter in a public place.

14 E.g. *Derbyshire* v *Police* [1967] N.Z.L.R. 391; *Melser* v *Police* [1967] N.Z.L.R. 437; *Wainwright* v *Police* [1968] N.Z.L.R. 101.

15 In 1976, 4440 charges of indecent, riotous or offensive conduct, 2375 of obscene, threatening or abusive language and 147 of drunkenness accompanied by disorderly conduct were laid. Of these charges 3735, 2141 and 135 respectively resulted in summary conviction. (Statistics of the N.Z. Justice Department, Government Printer, Wellington.) Note: these figures incorporate other offences as well as those contained in s.3D. While statistics are unavailable, it is rare for convictions under s.3D to go on appeal. Thus the problem of determining the parameters of the section has largely been left to the magistrates themselves.

16 For an exhaustive and illuminating examination of this topic, see: Burrows, "Statutes and Judicial Discretion" (1976) 7 N.Z.U.L.R. 1, and the challenging paper delivered to the N.Z. Law Society Conference in 1972 by D. F. Dugdale, "The Statutory Conferment of Judicial Discretion [1972] N.Z.L.J. 556.

17 These are enumerated by Burrows, ibid., 4-21.

18 E.g. Turner J. in the Court of Appeal in *Melser* v *Police* [1967] N.Z.L.R. 437, 444 stated of *Police* v *Christie* [1962] N.Z.L.R. 1109 that it was "a case in which I am inclined to accept the principal line of reasoning though I have some doubt as to whether I myself would have been brought to the same conclusion on the facts as the learned Judge."

are cognisant of this difficulty and various methods have been used in an endeavour to overcome it.

The legislature often fetters the judge's or magistrate's use of his discretion by expressly stating in the particular statute the relevant considerations which must be taken into account when reaching his decision.[19] This is some protection against an arbitrary and unjust use of the judicial discretion. With the deletion in 1924 of the breach of peace requirement from section 3D no such safeguard now exists.[20] The courts' discretion is unfettered.

The courts, in an endeavour to ensure consistency and rationality of decision, often themselves state the considerations that are to be taken into account when exercising the discretion. These rules or guidelines can be established as an integral part of the process of interpreting the statute. They can, for example, result from the application of the various rules of statutory interpretation. In *Police* v *Christie,* Henry J. invoked "the cardinal rule of statutory construction in New Zealand . . . that contained in s.5(j) of the Acts Interpretation Act 1924[21,22] as authority for overruling earlier decisions of the Magistrate's Court which had held a breach or likely breach of the peace still to be an element of the offence despite the exclusion of all references to such in the 1924 Amendment. In the Supreme Court in *Melser* v *Police*[23] Tompkins J. said it was clear that the word "disorderly" was not to be interpreted *ejusdem generis* but disjunctively. Nevertheless in *Osborne* v *Police*[24] Chilwell J. invoked the *ejusdem generis* rule in order to determine which of a number of definitions of the word "offensive" in the Shorter Oxford Dictionary he should adopt.

As a general rule, however, where a completely unfettered discretion is conferred or where the statute is vaguely worded the rules of statutory interpretation do not form a useful guide as to how the discretion should be exercised. In this situation the courts, in formulating rules for their guidance, are engaging in the process of judicial law making. It is

19 For a more detailed discussion see: Burrows, supra, n.16, 4-5.

20 Supra, n.4. The justification for deletion was that the requirement led to the extraordinary result that "a person could be most abusive and insulting to another person but unless you could prove intent to provoke actual fisticuffs there was no offence." (Per the Honourable Mr Parr, Minister of Justice. 204 N.Z.P.D. 1079.)

21 This section states: "Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit." There is a clear conflict between this section and the rule that penal statutes should be strictly construed. An example of the adoption of the latter rule in the field of civil liberties can be found in *Billens* v. *Long* [1944] N.Z.L.R. 710, 717 where Sir Michael Myers said: "[t]he Court must see that the meaning of the enactment is clearly expressed before it holds that the subject's right of free speech is taken away." In recent years, however, the New Zealand courts have recognised that s.5(j) directs them to apply the same general principles to penal statutes as to others. E.g., *Aburn v Police* [1964] N.Z.L.R. 435, 436-437 (per Tompkins J.); *R.* v *Clayton* [1973] 2 N.Z.L.R. 211, 214 (Court of Appeal, per McCarthy J.)

22 [1962] N.Z.L.R. 1109, 1112.

23 [1967] N.Z L.R. 437, 439.

24 Unreported, Supreme Court, Dunedin, 17 February 1978 (M.152/77), Chilwell J. Noted in [1978] N.Z. Recent Law 260.

arguable that as the legislature saw fit to confer an unfettered discretion on the courts it is contrary to the legislative intention to establish these rules. The following extract from the judgment of Bowen L. J. in *Gardner* v *Jay* has been quoted in numerous cases:[25]

> I think that when a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the Judge, why should the Court do so?

Nevertheless, as Burrows states, "as a rule the desire for consistency of decision and the influence of the common law doctrine of precedent have proved too strong to resist, and somehow or other criteria tend to be formulated for the guidance of future courts".[26,27] This is true of section 3D.

Fettering the Unfettered Discretion

Confronted with the task of defining disorderly or offensive behaviour, the New Zealand judiciary established the basic test of whether the behaviour in question seriously offends a fictitious character called the "right-thinking man".

One finds the first reference to this character in *Police* v *Christie*.[28] In the Magistrate's Court the charge of disorderly behaviour was dismissed. The Magistrate, following two previous decisions of that Court,[29] held that the section was aimed at the suppression of breaches of the peace or at conduct calculated to provoke a breach of the peace. After examining the history of the legislation,[30] following Scottish authority[31] and applying section 5(j) of the Acts Interpretation Act 1924,[32] Henry J. in the Supreme Court concluded that a breach of the peace was not an element of an offence against section 3D.[33] *Black's Law Dictionary*[34] was consulted for guidance as to the meaning to be attached to the word "disorderly". Henry J. stated:[35]

25 (1885) 29 Ch. D. 50, 58. In *Rogers* v *Rogers* [1954] N.Z.L.R. 674, 678 Barrowclough C. J., in delivering the judgment of the Court of Appeal, said: "To fetter [the discretion] now by laying down any . . . hard and fast rule . . . would amount to usurpation by the court of the functions of the legislature. We are clearly of the opinion that there is no such rule, and that it is beyond the interpretative functions of this court to attempt to make one." Cited by Burrows, supra, n.16 at n.23.

26 Burrows, supra n. 16, 7.

27 The legal status of these criteria is considered, infra, pp.224-227.

28 [1962] N.Z.L.R. 1109.

29 *Police* v *Ward* (1935) 30 M.C.R. 76; *Jones* v *Carkeek* (1929) 24 M.C.R. 150.

30 Supra, n.4.

31 *Campbell* v *Adair* 1945 S.C. (J) 29.

32 Supra, n. 21.

33 The earlier section, s.3(ee), (supra n.4), was considered in two decisions of the Supreme Court, *Wilcox* v *Baigent* [1950] N.Z.L.R. 636 and *Mahood* v *Robinson* [1952] N.Z.L.R. 103, both of which concerned the use of insulting words. As Henry J. pointed out, the issue of breach of the peace was not raised. In the former case Fair J. found the word "scab" when applied to a trade unionist was insulting; in the latter case Stanton J. held that where the word used was insulting per se, no intention to insult need to be proved. See discussion of mens rea, infra, pp.241-242.

34 (4th ed. 1957) 556.

35 [1962] N.Z.L.R. 1109, 1113.

> To behave in a disorderly manner is . . . to act in a manner which contravenes good conduct or proper conduct. The behaviour in respect of which the section speaks is behaviour in a public place, so it becomes simply a question whether or not the behaviour in a public place seriously offends against those values of orderly conduct which are recognised by right thinking members of the public. . . . The standard fixed ought to be reasonable and such as not unduly to limit freedom of movement or speech or to impose conditions or restrictions that are too narrow. The conduct must be serious enough to incur the sanction of a criminal statute.

The actions of the defendant — following an unescorted young woman on a public street at night without making any attempt to talk to or molest her — were found to come within this definition and thus to constitute disorderly behaviour.

Three years later in *Price* v *Police,* Haslam J., in finding that the use of offensive language could amount to an offence against section 3D,[36] defined offensive behaviour as "a course of action calculated to cause resentment or revulsion in right-thinking persons."[37] This definition was adopted by the Magistrate in *Derbyshire* v *Police* who found that the burning of the Union Jack in the vicinity but not in the presence of the Governor-General constituted offensive behaviour. This finding was affirmed on appeal by Wilson J. who held that although the behaviour constituted a form of political protest this did not prevent it from being offensive:[38]

> Political fanatics, as well as ordinary citizens, are required to abstain from offensive behaviour in public places. The only difficulty that I can see, in such circumstances, lies in applying the expression "right-minded persons" in Haslam J.'s definition. No such difficulty arises in this appeal, however, because a respect for the flag of our fathers which forms, moreover, an integral part of our own flag, is to be expected in persons of decent instincts regardless of their political opinions.

Melser v *Police,* in the words of counsel for the appellants, raised "a serious question as to how far section 3D and the offence of disorderly behaviour may be invoked to deal with political demonstrators."[39] In the Supreme Court, Tomkins J. found:[40]

> It [the appellant's conduct] was contrary to proper behaviour; a defiance of the forces of law and order; it was conduct which contravened proper conduct within view of a public place; and was in its effect lawless conduct. I think it was conduct which seriously offended against those values of orderly conduct which are recognised by right-thinking members of the public.

The case continued on appeal thus affording the New Zealand Court of Appeal its only opportunity to date to examine section 3D. Whilst the Court delivered separate judgments, it was in agreement that the actions of Melser and others — protesting against the intervention of the United States in the Vietnam war by chaining themselves to the pillars at the entrance to Parliament House immediately prior to a proposed visit by the American Vice-President — amounted to disorderly behaviour.

North P. and Turner J. both adopted the concept of the right-thinking

36 Especially where the words used were accompanied by a persistence in remaining in the company of the person to whom they were addressed, and in pursuing an obscene class of topic; cf. *MacDonald* v *Police* [1965] N.Z.L.R. 733 (per Barrowclough C. J.).
37 [1965] N.Z L.R. 1086, 1088.
38 [1967] N.Z.L.R. 391, 392.
39 [1967] N.Z.L.R. 437, 440.
40 Idem.

man but added further refinements. North P. accepted that a person could be guilty of an offence against the section when his conduct did not and was not calculated to cause a breach of the peace, but he emphasised:[41]

> [N]ot only must the behaviour seriously offend against those values of orderly conduct which are recognised by right-thinking members of the public but it must at least be of a character which is likely to cause annoyance to others who are present. . . . Section 3D forms part of the Police Offences Act 1927, and the collation of the words in that section in my opinion show that they are directed to conduct which at least is likely to cause a disturbance or annoyance to others. To lay down a wider test would, I think, be contrary to the public interest and might unduly restrict the actions of citizens who, for one reason or another, do not accept the values of orderly conduct which at the time are recognised by other members of the public. In short, there must be reasonable room for change in habits and behaviour.

Turner J. expressed himself in similar terms:[42]

> Disorderly conduct is conduct which is disorderly; it is conduct which, while sufficiently ill-mannered, or in bad taste, to meet with the disapproval of well-conducted and reasonable men and women, is also something more — it must, in my opinion, tend to annoy or insult such persons as are faced with it — and sufficiently deeply or seriously to warrant the interference of the criminal law.

While later in his judgment he said:[43]

> [C]onduct at least causing annoyance to well-conducted citizens, but yet short of any likely or imminent breach of the peace, may according to time, place and circumstances support a charge under section 3D; and whether it does so will in every case be a matter of degree.

These extracts from the judgment of Turner J. have been much quoted. Nevertheless it is submitted that the first statement, in particular, is ambiguous. The difficulty is with the expression "such persons". Does this contemplate any persons witnessing the conduct, for example the most intolerant and bigoted group of persons? Or are these the well-conducted and reasonable men and women referred to earlier in the sentence, i.e., must annoyance be caused to those amongst the bystanders who, in the particular time, place and circumstances, are representative of the right-thinking New Zealander? If the latter interpretation is correct, and it does receive some support from the second extract, this is contrary to the approach of his two brother judges. If the former is to be preferred then the conduct needs to meet with the *disapproval* of well-conducted men and women *and* to *seriously offend* people witnessing the conduct whether they be right-thinking or not. It is the writer's belief that neither interpretation was intended. But rather, to be disorderly, the conduct in the particular time, place and circumstances has to deeply offend or seriously annoy the right-thinking man *and* be likely to deeply insult or seriously annoy persons present. This issue, however, has not been expressly considered in subsequent decisions of the Supreme Court.

The third Judge, McCarthy J., took a different approach to the problems raised by section 3D. The various conflicting interests involved in any situation were to be weighed and balanced. And it was to be remembered "that freedoms are of different qualities and values and that the

41 Ibid., 443.
42 Ibid., 444.
43 Idem.

higher and more important should not be unduly restricted in favour of lower or less important ones."[44] Nevertheless he "defined" disorderly behaviour in a manner similar to that of his brother judges:[45]

> I agree that an offence against good manners, a failure of good taste, a breach of morality, even though these may be contrary to the general order of public opinion, is not enough to establish this offence. There must be conduct which not only can be fairly characterised as disorderly, but also is likely to cause a disturbance or to annoy others considerably. As Turner J. has already said, in the ultimate the question is one of degree.

Do these refinements of the right-thinking man test assist the ascertaining of whether behaviour is disorderly? It is arguable that the test is slightly narrower than before. The conduct must be judged objectively not only in relation to the generally accepted standards of community behaviour but also in relation to the time, place and circumstances in which it took place. So it is a question of degree and context. Furthermore, the test of disorderly behaviour is now two-pronged. The conduct must seriously offend the sensibilities of the right-thinking man *and* it must also be likely to annoy considerably[46] or seriously[47] the person confronted with it.

The Legal Status of the Melser Test

The decision in *Melser* has received harsh academic criticism[48] which has been essentially of a twofold nature. The vague wording of the test, and in particular the concept of the right-thinking man, has been criticised[49] and the conservative manner in which the test was applied to the facts has been questioned.[50] The case, however, continues to be accepted as the most authoritative consideration of section 3D and this is reflected in the fact that it has been the subject of constant reference by judges of the Supreme Court when exercising their discretion.[51]

44 Ibid., 446.
45 Idem.
46 Per McCarthy J., idem.
47 Per Turner J., ibid., 443.
48 E.g., Keith, supra, n.7; Palmer, supra, n.7; Dugdale, supra, n.16; McBride, supra, n.8; Clark, supra, n.7; *Crime in New Zealand,* Department of Justice (Wellington, 1968) 17.
49 E.g. Dr Martyn Finlay, the then Opposition M.P. for Waitakere, stated in the debate in the House of Representatives on the Police Offences Amendment Bill 1967: "I am disturbed that the test of disorderly conduct is that which is offensive to the right-thinking man, a concept that I believe defies definition." 354 N.Z.P.D. 4540. A year later the Justice Department stated: "It may not be going too far to say that as the law stands, and accepting the correctness of the Court's decisions [notably *Derbyshire* and *Melser*] 'offensive behaviour' and 'disorderly conduct' can mean anything that is distasteful to, or annoys the majority. . . . To refer to views that all 'right-thinking persons' detest is, of course, to beg the question." *Crime in New Zealand,* supra, n.48. In a paper delivered to the Law Society Conference in 1972, D. F. Dugdale said: "*Melser's* case produced nothing more helpful than the remarkably circular proposition that the behaviour that the criminal law should punish as disorderly is that behaviour that is so disorderly that the criminal law should punish it." Supra, n.16, 558.
50 A parallel can be drawn between the right-thinking New Zealander who is said to possess a volatile and conservative temperament and that of his Australian counterpart who appears more understanding and tolerant of political behaviour. E..g. *Worcester* v *Smith* [1951] V.L.R. 316; *Ball* v *McIntyre* (1966) 9 F.L.R. 237.
51 These cases are examined infra, pp.227-238.

What is the true legal status of the test in *Melser*? Is it a legal rule or a principle of common law which will be binding on courts lower in the hierarchy, or is the test no more than a guide to future courts as to the matters or criteria to be considered when exercising the discretion vested in them by the legislature? In determining whether the conduct in question is disorderly or offensive is the court deciding a question of law, a mixed question of law and fact or a question of fact?

It will be seen that in a number of decisions of the Supreme Court the judicial pronouncements in *Melser* have been regarded as being authoritative and definitive of whether conduct is disorderly.[52] In two cases appeals against conviction have succeeded in the Supreme Court because the judge has found on the evidence the prosecution has not proved beyond reasonable doubt that in the particular time, place and circumstances people were likely to be offended.[53] This treating of the *Melser* test as the standard or criterion which the prosecution must satisfy to successfully establish its case suggests that the test is something more than a mere guideline for the judge or magistrate as to how to exercise his discretion and that it is indeed a principle of law. This trend is to be deprecated as it is tantamount to the judiciary creating the common law offence of behaving in a manner that offends the right-thinking man. In New Zealand all criminal offences are codified[54] and the question that must ultimately be determined is "was the conduct disorderly or offensive?" An alternative and better view is that whether particular behaviour is disorderly or offensive is a mixed question of law and fact. This was the opinion expressed by Turner J. in *Melser* and adopted by Jeffries J. in *Davis* v *Police*.[55] Turner J. said:[56]

> [T]his appeal turns, not on a point of law, but on a conclusion of mixed law and fact . . . and this is readily seen to depend, not on compliance or non-compliance with any exact definition, but on whether the admitted conduct of the appellants is sufficiently "disorderly" to be in breach of the statute. This is a question of degree.

This issue, however, has been the subject of recent authoritative consideration by the House of Lords in *Cozens* v *Brutus*.[57]

During the 1971 Wimbledon tennis championships a match involving a South African player was interrupted by the appellant, Brutus, walking on to the court throwing leaflets. Brutus blew a whistle and nine or ten other people came on to the court holding banners and placards protesting against apartheid in South Africa. A police constable asked the appellant to leave, but Brutus pushed him aside and sat down on the court. The appellant's behaviour aroused feelings of hostility amongst the crowd and eventually the constable had to lift and drag Brutus bodily from the court. Brutus was charged under section 5 of the Public Order

52 Infra, pp.227-235.
53 *Rogers* v *Police*, unreported, Supreme Court, Auckland, 6 August 1975, 873/75, Wilson J.; (noted [1975] N.Z. Recent Law 328); *Osborne* v *Police*, supra, n.24.
54 Crimes Act 1961, s.9.
55 Unreported, Supreme Court, Invercargill, 16 November 1977 (M.103/77), Jeffries J. Noted in [1978] N.Z. Recent Law 48.
56 [1967] N.Z.L.R. 437, 444.
57 [1973] A.C. 854. Noted [1972] C.L.J. 197; (1973) 89 L.Q.R. 8. The case is also examined by Williams, "Law and Fact" [1976] Criminal L.R. 472, 532 and by Burrows, "Some Reflections on *Cozens* v *Brutus*" (1975) 4 *Anglo-American Law Review* 366.

Act 1936 with insulting behaviour.[58] The Justices dismissed the charge without hearing Brutus. The case went on appeal by way of case stated. The Divisional Court found that the Justices had erred in law and remitted the case with a direction that the hearing be continued. The Court gave the term "insulting" a wide construction similar to that taken by the New Zealand courts in regard to section 3D. They held that insulting behaviour includes "behaviour which affronts other people, and evidences a disrespect or contempt for their rights, behaviour which reasonable persons would foresee is likely to cause resentment or protest."[59]

On further appeal to the House of Lords the decision of the Divisional Court was reversed and the Justices' decision restored. Their Lordships found that the Divisional Court's definition of insulting behaviour was too wide. The leading judgment was delivered by Lord Reid who pointed out that when the Act was passed in 1936:[60]

> Parliament had to solve the difficult question of how far freedom of speech or behaviour must be limited in the general public interest. It would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace because determined opponents may not shrink from organising or at least threatening a breach of the peace in order to silence a speaker whose views they detest. Therefore vigorous, and it may be distasteful or unmannerly speech or behaviour, is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting.

Lord Morris of Borth-y-Gest was more forthright in his criticism of the Divisional Court's definition:[61]

> What the Divisional Court have done is to lay down a definition of the words "insulting behaviour" and then to say that the appellant's behaviour came within the definition. But the Act contains no such definition and indeed no words of definition are needed. The words of the section are clear and they convey of themselves a meaning which the ordinary citizen can well understand. The suggested definition would enlarge what Parliament has enacted, and it would do this in relation to a criminal offence. It would lay down that behaviour which affronts other people and evidences a disrespect or contempt for their rights and which reasonable people would foresee would be likely to cause resentment or protest is insulting for the purposes of section 5. It may well be that behaviour which is insulting will often be behaviour which shows a disrespect or contempt for people's rights but it does not follow that whenever there is disrespect or contempt for people's rights there must always be insulting behaviour. Furthermore, there may be many manifestations of behaviour which will cause resentment or protest without being insulting.

58 The section states: "Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence." It is instructive to compare s.3D and s.5. A preliminary distinction can be made on the basis of the description of conduct covered by the offence. Section 3D embraces a wider spectrum of behaviour than the narrower threatening, abusive or insulting conduct covered by s.5. This can in part be explained by their differing origins, one the result of a specific public order problem (clashes between Jews and the British Union of Fascists — the "Blackshirts"), the other the result of a natural progression of a long line of enactments on the subject, (supra, n.4). The most important distinction, however, revolves around the breach of peace requirement. Its absence in s.3D permits the descriptive words of the offence to be interpreted per se without reference to cause and effect. Its presence in s.5 gives equal emphasis to whether the conduct was insulting, abusive or threatening, and to whether there was a threat to the peace.

59 [1972] 1 W.L.R. 484, 487 (per Melford Stevenson J.).

60 [1973] A.C. 854, 862.

61 Ibid., 863-864.

Their Lordships were not prepared to substitute their own definition. They agreed unanimously that the word was in common English usage and as it was being used in its ordinary sense it required no definition. Furthermore, the application of an ordinary word to a fact situation was a question not of law, but of fact. Thus a decision would not form a precedent binding on a court lower in the hierarchy. In the words of Lord Reid:[62]

> The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what the unusual sense is. But here there is . . . no question of the word "insulting" being used in any unusual sense. . . . It is for the Tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved.

If the New Zealand judiciary were to adopt the approach taken in *Cozens* v *Brutus,* they would be free to disregard the test in *Melser* if they felt it amounted to an unwarranted fettering of an unfettered discretion. Clearly we have a conflict between the approach of the House of Lords and that of the New Zealand Court of Appeal. If "insulting" is an ordinary English word requiring no definition then so too presumably are the words "disorderly" and "offensive". Nevertheless the members of the Court of Appeal have at some length defined the terms or at least expressed their view as to where the ambits of the provision lie.[63]

In considering the merits of the various approaches it is necessary to examine closely the decisions of the New Zealand Supreme Court subsequent to *Melser* and endeavour to answer the following questions. Has the *Melser* test been of assistance? Who is the right-thinking New Zealander? What temperament does he possess? Has the test only served to mask the fact that it is primarily a question of fact in each case with the judge or magistrate applying his own standard of disorderly or offensive behaviour? Or is there evidence of greater certainty in this area of the law as a result of the adoption of the *Melser* test?

Decisions of the New Zealand Supreme Court Subsequent to Melser

It is clear from *Melser* that the members of the Court of Appeal were in agreement that section 3D was not intended to criminalise all forms of irregular or unusual behaviour. This point was given added emphasis in *Kinney* v *Police* by Woodhouse J. who appears to have regarded *Melser* as a binding precedent. He said:[64]

> Quite recently section 3D of the Police Offences Act has been the subject of authoritative consideration by the Court of Appeal in *Melser* v *Police* [1967] N.Z.L.R. 437. The expression "disorderly behaviour" is, of course, a somewhat nebulous term, as that case recognises, but it is clear that the conduct under review must be something more than unmannerly, or disturbing, or annoying, before it can be the basis for a conviction in terms of the section. As Turner J. has pointed out in the *Melser* case (at p.444) the question is

62 Ibid., 861.

63 It could be argued that the House of Lords embarked on a similar venture when they stated the Divisional Court's definition to be too wide. An alternative and better view of their Lordships' actions is that they were merely stating the Court's definition was not that which is given to the word "insulting" in its common and ordinary usage and that there was nothing in the Act to indicate or to suggest that the word should be given any unusual meaning.

64 [1971] N.Z.L.R. 924, 925-926.

> one of degree and circumstance, and the conduct complained of must annoy or insult "sufficiently deeply or seriously to warrant the interference of the criminal law". In my opinion, the section should not be allowed to scoop up all sorts of minor troubles and it certainly is not designed to enable the police to discipline every irregular or inconvenient, or exhibitionist activity or to put a criminal sanction on over-exuberant behaviour, even when it might be possible to discern a few conventional hands raised in protest or surprise.[65]

The appellant had waded up to his knees in an ornamental duck pond after a daylight rock festival in the Botanical Gardens at Napier. There were few people about. However a constable observed Kinney's actions and ordered him out. Kinney complied. He had been in the pond for a period of two or three minutes. Kinney was arrested on a charge of disorderly behaviour and was convicted in the Magistrate's Court. Woodhouse J. allowed the appeal and quashed the conviction, concluding that whilst Kinney's behaviour may have been "immature or even stupid" it nevertheless fell "well short of the conduct defined by the Court of Appeal in the *Melser* case, and contemplated by section 3D of the Police Offences Act."[66]

In *Wainwright and Butler* v *Police* the former Chief Justice, Sir Richard Wild, applied the time, place and circumstance test. He said:[67]

> Disorderly behaviour was explained by the Court of Appeal in *Melser* v *Police* . . . by the use of various expressions in the three judgments. I apply these without restating or adding to them, and take as a guiding principle the opinion of Turner J. . . . that judgment of the conduct in question is in every case a matter of degree depending upon the relevant time, place and circumstances.

The appellants had laid a wreath dedicated to the dead and dying in Vietnam at an Anzac Day ceremony in Wellington. Wild C. J., however, showed no inclination to treat as a highly relevant part of the context in which the conduct took place the fact that the appellant was attempting to convey a sincerely held political opinion. The effect of the Chief Justice's decision to uphold the appellant's conviction was in fact to equate the Anzac Day ceremony with a religious gathering. He said:[68]

> Anzac Day ceremonies in New Zealand are by national tradition and universal acceptance occasions of remembrance and dedication. It is common knowledge that for most private citizens who attend they revive memories of the deepest and most personal character. That being the nature of the occasion, it was in my view disorderly behaviour on the part of the appellants to introduce into it by means of their wreath and, indeed, to press upon people present a point of view however sincerely held which they knew would be annoying to most and offensive to many.

This type of reasoning may well be appropriate if the gathering was a private religious occasion. But Anzac Day is a public day of commemoration and it was surely being seriously treated as such by the appellants. Indeed it had been accepted by the Chief Justice that "the appellants were dressed in seemly fashion, participated in the religious part of the ceremony, and were obedient to the request of the R.S.A. officials.

65 These words of caution were adopted in revised police instructions issued in 1972 which emphasised that the main purpose of s.3D was the prevention of disorder and violence. See McBride, *Handbook of Civil Liberties* (Wellington, 1973), 71.
66 [1971] N.Z.L.R. 924, 926.
67 [1968] N.Z.L.R. 101, 103.
68 Idem.

. . . [T]heir conduct, except in regard to their wreath, was unexceptionable."[69]

In concluding his examination of disorderly behaviour the Chief Justice stated:[70]

> It is as well for me to emphasise that this decision in no way restricts the right of the appellants or of like minded persons to hold their views or to express them publicly. It means simply that conduct that in the prevailing circumstances would offend the public conscience the law will not allow.

If this is the standard or criterion by which disorderly behaviour is to be determined then it is certainly unduly restrictive of free speech. Freedom of expression surely means freedom to express not only views in support of the preservation of the status quo but also minority views which may often be highly unpopular. It also means freedom to express these opinions not merely in the press and scholarly journals or on the political platform, but to confront ordinary people, in public, with views differing from their own. The case highlights the ill-defined nature of the *Melser* test and demonstrates the conservative and intolerant temperament that has been attributed to the right-thinking New Zealander.

A less restrictive application of the time, place and circumstances test to the activities of the political demonstrator can be found in the judgment of Mahon J. in *O'Dea* v *Police*.[71] The learned Judge observed that the section had been "considered and authoritatively interpreted by the Court of Appeal in *Melser*."[72] He regarded the oft-quoted statements of North P. and Turner J. "as defining and explaining the criterion of liability under the section"[73] and expressly adopted the words of caution contained in *Kinney*. Emphasising the need to examine the time, place and circumstances of the behaviour, Mahon J. carefully considered the peculiar facts of the case. O'Dea had led a group of three hundred people protesting against British policies in Northern Ireland, in a march to the British Consulate in Auckland. The group formed a circle around O'Dea who delivered a speech and then ignited a petrol-soaked Union Jack which burned rapidly.[74] Mahon J. found:[75]

> The intrinsic significance of the act was known only to the demonstrators. Other bystanders or passers-by would only see the puff of flame followed by the orderly dissolution of the assembly. . . . [T]here is no room on the proved facts for any inference that there was serious annoyance caused to members of the public by the act complained of.

Thus it is implicit in Mahon J.'s judgment that O'Dea's conduct did not amount to disorderly behaviour because in the nature of the demonstration there was no likelihood of serious annoyance being caused to passers-by. The second prong, therefore, of the *Melser* test was not satisfied.

69 Ibid , 102.
70 Ibid., 103.
71 Unreported, Supreme Court, Auckland, 26 April 1972 (M.261/72), Mahon J. (Noted [1972] N.Z. Recent Law 264.)
72 Ibid., 3.
73 Idem.
74 O'Dea was convicted on a charge of disorderly behaviour in the Magistrate's Court. The Magistrate in a reserved judgment found that "to burn a national flag, even as a symbolic gesture, in the circumstances and at the time and place where the present act took place is behaviour seriously offending against those values of orderly conduct which are recognised by right-thinking members of the public, and of a character likely to cause annoyance to others who are present." Quoted by Mahon J., ibid., 2-3.
75 Ibid., 6-7.

Whilst the decision in *O'Dea* is to be welcomed, the peculiar facts of the case cannot be over-emphasised: the demonstration was peaceable and orderly; O'Dea was encircled by fellow protesters at the time the flag was ignited; the conflagration was momentary; other people would have had difficulty in realising the intrinsic significance of O'Dea's actions. This would have only been known to the demonstrators themselves and as they were in sympathy with O'Dea they were unlikely to be annoyed. Further, as the right-thinking man would have been unaware of the significance of the act he would not be seriously offended by the behaviour in question. So it can be argued that the first prong of the *Melser* test was not satisfied either. In these circumstances O'Dea's actions were not disorderly. There is no suggestion in the judgment that Mahon J. has imputed a greater tolerance of symbolic speech to the right-thinking man than did Wilson J. in *Derbyshire* or Wild C. J. in *Wainwright*. One can but speculate whether the learned Judge would have reached the same conclusion had the significance of O'Dea's actions been obvious to passers-by. Perhaps he would have examined their reactions in order to assist his determination of whether the sensibilities of the right-thinking New Zealander would have been offended in the time, place and circumstances.

This is the approach that was adopted by Wilson J. in delivering an oral judgment in *Rogers* v *Police*.[76] A complaint had been made concerning nude bathing at Palm Beach on Waiheke Island. On the day in question three police officers witnessed Rogers bathing in the nude and charged him with offensive behaviour. Wilson J. regarded section 3D as one of a number of sections of the Police Offences Act that were "designed to prevent or forestall the commission of more serious offences."[77] He believed the offences in the Act had the common element "that there must be something in the behaviour which is alleged against the defendant which calls for the intervention of the law in order to prevent some more serious offence taking place."[78] After reading from the judgments of North P. and Turner J. in *Melser* and repeating the definition of offensive behaviour he had adopted in *Derbyshire,* he concluded that "the law" required him "to apply an objective test, not whether any individual person was in fact offended, but whether the behaviour was likely to offend representative members of the community in the time, place and circumstances of the behaviour."[79] He observed that while other people were present at the beach they were apparently unmoved or at least not visibly offended by Rogers' state of undress. The part of the beach where the appellant had swum had regularly been used by nudists for a number of years. Wilson J. concluded:[80]

> [I]t is reasonable to draw the inference that those who went there and stayed there were representative of the community in relation to that time and place and those circumstances. There is no indication that they were in any way offended by what they saw and I am not prepared to accept the view that, because someone obviously complained to the police sergeant, that those complainants were more representative of the standard of conduct of the community than the persons who were there without, apparently, any objection whatsoever.

76 Unreported, Supreme Court, Auckland, 6 August 1975 (M.873/75), Wilson J. (Noted in [1975] N.Z. Recent Law 328.)
77 Ibid., 1.
78 Idem.
79 Ibid., 3.
80 Ibid., 4.

It is suggested that Wilson J. need not have considered the first prong of the *Melser* test. He could have simply found that in the time, place and circumstances the likelihood of annoyance to others present, whether or not they be right-thinking — the second prong of the *Melser* test — had not been proved. As it had been established in evidence that the beach was regularly used by nudists, it was more likely people present would be in sympathy with, rather than annoyed by, Rogers' behaviour. On the other hand, if this was a less remote beach that was being used by both nudists or "topless bathers" and ordinary bathers alike then, on a complaint being made and a charge being laid, the court may well find the second prong of the *Melser* test to have been satisfied; that in these circumstances it was likely persons present on the beach, whether or not they be right-thinking, would be annoyed. The court would then need to consider, as did Wilson J., who was the more representative of the community in the particular time and place and circumstances: the nudists or the "topless bathers" having regard to the fact that the ordinary bathers were seemingly unperturbed by the behaviour, or that person or those persons who had laid the complaint.

The judgment of Wilson J. was closely examined by Chilwell J. in *Osborne* v *Police*.[81] While his oral judgment is not altogether clear on this point it would appear conviction was quashed on the ground that the likelihood of annoyance to persons present was not proved. Osborne had urinated alongside the window of a shop in the main street of Dunedin at two o'clock in the morning. The street was virtually free of people and it had been found by the Magistrate that the only people present apart from the police officers were members of the defendant's own party. In applying the onus of proof the Magistrate, in Chilwell J.'s view, was obliged "to assume that they were in company with the appellant and accordingly more likely to be in tune with his activities that evening rather than the contrary".[82] The constables merely suspected that Osborne had urinated. This, in the learned Judge's opinion, ought not to have brought about feelings of resentment or revulsion. The Magistrate had taken the view that simply because other people were present when Osborne urinated, this brought his conduct "well within" the scope of section 3D. In so doing he had "failed properly to consider the principles applied" in *Rogers* and *O'Dea* which were "based upon" the decision of the Court of Appeal in *Melser* and that of Woodhouse J. in *Kinney*.[83] Whilst the offence of casting offensive matter[84] had been committed, the conduct in question "did not warrant the intervention of the 'law and order' provision contained in section 3D".[85] Having regard to the totality of the evidence, Chilwell J. found:[86]

> [T]he prosecution did not prove beyond reasonable doubt that at the time and place and in the circumstances and having regard to the people who were present there were people likely to be offended in the sense of having their feelings aroused to the point of resentment or revulsion.

The learned Judge in his examination of *O'Dea* and *Rogers* observed that the convictions in these cases were quashed on the ground that it

81 Unreported, Supreme Court, Dunedin, 17 February 1978 (M.152/77), Chilwell J.
82 Ibid., 5.
83 Idem.
84 Police Offences Act 1927, s.3(o).
85 Supra, n.81, 6-7.
86 Ibid., 5.

had not been proved that offence had been caused to the right-thinking members of the community in the particular time, place and circumstances. It is not clear whether he reached a similar finding in this case or whether he allowed the appeal because in the time, place and circumstances people, right-thinking or not, were not likely to be seriously annoyed.

In contrast to the approach taken in *O'Dea, Rogers* and *Osborne* is that of Quilliam J. in *O'Connell* v *Police*[87] where the reactions of witnesses to the conduct does not appear to have weighed heavily with the learned judge in determining whether in the time, place and circumstances the right-thinking man would be offended and people present likely to be seriously annoyed by the behaviour in question. At half past one in the morning, the appellant and three others were travelling by gondola from the Skyline Restaurant in Queenstown to the lower terminal. Shortly after leaving, O'Connell opened the gondola doors and climbed out on to the roof. He was struck on the head by a roller as the gondola came to a tower and was thrown forty or fifty feet to the ground where his fall was broken by trees and scrub. He received cuts and abrasions and after considerable difficulty was rescued and taken to hospital. He was later charged with disorderly behaviour. It was argued unsuccessfully before the Magistrate and on appeal that while the actions of O'Connell amounted to "crass stupidity, it was not behaving in a disorderly manner within the meaning of section 3D."[88]

Quilliam J. observed that there had been a number of decisions of the courts as to what constitutes behaving in a disorderly manner. He found these to be "crystallised in the judgments of the Court of Appeal in *Melser*" the facts of which were "of no relevance" but "the statements of principle by the members of the Court" were.[89] After quoting at length from all three judgments, Quilliam J. concluded that "the test, therefore, is whether the conduct is such as the ordinary person [the right-thinking man?] would disapprove of as being ill-mannered or in bad taste and which is calculated to annoy or upset others".[90] With all due respect to the learned Judge this is to over-simplify the test in *Melser*. Quilliam J. not only appears to have placed little emphasis on the two-pronged nature of the *Melser* test — the need for the conduct in question to seriously offend the right-thinking man and to considerably annoy persons likely to be faced with it — but he has also brought within the ambit of the provision conduct calculated to *upset* others. It is submitted this criminalises behaviour which otherwise would not fall within the section. This is evident in the following extract from Quilliam J.'s judgment:[91]

> Although the only person placed in danger was the appellant himself it was nevertheless the kind of thing which can and does cause distress to people who happen to see it. This is rather similar to the person who gets out on a ledge far above ground level and has to be coaxed to come down. Onlookers feel upset and distressed at the prospect of an imminent disaster. It is a form of conduct which is contrary to public order and is an annoyance and disturbance to others.

87 Noted in [1977] N.Z. Current Law 786.
88 Unreported, Supreme Court, Invercargill, 29 September 1977 (M.80/77), Quilliam J., 2.
89 Idem.
90 Ibid., 3.
91 Idem.

It is respectfully submitted that the possibility of a person committing suicide may cause fear or alarm in the minds of people present, a fear or anxiety that the person may fall and be killed. People may indeed be "upset" or "disturbed" but surely not seriously offended or annoyed.

The new-found extended width of the section is demonstrated by Quilliam J.'s finding that he had "no doubt at all that the appellant's conduct must be described as disorderly. It is just the kind of conduct which is calculated to upset an average person [the right-thinking man?] and there was certainly evidence that there were onlookers."[92] Onlookers indeed there were — the three people sharing the gondola with O'Connell. One of the three was called on to give evidence and in her testimony she did not state that the appellant's conduct had upset or disturbed her in any way. This led to an argument by counsel that for the conduct in question to be disorderly a proved effect on persons present at the time had to be shown. The learned Judge quickly dismissed this somewhat spurious argument by stressing that the judgments in *Melser* were expressed in similar terms, namely that the conduct must be such as is "likely" to annoy or disturb others.[93] This, Quilliam J. said, was "a matter for determination by the Court upon the basis of what can reasonably be expected in the circumstances."[94] However, the time, place and circumstances of the behaviour were matters which Quilliam J. appears to have examined more carefully after affirming O'Connell's conviction than when determining his guilt. It was only when reducing sentence from a fine of $250 to $150 that he observed that, as it was dark and only three people witnessed the appellant's actions, only a few people were likely to be affected by his behaviour.[95]

It is extremely difficult to reconcile this decision with those in *O'Dea, Rogers* and *Osborne.* In all four cases the *Melser* test has been regarded as being definitive of disorderly behaviour, and the people witnessing the conduct have been in sympathy with, or at least not visibly offended by, the actions of the appellants.[96] In the latter three cases this was sufficient evidence on which the judges could conclude that it had not been proved that the behaviour in question was likely to annoy or offend persons present. Counsel's argument in *O'Connell* that actual offence was necessary possibly obscured the real issue from Quilliam J. Instead of establishing whether in the time, place and circumstances it was likely that people, right-thinking or not, confronted with O'Connell's behaviour would be seriously annoyed, he affirmed the appellant's conviction, apparently finding both prongs of the *Melser* test to be satisfied where the conduct was of a type likely to upset the average person and where there was evidence of onlookers. The reactions, however, of two of the people in the gondola with O'Connell were unknown. Was Quilliam J. not obliged, as was Chilwell J. in *Osborne,* to assume in O'Connell's favour that as they were accompanying him they were more likely to be in tune with his activities that evening, as indeed the third person was, than the contrary? A final point of comparison is that Wilson J. in *Rogers* commented that "there must be something in the behaviour which is alleged

92 Ibid., 4.
93 The argument has been used, again unsuccessfully, in Australia. See *Inglis* v *Fish* [1961] V.R. 607; *Ellis* v *Singleton* (1972) 3 S.A.S.R. 437.
94 Supra, n.88, 4.
95 It was accepted that people on the ground would at the time be unaware of O'Connell's antics.
96 With the possible exception of the complainant in *Rogers.*

against the defendant which calls for the intervention of the law in order to prevent some more serious offence taking place."[97] This statement was adopted by Chilwell J. in *Osborne*. The point was not considered by Quilliam J. and it is difficult to see how the intervention of the law would have prevented a more serious offence occurring in this case.

In contrast with these decisions is *Sherie* v *Police*[98] where Coates J. was able to conclude from the reactions of people witnessing the behaviour that in the time, place and circumstances there was a likelihood of serious annoyance being caused to persons present. Sherie walked on to a softball pitch carrying a banner bearing the words "No to Apartheid in Sport" during a game between a South African team and a local team. This caused a disruption in play and when approached by the police he sat down on the pitcher's mound. The crowd, annoyed by the stoppage in play, reacted to Sherie's behaviour by booing loudly. The police forcibly removed Sherie from the playing area and charged him with behaving in a disorderly manner. The balancing of the conflicting interests, the approach adopted by McCarthy J. in *Melser,* was invoked by Coates J. He observed Sherie had not been denied the opportunity to protest, this being permitted both outside and within the park. However, Sherie's manner of protest was such as to bring the game to a halt and he had thus "carried his protest to the stage where it interfered with the freedoms of others who showed their annoyance by their reaction." Coates J. affirmed the appellant's conviction, stating:[99]

> In my view this behaviour by the appellant at that time and place and in the circumstances there prevailing was rightly found by the learned Magistrate to have been disorderly. I consider that this behaviour did tend to annoy and disturb others sufficiently seriously to warrant the interference of the criminal law and that he sought to exercise his freedom to protest in a way which interfered with the freedoms of those who had paid to see this game and who resented the disruption of play which he had deliberately caused.

In the cases examined prior to *Sherie* the judicial pronouncements in *Melser* have been afforded the status of principles of common law. The decision of the Court of Appeal has thus been treated as if it were a precedent binding on the Supreme Court. In *Sherie* can be found the first evidence of the judgments in *Melser* being regarded as merely outlining the matters or criteria to be considered by the court in determining whether behaviour is disorderly. Coates J. stated of *Melser, Christie* and *Wainwright*: "The judgments were simply explaining what could be regarded as disorderly behaviour in a particular situation. . . . The predominant consideration is whether or not the behaviour is to be adjudged disorderly having regard to the circumstances prevailing at the time and place at which the behaviour occurs."[1]

However, this point is obscured somewhat by Coates J.'s statement that "each case must be considered on its own particular facts to which should be applied the principles enunciated in the three decisions."[2] Is he too elevating the right-thinking man test and its refinements to the status of principles of common law? The tenor of the judgment would

97 Supra, n.77.
98 Noted in [1976] N.Z. Current Law 970.
99 Unreported, Supreme Court, Auckland, 26 October 1976 (M.997/76), Coates J., 7.
1 Ibid., 8.
2 Ibid., 8-9.

suggest not. In *Davis* v *Police*[3] and in *Dixon* v *Police*,[4] however, it is clear that the judgments in *Melser* have not been regarded as being definitive of whether conduct amounts to disorderly behaviour but rather as merely setting the ambits of the section.

The facts in *Davis* were in dispute. A police constable gave evidence that at half past four one Wednesday afternoon in a main street in Invercargill he heard three loud bangs audible at a distance of up to 150 yards. On proceeding to the source of the noise he found the appellant hitting something on the ground with a pool cue. The appellant, however, testified he had exploded one pistol starting cap not with a cue but with his heavy metal-tipped boot. This difference in evidence was not resolved by a finding of fact by the Magistrate, but Jeffries J. observed that the appellant admitted to exploding at the very least one cap and that he also admitted by implication it was a fairly loud noise. Counsel for the appellant submitted, citing *Melser* and *Kinney,* that Davis's conduct was not of a sufficiently serious nature to warrant the interference of the criminal law. Jeffries J. observed:[5]

> Undoubtedly, the two cases which have been cited, and a third being a recent unreported decision of Quilliam J. in this Court (*O'Connell* v *Police,* M.80/77, delivered 29 September 1977) are of very great help in obtaining a feel for where the boundaries of this section should be set. However, whether or not any conduct is disorderly conduct so as to bring it within the terms of the section can only be finally decided by an examination of the particular circumstances. That observation, of course, is consistent with the cases I have mentioned. See particularly the judgment of Turner J. in *Melser* at p.444. It is not possible to formulate a satisfactory definitive definition of disorderly behaviour and it was never intended that would be the case.[5]

Turning his attention to the facts of the case the learned Judge found that "the appellant was bent on creating a loud noise, by exploding pistol starting caps, and that is the type of noise which can frighten a large number of the public."[6] He did not accept counsel's argument that other similar loud noises created in the community did not attract the criminal sanction.[7] Conviction was correctly entered in this case as "the noise created by the appellant was intentional and was noise for the sake of noise, and it was loud and potentially frightening and offensive to a number of people who were present in the area."[8] In stressing that Davis's actions were intentional it is submitted Jeffries J. was not suggesting mens rea is required for the offence[9] but was emphasising one of the particular circumstances of the case. The appellant, in a main city street at rush hour, had deliberately chosen to commit the conduct in question. Nevertheless one must reflect on whether the imposition of a criminal sanction in the form of section 3D is necessary in these circumstances. Would this type of behaviour be better regulated by means of a bylaw?

3 Noted in [1978] N.Z. Recent Law 48.
4 Noted in [1977] N.Z. Current Law 118.
5 Unreported, Supreme Court, Invercargill, 16 November 1977 (M.103/77), Jeffries J., 2-3.
6 Ibid., 3.
7 Jeffries J. stressed that while members of the public can be momentarily frightened or irritated by a sudden noise such as a car backfiring, this is clearly accidental and unintended, and perhaps a necessary part of living with the motorcar. Idem.
8 Ibid., 3-4.
9 See dicussion infra, pp.241-242.

In *Dixon* v *Police*[10] is to be found the first reference in a case concerning the interpretation of section 3D to the decision of the House of Lords in *Cozens* v *Brutus*. Dixon followed a nineteen-year-old female pedestrian on his bicycle at a quarter to nine one evening, at which time it was still daylight. On two occasions he rode past the girl, stopped, and as she walked by endeavoured to engage her in conversation concerning sex. The learned Judge found that it emerged from the evidence "that the appellant did not raise his voice and did not actually impede the complainant from movement in any way."[11]

Somers J. emphasised the need for serious insult to the right-thinking man before the intervention of the law was warranted by reference to the doubt expressed in *Melser* by Turner J. as to the conclusion reached in *Christie,* a case which Somers J. observed bore some similarity to the case in issue. The matter was one of degree. Of the decision in *Melser* he said:[12]

> I do not think that the Court of Appeal was endeavouring to define disorderly conduct but rather to illustrate the parameters intended by the legislature as bounding the offence and in general to afford examples having regard to the facts of that particular case.

He continued:[13]

> In the end the question is whether the conduct of the appellant was disorderly. The word "disorderly" is an ordinary English word and it is I think in the end mainly if not wholly a question of fact as to whether or not his conduct fell within that description. See *Cozens* v *Brutus* [1973] A.C. 854, 861 per Lord Reid, 863 per Lord Morris of Borth-y-Gest and 865 per Viscount Dilhorne.

The learned Judge quashed the appellant's conviction, finding that the word "disorderly" was inappropriate to describe Dixon's conduct.[14] Somers J. was reluctant to interfere with a "finding of fact or principally of fact", however, it was a rehearing and it was for him to examine the evidence "having due regard in weighing that evidence to any opinion formed by the learned Magistrate and to the advantages he derives from the general atmosphere of the trial."[15]

Whilst it has never been expressly recognised in any judgment of the Supreme Court, the writer has suggested that the test in *Melser* is two-pronged. Having regard to the time, place and circumstances of the conduct, serious offence to the right-thinking man *and* the likelihood of considerable anoyance to persons present, whether or not they be right-thinking, must be established.

It is unlikely, however, that there will be any significant consistency of decision while one of the questions to be determined is whether the conduct is likely to seriously offend the right-thinking man. Assuming there is such a creature, how are his reactions to the behaviour in question to be determined? Traditionally this has been the function of the jury,

10 Unreported, Supreme Court, Christchurch, 22 April 1977 (M.104/77), Somers J.
11 Ibid., 2.
12 Ibid., 3.
13 Idem.
14 The Magistrate used the words "insulting", "offensive", "improper" and "indecent" to describe the conduct of the appellant, and to these said Somers J. "might be added 'distasteful', 'unmannerly', 'objectionable' and 'reprehensible'." Ibid., 3. It would appear that had Dixon been charged under s.3D with offensive or insulting behaviour, he would have been convicted by the learned Judge.
15 Idem.

twelve good men and true chosen at random from the community. Persons charged under section 3D, however, have no right to trial by jury.[16] The concept of the right-thinking man is so ill-defined that it results in a judge or magistrate, often unwittingly, regarding his reaction to the conduct as being that of the right-thinking person.[17] It is perhaps a recognition of this fact that led Wilson J. in *Rogers,* while acknowledging that an objective standard is to be applied, to examine closely the reactions of the people witnessing the behaviour as a guide to determining whether the right-thinking man would be offended or annoyed. This approach may have merit in the context of over-exuberant behaviour where people witnessing the conduct may well be a representative cross-section of the community, but its value in the context of political protest, where often one wishes to confront people holding opposing views, is open to question.

This problem is only exacerbated when the second prong of the *Melser* test is examined. Keith outlines the difficulty:[18]

> [O]ne must doubt whether the additional element of a likelihood of annoyance of those present helps. Will it not often be the case that those who are faced with political protest will be annoyed? Their opinions and beliefs will often be challenged. How else are their views going to be changed or be open to change except by this process of challenge, irritation and annoyance? North P. indeed acknowledged that "there must be reasonable room for change in habits and behaviour" and doubtless he would add "opinion", but how can this change become accepted or have a chance of acceptance if at the point when those whose habits or opinions are being tested become annoyed, the protest must stop? Is it not rather hypocritical to tell protesters that they can protest until they are on the point of persuading those affected to re-examine their position and that there they must stop?

The value of the second prong, however, is in the situation where the people witnessing the conduct are in sympathy with the behaviour or the views that are being expressed and consequently are not offended.[19] Despite the fact that these onlookers may be the most liberal members of society and that a right-thinking man would be offended, a person should not be convicted of an offence against section 3D because it is not likely that people present will be annoyed. This presupposes one point. A bystander, and most probably in this context this will be a police constable, will have witnessed the conduct in question. It is clear that as a charge has been laid that the conduct has offended his sensibilities. The second prong of the *Melser* test is patently meaningless if the fact that he witnessed the conduct and is annoyed is sufficient to establish liability.[20] This problem is not insurmountable. Turner J. in his judgment in *Melser* said that the conduct must not only tend to annoy or insult those persons

16 An offence against s.3D is punishable by a maximum of three months' imprisonment. Section 66 of the Summary Proceedings Act 1957 provides a right to elect trial by jury where the term exceeds three months.

17 See discussion, infra, pp.240-241.

18 *V.U.W. Essays on Human Rights,* supra, n.7, 64.

19 As in *O'Dea, Osborne* and *O'Connell.*

20 It is equally undesirable for his reaction to be treated as that of the right-thinking man. Nevertheless this has occurred. See: the "dressing-shed case" discussed by McBride, supra, n.8, 39-40; and in *Kinney* v *Police* [1971] N.Z.L.R. 924, 925, Woodhouse J. observed that the opinion of the constable — that because of the presence of ducks and goldfish in the pond, Kinney's paddling may have offended people looking at the scene from their homes — had been accepted by the Magistrate as the basis for his decision.

who are faced with it but it must do so sufficiently *deeply* or *seriously* to warrant the interference of the criminal law, while McCarthy J. said it had to annoy others *considerably*. It can also be argued that the mere fact that one person is annoyed is not sufficient to establish the likelihood of annoyance to *persons* present or to *others*. For example, Chilwell J. in *Osborne* examined the time, place and circumstances of the behaviour and determined that the police constables who had arrested and charged the appellant with an offence against section 3D should not have been offended by the behaviour in question.

On analysis of the recent cases it is clear that some reflect a less restrictive approach to what constitutes disorderly or offensive behaviour than was apparent in the 1960's. The New Zealand judiciary (the right-thinking man?) has become more tolerant of unusual, irregular or aberrant behaviour. This, it is argued, is due more to the cautionary tone than to the specific wording of the *Melser* test. There is no avoiding the fact, however, that it is still difficult to reconcile a number of decisions. If the two-pronged nature of the test were recognised, this could only result in a greater degree of certainty in this important area of the law. Nevertheless it must be emphasised that this would by no means be the complete, nor indeed the ideal, solution. The concept of the right-thinking man would still remain. One is led to the inevitable conclusion that the test of disorderly or offensive behaviour is so vaguely worded that the *Melser* pronouncements do little more than obscure the fact that the judge or magistrate is primarily making a decision of fact when exercising his discretion in deciding whether particular conduct is disorderly or offensive.

Reforming the Law

The legislature by virtue of section 3D of the Police Offences Act 1927 has conferred upon the judiciary an unfettered discretion to determine whether behaviour is disorderly or offensive. It can be argued that as the legislature saw fit to take this action the judiciary should not place self-imposed restrictions upon the exercise of this discretion. Nevertheless the courts have found it impossible to determine whether particular conduct is disorderly or offensive in a vacuum situation. Reference has been made to law dictionaries and to the *Shorter Oxford Dictionary*. The courts have coupled these definitions to the concept of the right-thinking man. Offensive conduct is "a course of action calculated to cause resentment or revulsion in right-thinking persons."[21] Disorderly conduct is that which "seriously offends against those values of orderly conduct which are recognised by right-thinking members of the public."[22] The concept was perpetuated by the Court of Appeal in *Melser*. In so doing, however, the Court stressed the need to examine the time, place and circumstances of the behaviour, and to find serious annoyance to be likely to be caused to persons present, adding that the courts should be slow to criminalise over-exuberant behaviour.

Due presumably to an awareness on the part of the judiciary of the need to re-introduce some certainty into this area of the law, not only has every subsequent decision of the Supreme Court made reference to the judgments in *Melser,* but in the great majority of cases the pronouncements of the Court of Appeal have been regarded as being defini-

21 *Price* v *Police* [1965] N.Z.L.R. 1086, 1088.
22 *Christie* v *Police* [1962] N.Z.L.R. 1109, 1113.

tive of disorderly conduct and have consequently been afforded the status of principles of common law. This action, however, is not to be applauded as it, in effect, creates the common law criminal offence of behaving in a manner offensive to or which annoys the right-thinking man. Thus it is argued that this is not the true legal status of the *Melser* test.

In formulating the test the Court of Appeal was not, strictly speaking, interpreting section 3D. There was no pretence to invoke the so-called "rules of statutory interpretation" in order to determine the meaning of the words "disorderly" or "offensive" within the context of section 3D. It is suggested that this undertaking of the Court of Appeal falls within the second category enumerated by Burrows where criteria are established as a matter of "patently pure judicial invention."[23] The members of the Court of Appeal were merely outlining the guidelines or criteria to be considered by courts in the future when determining whether particular conduct was disorderly or offensive. When exercising his discretion a judge or magistrate is determining a mixed question of law and fact. This was the view taken by Turner J. in *Melser* and more recently by Coates J. in *Sherie,* Jeffries J. in *Davis* and Somers J. in *Dixon.* Somers J., however, while conceding that it may be a mixed question, leaned more towards the view that the determination of the question of whether behaviour was disorderly was purely a question of fact. As he emphasised, he was supported in this view by the decision of the House of Lords in *Cozens* v *Brutus.* However, it must be remembered[24] that whether the words are threatening, abusive or insulting is not the only question the courts in England must consider before determining guilt. There must also be an intent to provoke a breach of the peace, or a breach must be likely to be occasioned. If the approach of the House of Lords is followed in New Zealand, there will be a number of unfortunate consequences.

Cases will not be able to go on appeal by way of case stated as this form of appeal is limited to questions of law.[25] And while an ordinary appeal to the Supreme Court is in the form of a rehearing[26] the judiciary may be reluctant to interfere with the magistrate's exercise of his discretion when he has had the advantage of hearing the witnesses and can thus better determine what weight to attach to particular evidence.[27] Further, an appeal to the Court of Appeal will not be as of right as this too is limited to questions of law,[28] and leave of the Court of Appeal, or a certificate of the judge who tried the case that it is a fit case for appeal, will be required.[29]

If disorderly or offensive behaviour is to be treated solely as a question of fact no one will have any advance indication of what constitutes such behaviour. The difficulty inherent in determining whether conduct is disorderly or offensive by gauging the reaction of the right-thinking man will be exacerbated if in the future the only yardstick available to a judge or magistrate is an examination of whether the conduct is encompassed by the ordinary meaning of the words. For example, in *Dixon,* Somers J. found the appellant's behaviour to be insulting or offensive but not

23 Supra, n.16, 6.
24 Supra, n.58.
25 Crimes Act 1961, s.360; Summary Proceedings Act 1957, s.107.
26 Summary Proceedings Act 1957, s.119(1).
27 E.g., such reluctance was felt by Somers J. in *Dixon.*
28 Crimes Act 1961, s.383(1)(a).
29 Crimes Act 1961, s.383(1)(b).

disorderly. Would twelve right-thinking men (a jury!) have reached the same conclusion? And if they were told to apply the ordinary understanding of disorderly and offensive conduct to the facts in *O'Connell* and *Osborne* could one confidently predict that the former would be convicted and the latter acquitted? In giving the expressions their ordinary meaning, a judge or magistrate may be able to examine the various dictionary definitions and by using the ejusdem generis rule find the most appropriate, but surely this was the very origin of the test in *Melser*!

Consistency of decision requires that the courts continue to have regard to the *Melser* pronouncements not as principles of law or as binding precedent, but as criteria to be considered to assist in the determining of the ordinary meaning of the words "disorderly" and "offensive". The wording is not as significant as the cautionary note against undue interference by the state in individual freedom of expression that they express. In so regarding the pronouncements, the court, it is argued, would not be determining a question of fact but a mixed one of law and fact. As Lord Reid recognised in *Cozens* v *Brutus*:[30]

> If it is alleged that the tribunal has reached the wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision.

For example, if when exercising his discretion a magistrate makes no reference to the decision in *Melser* and, defining disorderly behaviour as irregular or unusual conduct, enters a conviction, an appellate court should find him to have erred in law — not because he has not adopted the *Melser* test as being definitive of disorderly behaviour, nor because he has chosen not to follow the criteria contained therein, but because his decision is unreasonable having regard to the ordinary meaning of the word.

This leads to the question whether, in the absence of any indication from the legislature as to the matters to be considered when exercising the discretion, a magistrate or a judge sitting without a jury is competent to determine whether behaviour is disorderly or offensive. At present, in exercising his judicial function of interpreting section 3D, a judge or magistrate is required to make a decision based not on legal principles but on his personal assessment of the current community tolerance of such behaviour. He is given such a wide discretion that he is not merely interpreting the law but he is in fact making it. He is called upon, if not to lead social change, at least to be *au fait* with current standards. What special qualifications have the members of the judiciary for this task? They are certainly learned and experienced men in the ways of the law. They are qualified to determine legal issues, for example the existence of an intent to provoke, or the likelihood of a breach of the peace, but not to determine matters "which are as much sociological as legal."[31] In short, they are not psychologists, political scientists or sociologists. This problem was recognised by Wilson J. in *Rogers*:[32]

30 [1973] A.C. 854, 861.

31 Per McCarthy J., *Melser* v *Police* [1967] N.Z.L.R. 437, 445.

32 Unreported, Supreme Court, Auckland, 6 August 1975 (M.873/75), Wilson J., 3.

> It is very difficult indeed for a judge or a magistrate, whose opportunities of joining in the common life of the community are limited, to be able to say, from his own experience, whether behaviour is likely to offend the representative members of the community in the time, place and circumstances where it occurred.

Thus, no matter whether disorderly behaviour is regarded as being a question of law to be determined by applying the principles of *Melser,* a mixed question of law and fact to be determined by treating *Melser* as setting the parameters of disorderly behaviour, or purely a question of fact to be determined by giving the expression its ordinary meaning, we still have the situation of a judicial officer making a value-judgement based on non-legal considerations.

Certainty in the criminal law, consistency and rationality of decision require the injection of further considerations beyond the ill-defined test in *Melser.* A simple yet effective means of so doing is to re-introduce the breach of peace requirement[33] which was deleted from the statutory provision in 1924.[34] It is suggested that the section be phrased to make it clear that section 3D is not an offence of strict liability and that mens rea is required in the form of an intent to provoke a breach of the peace or a recklessness as to whether a breach of the peace is likely to occur.

The issue of whether section 3D is an offence of strict liability has been afforded only scant consideration by the courts. Stanton J. in *Mahood* v *Robinson,* a case concerning the use of insulting words, found that where the word used was "insulting per se" no intention to insult need be proved.[35] In *Derbyshire,* Wilson J. found that if the appellant's behaviour was to be regarded as offensive it had to be "calculated to cause resentment or revulsion",[36] while in the Court of Appeal in *Melser,* Turner J. concluded that the behaviour of the appellant was "certainly calculated to give serious annoyance to the public."[37] In *O'Connell,* Quilliam J. said the behaviour had to be "calculated to annoy or upset others."[38] In none of the cases, however, was the mental element of the offence considered. The word "calculated" would suggest mens rea in the form of intention[39] was required rather than mere recklessness.[40] It may be possible to find such an intent in *Derbyshire* and even in *Melser* but it is difficult to detect in *O'Connell.* Considering the time, place and circumstances of O'Connell's behaviour it is impossible to reach any conclusion other than that his act of bravado was done for the amusement of, or to impress the other members of, his party in the gondola. In *Wainwright* and in *Davis,* in affirming conviction, the malevolent motives of the appellants was emphasised, while in *O'Connor* v *Police* Richmond J. allowed an appeal against conviction when there was no proof that the appellant "should have appreciated that there was at least a likelihood that his remarks would be overheard by the one and

33 This plea is not new. See Keith, supra, n.7, 67; McBride, supra, n.8, 51; Dugdale, supra, n.16, 558.
34 Supra, n.4.
35 [1952] N.Z L.R. 103.
36 [1967] N.Z.L.R. 391, 392, adopting the statement of Haslam J. in *Price* v *Police* [1965] N.Z.L.R. 1086, 1088.
37 [1967] N.Z.L.R. 437, 445.
38 Unreported, Supreme Court, Invercargill, 29 September 1977 (M.80/77), Quilliam J., 3.
39 Direct or oblique. See Cross and Jones, *Introduction to Criminal Law* (8th ed., London, 1976), 30-36.
40 In the legal sense: the conscious taking of an unjustified risk. Ibid., 37-38.

only person to whom they could be both a serious insult and source of annoyance."[41]

In view of the recent re-emergence of the presumption of mens rea,[42] it may be in the future that mens rea in the form of intention or recklessness will be required, or that the halfway-house approach established in *R.* v *Strawbridge*[43] will be adopted. This requires that mens rea be presumed unless the accused can point to evidence showing an honest belief held on reasonable grounds in the existence of facts which if true would make his acts innocent. In determining whether the presumption is rebutted and the offence is to be one of strict liability, the court would need to have regard to the purpose of the Police Offences Act 1927, the subject-matter being regulated, the penalty imposed, the stigma of conviction, and whether the conviction of those who did not intend to breach the section would deter others in the future from similar actions or whether "conviction of the innocent" would bring the law into disrepute. These considerations, however, would be unnecessary if the section was amended as suggested.

The proposed amendment would also impose a less extensive and more justifiable restriction on freedom of expression. Expression would be restricted only to the extent necessary to protect the legitimate interest in public order and not the more elusive or illusory interest in protecting the sensibilities of the right-thinking person. That the true function of section 3D is as a law and order provision was recognised in the judgments of Woodhouse J. in *Kinney,* Wilson J. in *Rogers* and Chilwell J. in *Osborne,* and by the revised police instructions issued in 1972.

Under the proposed amendment there would undoubtedly be greater scope for serious political expression. Yet public order need not be threatened. The police, before intervening, and the courts, before convicting, would need to consider:

1. Did the person in question intend to provoke a breach of the peace or was he reckless as to the likelihood of a breach of the peace occurring? If an individual, for example Wainwright, was determined to air his views at a gathering of people whom he knew were of opposite persuasion, then this would obviously be some evidence of being reckless as to the likelihood of a breach of peace occurring and possibly of an intention to provoke a breach of the peace. If a person exercising his freedom of expression is unexpectedly confronted with an unreasonable and hostile audience then the converse situation would apply. If, however, he continues speaking, being reckless as to whether a breach of the peace occurs,[44] then the courts would need to consider whether the further element of the offence was satisfied.

2. Could the behaviour of the person in question fairly be described as disorderly or offensive? The words are to be given their ordinary meaning, and assistance in ascertaining this may be gained from the judgments in the Court of Appeal in *Melser* where it was stated that

41 [1972] N.Z.L.R. 379, 381.

42 E.g. *Sweet* v *Parsley* [1970] A.C. 132; *Police* v *Creedon* [1976] 1 N.Z.L.R. 571. In the latter case, at 573, McCarthy P. said: "*Sweet* v *Parsley* is now well established as a dominating authority in this shifting field, and as reasserting the ascendancy of the requirement of fault in criminal law. It was respectfully approved and applied by this court in *R. v Strawbridge* [1970] N.Z.L.R. 909."

conduct is not in breach of section 3D merely because it is ill-mannered, irregular, unusual or a breach of morality. The section is not designed to scoop up all sorts of minor troubles.

It may be argued that if this amendment is adopted, the preventive power at present available to the police to step in and curb behaviour before it results in a more serious offence occurring will be seriously impaired. If need be, this type of behaviour can be regulated by bylaw[45] or by specific statutory provision.[46] In a statute which makes it an offence to suspend meat or offal overhanging a public place,[47] or to permit a horse to serve a mare in or within view of a public place,[48] or to roll a cask, beat a carpet, fly a kite or use a bow and arrow to the annoyance of any person in a public place,[49] this should not prove to be too difficult. A vague catch-all provision is not the answer. The demonstrator, the exhibitionist, the police, the lawyer advising his client and the courts alike will be better judges of the existence or the likelihood of a breach of the peace than of whether the right-thinking man will feel resentment or revulsion and whether persons present will be seriously offended or annoyed.

Conclusion

The message is clear. Section 3D can continue to operate as a most useful and potent weapon in the police arsenal for regulating fringe "criminal" behaviour. The courts can continue to interpret the section on the ad hoc basis of reviewing the conduct in question, and, by referring to the *Melser* test either as a principle of law or as an indicator of the parameters of the section, or by simply giving the words "disorderly" or "offensive" their ordinary meaning, can determine whether the imposition of the criminal sanction is appropriate. This is certainly conducive to flexibility in the law but as has been emphasised this is achieved at the expense of certainty. Free-ranging political and social expression are vital to the continued existence of any true democracy. However, this expression is stultified when the citizen is unsure as to the lawful limits of his proposed conduct. The conflict between flexibility and certainty is insoluble. The interests of justice require both. Nevertheless the law at present is weighted too heavily in favour of flexibility. Reintroduction of the need to prove an intention to provoke a breach of the

43 [1970] N.Z.L.R. 909. See Smith, "Halfway to the Halfway House?" [1971] N.Z.L.J. 304.

44 The speaker must take his audience as he finds it. See *Jordan* v *Burgoyne* [1963] 2 Q.B. 744 where the problem of the hostile audience and liability under the Public Order Act 1936, s.5 was considered by the English Court of Appeal.

45 E.g. in *Kinney v Police* [1971] N.Z.L.R. 924, 926, Woodhouse J., on finding the appellant's conduct to fall outside the ambit of s.3D, stated that "it remains open to the local authority to issue an edict in the form of a bylaw regulating the paddling by persons in the City ponds, should so solemn an injunction seem necessary."

46 If the maximum penalty for the offence was only a fine, then initiation of proceedings would normally be by summons. However, if a person refused to desist from his conduct when requested by a constable there would be a power of arrest under the Crimes Act 1961, s.315(2)(a) or (b) — obstruction of a constable in the execution of his duty being an offence punishable by imprisonment, Police Offences Act 1927, s.77.

47 Police Offences Act 1927, s.3(1).

48 Police Offences Act 1927, s.3(v).

49 Police Offences Act 1927, s.3(w).

peace or recklessness as to whether a breach is likely to occur would redress this balance.

In such an important area as freedom of expression, we cannot afford to criminalise conduct, whether it be symbolic speech or over-exuberant behaviour, purely on the basis of broad dictionary definitions. The question of whether conduct is disorderly or offensive must be seen to be a mixed question of law and fact. Although Lord Reid stated the question of whether behaviour was insulting to be one of fact, he did recognise there could be a question of law involved albeit of the limited character of whether the decision was unreasonable, having regard to the common and ordinary usage of the word. Consistency and rationality of decision demand that regard be had to the decision in *Melser,* not as a binding precedent but as stating criteria to be considered to assist the court in the determination of whether particular behaviour falls within the ordinary meaning of the words "disorderly" or "offensive". It may be that the wording of the *Melser* test will not be of as much utility as the clear warning evinced by the judgments against undue interference by the state in the liberties of the individual.