"THE POLICEMAN'S FRIEND" SECTION 3D OF THE POLICE OFFENCES ACT, 1927

Section 3D of The Police Offences Act, 1927, as enacted by Section 2 of The Police Offences Amendment Act (No. 2) 1960, provides that:—

> Every person commits an offence and is liable to imprisonment for a term not exceeding three months or to a fine not exceeding two hundred dollars[1] who in or within view of any public place as defined by section 40 hereof, 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.

Section 3D is one of the most frequently used sections of the Police Offences Act 1927, and charges under it are laid almost every day. The wide-ranging nature of the section's operation is best illustrated by some recent examples of its use.

Words painted on a motor-cyclist's jacket which referred indecently to a sexual practice together with a reference to the police were held to constitute offensive behaviour in a recent Magistrate's Court decision.[2] A charge of offensive behaviour brought against a 64-year-old Anglican clergyman for appearing naked on a public beach was dismissed after he produced in Court a pair of flesh coloured shorts.[3] Three engineering students were charged under section 3D after they had attempted to stop the Royal Motorcade during the visit of the Royal Family to Auckland on March 25, 1970. The stated object of the students' action was to make the Queen an honorary member of the Auckland University Society of Engineers. The students' defence was that their action was nothing more than a harmless student prank was rejected and they were each fined $20.[4] Three youths who had taken two Anzac Day wreaths from the Cenotaph in Palmerston North and set fire to them were charged with disorderly behaviour under Section 3D. The youths had thought that the wreaths had been laid by the Progressive Youth Movement and believed their action would be acceptable to most people. However, the Magistrate did not accept this argument and fined the youths $30 each.[5] The political demonstrator is not immune from the section's operation. Sixteen people, opposed to the 1970 All Black Rugby Tour of South Africa, invaded Athletic

1. Now $500—Police Offences Amendment Act 1967 s. 2(1).
2. *Evening Post,* 8 April, 1970.
3. *Dominion,* 8 April, 1970.
4. *Evening Post,* 12 May, 1970.
5. *Evening Post,* 12 May, 1970.

Park during the course of the final trial for the team. They were all charged with disorderly behaviour under section 3D, pleaded guilty, and were fined $50 each.[6]

History of Section 3D

Section 3D has a long history. Under Section 4 of the Vagrant Act 1866 Amendment Act 1869, it became an offence to use "threatening, abusive or insulting words or behaviour in any public street, thoroughfare, or place, with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned".[7] The section was altered slightly by Section 3 (29) of the Police Offences Act 1884 which made it an offence to use any "threatening, abusive or insulting words or behaviour in any public place within the hearing or within view of passers-by, with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned."

This form was retained in subsequent Acts and it so appeared in Section 3 (ee) of the Police Offences Act 1908, which was a consolidation of all Acts then in force. However, by Section 2 of the Police Offences Amendment Act 1924, the form of the section was materially altered. Up to that time the emphasis had been on breach of the peace. For a prosecution to succeed it was not sufficient to show an insult or a threat to a passer-by unless there was either intent to create or the possibility of a breach of the peace. The 1924 Amendment, however, omitted all reference to a breach of the peace, either actual or likely. The amendment read:

> Section 3 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.

The deletion of the breach of the peace requirement was justified because otherwise "a person could be most abusive to another person, but unless you could prove intent to provoke actual fisticuffs there was no offence".[8]

The 1924 Amendment was later re-enacted when the Police Offences legislation was consolidated in 1927.[9]

The 1960 Amendment (Section 3D) is couched in similar language to the 1924 Amendment. The final words of the 1924 Amendment —"or strikes or fights with any other person"—are omitted. The 1960

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6. *Evening Post,* 25 May, 1970.
7. This provision was based on earlier English legislation which is still in force in the U.K.—Metropolitan Police Act 1839 s.54(13).
8. This statement was made by the Hon. Mr. Parr, Minister of Justice 1924. 204 N.Z.P.D. 1079.
9. Police Offences Act 1927. s.3(ee).

Amendment creates a separate offence of fighting in a public place (Section 3B). The main differences between the 1924 and the 1960 Amendments are first, that the maximum penalty has been increased from ten pounds to either three months imprisonment or a $200 (now a $500) fine; secondly (and this is the main innovation of the 1960 Amendment), the right of arrest without warrant is given to a constable, and to all persons whom he calls to his assistance, of any person whom he finds committing or whom he has good cause to suspect of having committed an offence against the Section.[10]

The 1960 Amendment was enacted to deal with the problem of hooliganism and during the course of the debate in Parliament the then Minister of Police, the Hon. P. G. Connolly, produced reports describing the incidence of hooliganism in particular towns and cities.

The granting of the right of arrest without warrant "is the real value of the section from the police point of view and the power to arrest is widely used to deal with disturbances especially outside hotels, coffee bars, at dance halls, and at pop concerts".[11]

Under the present legislation, speech and conduct which were originally coupled remain separated. K. J. Keith[12] suggests that "it is now possible to argue that words, to be caught under the section must be threatening, abusive or insulting. It may not be possible to argue that offensive or disorderly words—as opposed to behaviour—constitute an offence."[13]

Analysis of Section 3D

The weaknesses and inadequacies of the present legislation are best seen by dividing the section into types of behaviour and types of words and analysing each type in turn.[14]

<table>
<tr><td colspan="3">In or within view or hearing of a public place</td></tr>
<tr><td>Behaves in a</td><td rowspan="2">or</td><td>Uses any</td></tr>
<tr><td>Riotous Offensive
Threatening Insulting
Disorderly

Manner</td><td>Threatening
Abusive
Insulting

Word</td></tr>
<tr><td colspan="3">This offence is punishable by imprisonment</td></tr>
</table>

10. The arrest provisions though originally contained in the Police Offences Act 1927, are now to be found in the Crimes Act 1961, s.315.
11. R. S. Clark, "Disorderly Behaviour" (1967) 31 *Comment* 23, 24.
12. "The Right to Protest": *V.U.W. Essays on Human Rights* (ed. K. J. Keith, 1968) 49.
13. *Ibid.* 62. In support Keith cites *McDonald* v. *Police* [1965] N.Z.L.R. 733—Contra *Price* v. *Police* [1965] N.Z.L.R. 1086.
14. In this paper I do not intend to discuss what constitutes a "public place". The definition of "public place" in the Police Offences Act 1927 is extremely wide. See s. 2 and also the extended definition of the same term in s. 40.

(1) Types of Behaviour

(i) *Riotous Behaviour:*

Though there are no reported New Zealand decisions on what constitutes "riotous behaviour", in the context of section 3D, the word "riotous" may be regarded on the authority of The Concise Oxford Dictionary (3rd Ed.) as meaning "excessive and objectionable revelry or acts".

It is important not to confuse the minor offence of "riotous" behaviour with taking part in a "riot" as the word "riot" is generally understood.[15] The holding of a drunken party with screaming and yelling in a residential street at 2 a.m. might constitute "riotous" behaviour. However, as "riotous" behaviour usually involves "disorderly" behaviour, the latter is regarded by the police as the more appropriate charge. This may explain the complete lack of New Zealand authorities involving prosecutions for "riotous" behaviour. What constitutes "riotous" behaviour has, however, been discussed by Australian Courts on a number of occasions.[16]

In *Scott* v. *Howard and Parkinson,*[17] a Victorian Supreme Court decision early this century, Hodges J. held that though it was difficult to define or give a comprehensive definition of what constitutes "riotous" behaviour his view was that the conduct must be calculated to alarm the public.

(ii) *Threatening Behaviour:*

This is not a common offence as it is usually accompanied by words which bring the circumstances within the offence of using "threatening" words. This offence also merges into the offence of assault. The attitude of the police is that a charge of "threatening" behaviour is appropriate where the threat was conveyed merely by act or gesture and the proof falls short of assault.

Brownlie[18] states that "any behaviour which causes persons of ordinary maturity and firmness to apprehend physical harm to their persons or property is threatening. Behaviour is also threatening if the defendant could reasonably foresee its effect on groups of individuals of less than ordinary firmness e.g., children and old people".[19]

In *McMahon* v. *Dollard,*[20] the two defendants were among a group of fifteen young persons marching along a footpath, taking up the whole width of the footway. They were dressed in black leather

15. See the Crimes Act 1961 ss. 86-91—Sections dealing with unlawful assemblies, riots and breaches of the peace.
16. *Ex parte Andrews* (1871) 10 S.C.R. (N.S.W.) 172; *Atwell* v. *Thomas* (1896) 2 W.N. (N.S.W.) 67; *Burton* v. *Mills* (1896) A.L.T. 262; 2 A.L.R. 67; *Ex parte Jackson: re Dowd* (1932) 49 W.N. (N.S.W.) 126.
17. (1912) V.L.R. 189: 33 A.L.T. 221: 18 A.L.R. 157.
18. *The Law Relating to Public Order* (Butterworths, London 1968).
19. *Ibid.* 11.
20. [1965] Crim. L.R. 238.

jackets and were chanting "Down with the Mods" and as people riding motor scooters passed, they shouted "We will have you over". The two defendants together with the other youths, were charged with "threatening" behaviour.[21] The Divisional Court held that the whole group had acted together and thus each member was guilty of "threatening" behaviour.

(iii) *Insulting Behaviour:*

The adjective "insulting", in relation to conduct, presents many problems. A line has to be drawn between insulting conduct on the one hand and annoying or irritating conduct on the other.[22] In *Bryan* v. *Robinson,*[23] a case under s. 54(13) of the Metropolitan Police Act 1839 (U.K.), the defendant, who was employed as a hostess at a restaurant, stood in the doorway and smiled and spoke to three men who were walking past the premises. Evidence was given that they were annoyed by her conduct and immediately walked across the street. The Divisional Court quashed her conviction on the ground that her conduct could not be held to amount to insulting behaviour. In the words of Lord Parker, "It is true that three men were annoyed but quite clearly somebody can be annoyed by behaviour which is not insulting behaviour."[24]

Whether *Bryan* v. *Robinson* is applicable to New Zealand is doubtful. The principal ground on which the prostitute's appeal was successful was that, though her conduct was annoying and even insulting, it was not of a character whereby a breach of the peace might be occasioned. This was required by the section. As noted earlier, the necessity that there be a breach of the peace or an intention to provoke such a breach is not required under Section 3D.

Because the offence of insulting behaviour is usually accompanied by insulting words the offence of using "insulting words" may be a more appropriate charge. This is the attitude of the police. However, where the insult is conveyed merely by act or gesture, this would probably constitute insulting behaviour.

(iv) *Offensive Behaviour:*

"Offensive behaviour" had been used for many years by the Police as a catch-all charge over a wide variety of situations.

In a recent New Zealand case, "offensive behaviour" was defined as "a course of action calculated to cause resentment or revulsion in right-thinking people."[25]

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21. The charge was brought under the Public Order Act 1936 s.5—The U.K. equivalent of our S.3D.
22. Many of the difficulties in this area are detailed by David Williams: *Keeping the Peace: The Police and Public Order:* (Hutchinsons 1967) pp. 159-162.
23. [1960] 1 W.L.R. 506.
24. *Ibid.* 507: Case noted in (1960) 76 L.Q.R. 349.
25. *Price* v. *Police* [1965] N.Z.L.R. 1086, 1088 per Haslam J.

An Australian judge has held that behaviour to be offensive must be such as is "calculated to wound the feelings or arouse anger, resentment, disgust or outrage in the mind of a reasonable person."[26]

The "right-thinking man" approach was used by Wilson J. in *Derbyshire* v. *Police*[27] in holding that the burning of a Union Jack in the vicinity but not in the sight of the Governor-General constituted offensive behaviour. The mere fact that the gesture was politically inspired did not prevent it from being offensive behaviour within the section. Political fanatics as well as ordinary citizens were required to abstain from offensive behaviour in public places. The only difficulty was in applying Haslam J.'s expression "right-thinking persons". However, no such difficulty arose in the particular case 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."[28]

Wilson J.'s statement has serious weaknesses. How is one to define a "person of decent instincts"? Who is a "right-thinking person"? The dangers of the test are manifest.

> What if a "person of decent instincts" genuinely considers that New Zealand should not remain a Monarchy and chooses, as appeared to be the case here, to burn the flag to express this view? . . . Is there not a real danger that the preference of "right-thinking persons" is likely to be the *status quo,* that all strong action by a minority group challenging accepted opinions is likely to cause resentment in such persons' minds?[29]

In Australia, the charge of "offensive behaviour" is frequently used against the political demonstrator who cannot be charged with a more specific offence.[30]

The Australian Courts have drawn a distinction between words and behaviour in determining whether conduct during political demonstrations may constitute offensive behaviour.

In *Worcester* v. *Smith,*[31] O'Bryan J. held that offensive behaviour does not extend ". . . to the peaceful and inoffensive statement either verbally or in writing of political views."[32]

"The mere expression of political views, even when made in the proximity of the offices of those whose opinions are being attacked does not amount to offensive behaviour."[33] The particular protest

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26. O'Bryan J. in *Worcester* v. *Smith* [1951] V.L.R. 316.
27. [1967] N.Z.L.R. 391.
28. *Ibid.* 392.
29. K. J. Keith Op. cit. n.12 at pp. 63-64.
30. cf. N.Z. where the charge of "behaving in a disorderly manner" is more frequently used by the police.
31. [1951] V.L.R. 316.
32. *Ibid.* 317.
33. *Ibid.* 318.

which was against U.S. policy in Korea took place outside the offices of the U.S. Consulate in Melbourne and the particular placard complained of bore the words, "Stop Yank Intervention in Korea".

The offence is not committed where there is no evidence that any persons referred to by words inscribed on a banner carried by the defendant saw the words, or that any one present was so related to the party against whom the words were directed that he might reasonably resent them as offensive.

From O'Bryan J.'s statement there would seem to be a clear need for somebody to be *actually* offended by the defendant's conduct before it can be held to be "offensive". This evidential point may be important.

Worcester v. *Smith* was followed in a recent Australian case, *Ball* v. *McIntyre.*[34] In this case, a student in the course of a political demonstration against Australian involvement in the war in Vietnam hung a placard upon and squatted on the pedestal of a statue erected as a public memorial to King George V outside Parliament House, Canberra. Kerr J. allowed the student's appeal against conviction for offensive behaviour on the grounds first, that the ". . . charge was not available to ensure punishment of those who differ from the majority"[35] and secondly, because no "reasonable man seeing such conduct to be truly political conduct would have his feelings wounded or anger, reesentment, disgust or outrage roused."[36] Though the reasonable man might "agree or disagree with the politics of the student and with the general propriety of his method of protest . . . he could see that the student's dominant motive was one of political protest."[37] Offensive behaviour was defined by Kerr J. as behaviour calculated to produce significant emotional reactions in the reasonable man. The particular behaviour when considered in its full setting was not a "pre-arranged defilement, abuse, or misuse of the statue but an incidental resort to it during the political protest or demonstration with the emphasis on the protest, and not on some mistreatment of the statue".[38] As such, it was not "offensive" behaviour.

Kerr J. defined the reasonable man (equivalent to the N.Z. right-thinking man) as one who was mature enough to tolerate spontaneous political protests even though the views expressed were violently at odds with his own and who was ". . . reasonably tolerant and understanding and reasonably contemporary in his reactions".[39] This approach has not been followed by the N.Z. Courts in the cases in-

34. [1966] 9 Fed. L.R. 237.
35. *Ibid.* 241.
36. *Ibid.* 244.
37. *Idem.*
38. *Ibid.* 240.
39. *Ibid.* 245.

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volving conduct arising out of political demonstrations. The N.Z. Courts have adopted a more conservative approach.[40]

It is inevitable that the political demonstrator will annoy and offend many people simply because his views are at odds with those of the majority in the community. The tolerant approach of the Australian Courts in *Worcester* v. *Smith* and *Ball* v. *McIntyre* is to be preferred, if only on the ground that it provides better protection for one of the basic rights of a democratic society—the right to dissent.

The use of offensive words does not constitute an offence under Section 3D. In *McDonald* v. *Police*[41] Barrowclough C.J. held that the mere use of words spoken in a quiet conversational tone, even though they were clearly offensive was not "offensive behaviour" within the meaning of that expression as used in Section 3D. Barrowclough C.J. supported his interpretation by tracing the history of Section 3D. A clear distinction between speech and conduct had been drawn back to 1908 and indeed to 1884. "The fact that the legislature refrained from increasing the categories of words when it expressly increased the categories of behaviour . . . clearly shows that in the context of Section 3D (i) it did not regard the use of words as being within the concept of behaviour".[42] However, this approach was not followed by Haslam J. in *Price* v. *Police*.[43] He held that words alone may constitute offensive behaviour. Where offensive words are accompanied by acts of the accused in persisting in remaining in the company of the persons to whom such words are addressed and pursuing an obscene class of topic, an offence against Section 3D is amply proved.

In Australia, the Courts have been prepared to hold that behaviour is not offensive merely because it is improper or morally blameworthy. In *Anderson* v. *Kynaston*,[44] the Victorian Supreme Court held that "offensive behaviour" means conduct which is offensive when judged by an external standard. It must not be taken as covering all conduct which is merely, in a broad sense, blameworthy and therefore improper; or conduct which is hurtful only in the sense that it may turn out to be hurtful to "another person's" future, disposition, or character. For these reasons the Court held that a man could not be punished for showering favours on a small girl whom he chanced to meet at a cinema or for having requested her company on a future occasion. It was irrelevant what his ulterior motives were or what distress he undoubtedly caused the child's parents.[45]

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40. E.g. *Melser* v. *Police* [1967] N.Z.L.R. 437. *Wainwright* v. *Police* [1968] N.Z.L.R. 101.
41. [1965] N.Z.L.R. 733
42 *Ibid.* 736.
43. [1965] N.Z.L.R. 1086.
44. [1924] V.L.R. 158.
45. Australian examples of offensive behaviour: Turning out the lights in a public hall as a practical joke (*Densley* v. *Mertin* [1943] S.A.S.R. 144): Saying particularly rude things about policemen (*Brady* v. *Lenthal* [1930] S.A.S.R. 314): Over-aggressive salesmanship of pamphlets (*Ex parte Weiss: re McClung* (1946) 63 (N.S.W.) 207).

A charge of offensive behaviour against a man dressed as a woman who had gone on to a public street at night was rejected by Macfarlan J. in *Hannaberry* v. *Crowther.*[46] There was no evidence of any conduct by the man which would make any suggestion to a member of the public or to the police of prurience, or of acting in a prurient manner. However, in a recent Magistrate's Court decision, a female impersonator was fined heavily after he had been seen by a constable to enter the women's section of a public lavatory. The defendant's defence that it would have looked "funny" if he had entered the men's toilet was rejected.[47]

A question which came before the New Zealand Supreme Court recently was whether a person can be guilty of offensive behaviour in a public place even though no one actually present is offended by his behaviour. The particular case involved two young men who, dressed as women, went into a women's dressing shed at the Centennial Pool at Christchurch. The men, one of them swimming in a bikini, had been noticed at the pool by an off-duty police constable who knew that they were in fact men. They had been seen by him to enter the women's dressing shed, in which women were present. A female attendant called by the constable found one of the men combing his long hair and the other "lounging nearlby". The two men were charged with offensive behaviour under Section 3D.

Counsel for the men argued that though Section 3D was a blanket provision against all kinds of "disorderly" behaviour, it fell short of encompassing, even by the word "offensive", what the men had done. Other women in the shed could only have been offended if they had been aware that the two were men.

As to the constable outside the shed, Counsel for the men quoted the authority of a recent Australian case *Inglis* v. *Fish,*[48] a decision of the Victorian Supreme Court. In that case Mr. Justice Pape held that it was enough that the behaviour in question occurred in a place where the presence of members of the public might reasonably have been anticipated; and in circumstances where such behaviour could be seen by members of the public who happened to be present if they were looking. On the other hand ". . . where conduct is observable only by the observer taking some unusual or abnormal action in order to take a view of that conduct—as by peeping through a keyhole, using a periscope in order to see through a fanlight, or crouching down and looking under a door . . . such conduct does not cease to be what . . . [one] might call behaviour in private".[49]

The constable under cross examination concerning the arrest of the two men said: "I told them I would be offended if my wife were

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46. [1945] V.L.R. 158: (1945) A.L.R. 92.
47. *Dominion,* 28 April, 1970.
48. [1961] V.R. 607.
49. *Ibid.* 612.

getting changed in their presence". Counsel for the men argued that this was "too remote an hypothesis" because what the constable was really saying was that he was offended at the thought of his wife undressing in the men's presence. However, Wilson J. found it unnecessary to decide the point. In dismissing the appeals against conviction he stated that there was already evidence that the constable had been offended at the sight of the men going into the women's dressing shed. "It was offensive to any person who knew the facts and that the men were there whether that person was actually inside the dressing shed or, as the constable was, outside and saw them enter".[50]

This decision cannot be regarded as satisfactory. A policeman should not be regarded as a reasonable man when determining whether conduct is offensive or not. The sensibilities of a police constable cannot be regarded as a substitute for the objective test of the right-thinking man. Policeman are in a special category as witnesses. Their reactions to deviant behaviour should be treated with caution by the courts.

The whole position regarding offensive behaviour is unsatisfactory at present. ". . . [T]he majority of convictions for offensive behaviour are not reviewed by the superior courts. Because of the circumstances in which a case is brought it is more likely than not that the police assessment of what is offensive will be accepted by the justices or stipendiary magistrate".[51] The offence of offensive behaviour is perhaps something which we could do without.

(v) *Disorderly Behaviour:*

"To behave in a disorderly manner is to act in a manner which contravenes good conduct or proper conduct".[52] It has been held that a man persistently following a young unaccompanied woman along a street in such a manner as to cause her concern is behaving in a disorderly manner (per Henry J. in *Police* v. *Christie*[53]). To the judge it was simply a question of deciding whether or not the behaviour seriously offended against those values of orderly conduct recognised by right-thinking members of the public. The conduct had to be serious enough to incur the sanction of a criminal statute. This meant that 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".[54] To warrant a conviction the conduct or behaviour had to be such that it constituted an attack

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50. Decision not yet reported. This report from the *Evening Post,* 11 December, 1969.
51. Campbell and Whitmore: *Freedom in Australia* (Sydney University Press 1966) 28.
52. *Police* v. *Christie* [1962] N.Z.L.R. 1109. 1113 per Henry J.
53. [1962] N.Z.L.R. 1109.
54. *Ibid.* 1113.

on public values worth preserving.[55] Henry J.'s decision in *Police* v. *Christie* ". . . is a clear enunciation of the proposition that 'reasonableness' marks the boundary between individual freedoms and unlawful action".[56]

To constitute disorderly behaviour ". . . not 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 be at least of a character which is likely to cause annoyance to others who are present".[57]

Disorderly behaviour 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".[58]

These approaches were used by members of the Court of Appeal in affirming the convictions of four people who chained themselves to the stone pillars at the entrance to Parliament House on the occasion of the 1966 visit of the Vice President of the United States, Mr. Hubert Humphrey.

The two approaches quoted above are substantially similar. However, a slight difference of emphasis is apparent. The first approach (that of North P.) emphasises the need for the behaviour to seriously offend against the values of "right-thinking" people. The second approach (that of Turner J.) stresses the need for the annoyance or potential annoyance to those witnessing the conduct to be serious. Both North P. and Turner J. accept, however, that the behaviour in question must be judged, not only in relation to the standards of behaviour generally recognised in the community, but also in relation to its effect at the particular time and place.

The Court of Appeal decision in *Melser* v. *Police* does allow the political demonstrator some freedom of action. The emphasis on the need for the conduct to "seriously offend' implies that it is not enough that the right-thinking man should be *offended:* he must be *outraged.*[59]

Also there must be potential annoyance to people likely to be there. It would seem, however, that no actual annoyance to right-thinking members of the public present, need occur. It is sufficient for

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55. This approach was adopted by Tompkins J. in the Supreme Court in *Melser* v. *Police* [1967] N.Z.L.R. 437.
56. Kilbride and Burns: "Freedom of Movement and Assembly in Public Places": (1966) 2 N.Z.U. L.R.1. at 14.
57. *Melser* v. *Police* [1967] N.Z.L.R. 437 at 443 per North P.
58. *Ibid.* 444 per Turner J.
59. This argument is advanced by R. S. Clark op. cit., n.11 at p.25.

such annoyance to become a potentiality.[60] In the Parliament Grounds case no evidence was produced to show that any members of the public were actually offended. The Court of Appeal took the view that the important thing was the potential annoyance to Members of Parliament.

McCarthy J. in *Melser* v. *Police* introduces a second approach to the application of Section 3D to political demonstrations. This approach involves the weighing of the various conflicting interests and freedoms involved in any situation. What is necessary is a compromise between the conflicting interests according to their relative importance. In the case before him, McCarthy J. considered the particular form of protest employed by the defendants to be subservient to the right of the Parliamentarians to entertain visitors "unembarrassed by unseemly behaviour on the part of intruders". His Honour stressed that the demonstrators were free to use other means of protest:— "through the press, on the platform, in the market place". The limitations on these avenues of protest are well known.[61]

Though evidential problems remain, the conflict of interests approach has many advantages over the "right-thinking man" approach. Most writers favour the test, if only because it enables the Court to consider the nature of the conduct in issue in relation to all the surrounding circumstances.[62]

The conflict of interests approach was utilised by Wild C.J. in upholding the conviction of two men who laid a wreath at the Wellington Citizens War Memorial during the course of an Anzac Day ceremony.[63] The wreath contained a placard which stated: "To the dead and dying of both sides in Vietnam. Must their blood pay the price of our mistakes?" Wild C.J. held that, taking into account the nature of the occasion, the men's conduct was disorderly. The men were attempting to press upon the people present a point of view, however sincerely held, which they knew would be annoying to most and offensive to many. Express use was made by Wild C.J. of Turner J.'s dictum in *Melser* v. *Police,* that whether or not the conduct in question was disorderly depended on time, place and circumstances: it was a matter of degree.

"Conduct that is acceptable at a football match or boxing match may well be disorderly at a musical or dramatic performance. Behav-

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60. See "The Political Demonstrator and the Law" (1968) 5 V.U.W.L.R. 68 at 72-74.
61. See Kilbride and Burns "Freedom of Movement and Assembly in Public Places" (1966) 2 N.Z.U.L.R. 1: I.L.M. Richardson: "Freedom of Assembly" (1956) N.Z.L.J. 265, 278.
K. A. Palmer: "Freedom of Peaceful Assembly and Association" [1969] Recent Law 113.
62. See K.J.Keith op. cit., n.12 at p. 65: "The Political Demonstrator and the Law" (1968) 5 V.U.W.L.R. 68 at 74-75.
63. *Wainwright* v. *Police* [1968] N.Z.L.R. 101.

iour that is permissible at a political meeting may deeply offend at a religious gathering."[64]

The Chief Justice emphasised that his decision does not restrict the right of people to hold opinions or to express them publicly. The decision meant simply ". . . that conduct that in the prevailing circumstances would offend the public conscience the law will not allow".[65] This last statement seems unnecessarily restrictive and conflicts with the general tenor of the judgment.

(2) Types of Words

(i) *Threatening Words:*

Threatening words are words conveying an intention to harm a person or his property. There are no reported New Zealand decisions on what constitutes threatening language. However, in *Lipman* v. *McKenzie,*[66] a decision of the Western Australian Supreme Court early this century, Stone C.J. held that the words—"If you want to fight you can have it as much as you like. I will give you all the fight that you want"—did not constitute threatening language. The particular words did not amount to anything more than a challenge or invitation to fight and could not be construed as a threat.

(ii) *Abusive Words:*

Abusive words are words which revile or upbraid in an unjustified and unnecessarily rude manner or tone. The words "threatening" and "abusive" both have associations with fights and general disorderly conduct. Any verbal hostility may constitute abusive language. This makes it difficult to isolate "abuse" from the general issue of provocation to disorder.[67] This may explain why the particular offence of using abusive words is a rare one.[68]

(iii) *Insulting Words:*

Insulting words are words with meaning or double-meaning which reflect offensively against a person's character, his upbringing or mode of life. The expression "insulting words" is not limited to words disparaging a person's moral character. It includes scornful abuse of a

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64. *Ibid.* 103.
65. *Idem.*
66. (1903) 5 W.A.L.R. 17.
67. For a discussion on the U.K. position regarding the offences of "threatening", "abusive", and "insulting" words under the Public Order Act 1936 s.5 see D.G.T. Williams: "Threats, Abuse, Insults": [1967] Crim. L.R. 385. See also by the same author "Protest and Public Order": [1970] Camb. L.J. 96 at 107-109. Williams argues that the adjectives "threatening", "abusive" and "insulting" represent a descending order of violence. From a study of newspaper reports he concludes that "insulting" words or behaviour are the least serious of the three categories in the view of prosecutors.
68. No reported New Zealand decisions.

person or the offering of any personal indignity or affront.[69] In *Wilcox* v. *Baigent*[70] Fair J. held that the word "scab" or the word "scabby" when applied to trade unionists was an insulting word in that it branded them as traitors to their fellow-workers' interests. In *Mahood* v. *Robinson,*[71] a case closely following *Wilcox* v. *Baigent,* Stanton J. held that the use of the word "scab" was insulting, whatever might have been the intention of the person using it. Consequently it was unnecessary to prove any intention to annoy or insult the person to whom the word was addressed.

The classic English authority on what constitutes insulting words is undoubtedly *Jordan* v. *Burgoyne.*[72] The facts of this case were as follows:— The National Socialist Movement held a meeting in Trafalgar Square. The speaker's platform was divided from the crowd by a line of police and near the platform there was a group of young people who included Jews, Communists and Committee for Nuclear Disarmament supporters. The intention of this group was to prevent any meeting being held at all and there was disorder throughout the meeting. At a time when the crowd was in excess of five thousand the defendant said ". . . [m]ore and more people . . . are opening their eyes and coming to say with us, Hitler was right. They are coming to say that our real enemies, the people we should have fought, were not Hitler and the National Socialists of Germany but world Jewry and its associates in this country".

This caused complete disorder and the meeting was immediately stopped. Lord Parker C.J., in the Divisional Court, held that the words were clearly insulting. The word "insult" was used in Section 5 of the Public Order Act 1936, in the sense of "hit by words" and was to be distinguished from the strong expression of one's own views and criticisms of opponents and their policies. To assert to an audience which included a number of Jews that Nazi policies which included the planned murder of Jews were correct was clearly insulting. Jordan's words were intended to be and were deliberately insulting to the people present at the meeting.

In *Jordan* v. *Burgoyne* Lord Parker held that a speaker must take his audience as he finds them. He must not anticipate a reasonable audience. The decision in Jordan's case does not remove all the problems.

"The difficulty is to decide how extensive the concept of fault is. Any expression of hostility or disapproval . . . might be said to be

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69. *Annett* v. *Brickell* [1940] V.L.R. 312; *Thurley* v. *Hayes* (1920) 27 C.L.R. 548 (H.C. Aust.); *Gebert* v. *Innocenzi* [1946] S.A.S.R. 172.
70. [1950] N.Z.L.R. 636.
71. [1952] N.Z.R.L. 103—See also *Murphy* v. *Plasterers' Society* [1949] S.A.S.R. 98, 105.
72. [1963] 2 All. E.R. 225: [1963] 2. Q.B. 774: Case noted in (1963) 26 M.L.R. 425: (1963) 79 L.Q.R. 322.

insulting in some sense. Annoyance is not a reaction sufficient to justify describing the cause of annoyance as 'insulting'."[73]

Under Section 5 of the English Public Order Act 1936 there must be either an actual breach of the peace or at least an intent to provoke such a breach. This requirement does not exist in New Zealand under Section 3D. Despite this, the decision in *Jordan* v. *Burgoyne* is probably still applicable to New Zealand.

A further problem relates to whether the insulting words must be addressed directly to those concerned or involve people within hearing. Three Australian decisions, *Gumley* v. *Breen,*[74] *Wragge* v. *Pritchard*[75] and *Lendrum* v. *Campbell*[76] support the view that the insulting words must be spoken in the presence of the person insulted or his associates. *Gumley* v. *Breen* involved the prosecution of an anti-conscription speaker who had alleged that thirty thousand British women behind the line in France were doing servile work and acting as concubines for the British officers. The Supreme Court of New South Wales reversed a lower court conviction for insulting words on the ground that none of the maligned women, nor any officers nor anyone else shown to be closely associated with them, was present.

Finally, on the difficulty in determining whether particular conduct or language is insulting, a recent English decision has done little to improve matters. In *Williams* v. *D.P.P.*[77] the defendant stood outside a club for U.S. servicemen and handed people going in and out copies of a leaflet addressed to American soldiers in Europe. The leaflet opposed the war in Vietnam and invited the reader to consider deserting. Some of the recipients appeared to be annoyed. The defendant appealed to the Divisional Court against a conviction for insulting writing contrary to Section 5(b) of the Public Order Act 1936[78] on the ground that to ask people to consider a course of action was not insulting. The Divisional Court in dismissing the appeal held that it was difficult to imagine anything more likely to be insulting than an invitation to a member of the Armed Services to desert. This decision seems to suggest that even a reasoned argument may be insulting where it is directed to inducing a course of conduct which the person addressed may regard as very dishonourable.

Criticisms and Conclusions

The preceding discussion illustrates, above all else, the wide-ranging nature of the offences capable of being caught in Section 3D. The section is one of the handiest weapons in the police arsenal. In

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73. Brownlie: *The Law Relating to Public Order* (Butterworths London 1968) 13.
74. (1918) 18 S.R. (N.S.W.) 1: 35 W.N. 24.
75. (1930) 30 S.R. (N.S.W.): 47 W.N. 70.
76. (1932) 32 S.R. (N.S.W.) 499: 49 W.N. 167.
77. [1968] Crim. L.R. 563: (1968) 112 Sol. Jo. 599.
78. As amended by s.7 of the Race Relations Act 1965 (U.K.).

New Zealand the police do not have to prove either a breach of the peace or the likelihood of such a breach. This means they can use the section for a multitude of minor offences which otherwise would not be caught. From the latest available *Statistics of Justice,* which cover the year 1968, two points become immediately clear. First, the mere handful of cases which reach the Supreme Court[79] as against the mass of charges laid under Section 3D.[80] Secondly, the paucity of occasions when charges under Section 3D are withdrawn or dismissed when measured against the occasions when convictions are entered.[81] This suggests that once a charge under Section 3D has been made against a person his chances of avoiding conviction are slight.

Further, the maximum penalty under Section 3D has increased from a $20 fine before 1960 to a three months prison term or a fine of up to $500. The day of the $10 fine has passed. An analysis of recent fines[82] under the section shows most fines to be in the vicinity of $50.

Yet another problem with Section 3D relates to police discretion. Though the Police Offences Act 1927 contains many specific offences such as the letting off of fireworks in a public place (Section 3(cc)), the police apparently have a discretion when such an offence occurs, whether they use Section 3(cc) or Section 3D.[83] This is disturbing because the maximum fine under Section 3(cc) is only $20 whereas the maximum fine under Section 3D is $500.

The analysis of the different types of behavior and words within Section 3D illustrates a further point. "Disorderly" behaviour and "offensive" behaviour are broad enough to cover conduct which is "riotous", "threatening", or "insulting". This is the attitude taken by the body which administers the section—the police. Hence the offences of "riotous", "threatening' 'and "insulting" behaviour have become redundant. The offences of "abusive" and "threatening" words are also within this category. All these types of behaviour and language serve no useful purpose at present. The section should be amended in such a way that they are omitted.

Would a piecemeal amendment of this nature remove all the difficulties surrounding the section? The answer, in my view, is no!

79. 5 (1968).
80. In excess of 2000 (1968).
81. Report on the New Zealand Police 1970: Appendix A: Crime and Offences Statistics, Calendar Year 1969. Fighting and disorderly or offensive behaviour —Offences reported = 2933. Offences prosecuted = 2370 (N.B.—These statistics must be read with caution. They include offences covered by s.3B as well as s.3D).
82. Analysis of Wellington newspaper reports (March 1 - June 1, 1970)—*Dominion* and *Evening Post.*
83. This example is given by Professor G. P. Barton: "Police Powers: Criminal Procedure": *V.U.W. Essays on Human Rights* (Sweet and Maxwell N.Z.) 30 at 35-36.

The section, at present, has far too wide an ambit. It penalises conduct which was not originally intended to be dealt with.[84] The use of Section 3D against the political demonstrator has caused much controversy. The political demonstrator is a relatively new phenomenon. He poses difficult problems for the law but this argument cannot be used to justify unnecessarily vague and restrictive laws. Section 3D acts as a serious restraint on freedom of action and expression. The political demonstrator when charged under Section 3D becomes subject to the whims and prejudices of the particular magistrate. No satisfactory test has yet been propounded by the courts as to what behaviour is permissible and what is not. The unwillingness of the New Zealand courts to regard truly political conduct as outside the ambit of Section 3D places the dissenter in a precarious position. The section has been interpreted by the courts in a way that severely curbs the right of citizens to assemble and demonstrate.

> It may not be going to far to say that, as the law stands, and accepting the correctness of the Court's decisions, '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 (simply) to beg the question.[85]

Disquiet at the present position was apparent in Parliament during the course of the debate on the Police Offences Amendment Bill 1967. A prominent Opposition lawyer said, "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."[86]

Strong criticism of the "right-thinking" man concept has come from the New Zealand Council for Civil Liberties. The basis of their criticism is as follows. The use of the concept of the "right-thinking man" as a measure of the quality of the behaviour in question is open to very serious objection. The concept logically begs the question, since the only possible definition of "right-thinking man" as used by the courts in this context is "one who is offended by the behaviour in question". Some kind of objective meaning could be given to the term only if it were possible to establish valid criteria by which "right-thinking" could be measured and if those who met these criteria and observed the behaviour in question were then able to testify in court that they were disturbed or annoyed by it. Such a suggestion is absurdly impracticable. The present position is just about as absurd, because here the judge or magistrate, whether he is aware of the fact or not, takes himself as the model of the "right-thinking man" and if the behaviour charged as disorderly offends against his rules of orderly conduct he finds the defendant guilty, and, if it does not, he acquits him. Since he has no means of sampling the view of

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84. See 325. N.Z.P.D. 3179-3198.
85. *Crime in New Zealand* (Department of Justice 1968) 17.
86. Statement by Dr. Martyn Finlay, M.P. for Waitakere, 354 N.Z.P.D. 4540.

citizens, his own reactions are his main criteria. This basis of judgment is altogether too subjective, and too dependent on the natural prejudices of fallible human minds, to be acceptable in so important a field as civil liberties.

A close examination of the phrase "right-thinking man" leads to ". . . the inescapable conclusion that 'right-thinking members of the public' . . . means 'the more conservative members of the public' and this is just not acceptable as a criterion to use in a democratic community capable of tolerating wide differences of opinion and behaviour".[87]

In the United States the dissenter's right of free speech is protected under the First Amendment to the Constitution. The full power of the law is marshalled to protect the demonstrator exercising his rights under the Constitution (*Terminiello* v. *Chicago,*[88] *Edwards* v. *South Carolina,*[89] *Gregory* v. *Chicago*[90]).

In Australia, the courts have given the political demonstrator an area within which he may safely move by recognising "truly political conduct" and by drawing a distinction between words and behaviour.

The fact that the ". . . [New Zealand] courts do not consider relevant the purpose or motive of the demonstrator is a regrettable error".[91] The actor's interest in engaging in the activity should be weighed against the particular community sensibilities which the law seeks to protect.

Recognising that the State has a legitimate interest in the use of sections such as Section 3D to regulate some kinds of public behaviour, the New Zealand Council for Civil Liberties has suggested that the law be framed and applied in such a way as to enable a distinction to be drawn between disturbances that involve genuine participants in political demonstrations and those which arise from fights especially between socially hostile groups, drink-caused brawls, unprovoked assaults and so on. The Council suggests that Section 3D be divided in two; putting "riotous" and "disorderly" behaviour in one of the two new sections, and "offensive", "threatening" and "insulting" behaviour in the other. Such a division would enable the former to be applied to the misbehaviour of participants in politically motivated action and the latter to other kinds of misbehaviour, not politically motivated. The Council for Civil Liberties feels that a law intended

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87. W. J. Scott, Chairman, New Zealand Council for Civil Liberties: "Insult could cost you your liberty", *Auckland Star,* March 10, 1970.
88. 337 U.S. 1 (1949).
89. 372 U.S. 229 (1963).
90. 89 Sup. Ct. 946 (1969). For a discussion on the attitude of the U.S. Supreme Court to the political demonstrator see K. Lipez "The Law of Demonstrations: The Demonstrators, The Police, The Court". (1967) 44 Denver L.J. 499 at 511-535.
91. K. A. Palmer: "Police Powers at Demonstrations" [1970] Recent Law 105.

for police coercion of the criminal fringe is at present being used for political purposes—and is therefore in danger of creating the very violence it is meant to prevent. I am in complete agreement with the Council on this point though I doubt whether their suggested division of Section 3D would remove many of the problems.

However, I disagree strongly with the Council on another of their suggestions. This is that the right to trial by jury be introduced. The Council's argument is as follows. Why has Parliament increased the monetary penalty for offences covered by Section 3D from $10 to $500 but left the alternative prison penalty unchanged at three months? The answer clearly is (in the Council's view) to increase the severity of the punishment without granting the accused the right to trial by jury. The result of this is that at present offences which may be politically motivated are handled in such a way that the operation of the law is made ludicrously inconsistent. There exists at present a denial of the full and due processes of the law to persons charged with offences which are, in essence, political. Though I would agree with the Council that many of the freedoms we now enjoy were largely won for us by the courage and independence of British juries, I still do not believe that the jury can be regarded today as a desirable body to decide political cases.[92] The jury is a reflection of the prejudices of the community. Many of these prejudices manifest themselves strongly against the political demonstrator and what he represents.

> Juries . . . safeguarded political liberties best in the days prior to universal suffrage, i.e. when the political views of jurors were more likely than now to differ from those of the king or colonial governor. Could a member of a generally dispised minority group always expect a particularly independent stance from a New Zealand jury? Perhaps he should not; recent newspaper editorials and letters to the paper suggest that we have a fairly low tolerance to dissent.[93]

Would Section 3D be more satisfactory if the breach of the peace requirement, deleted in 1924, was re-introduced? A consideration of the comparable English legislation may help to answer this question. In the United Kingdom, a person is guilty of an offence under Section 5 of the Public Order Act 1936 if he 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". To come within the words "intent to provoke a breach of the peace" a person must intend that, or be reckless as to whether his words or behaviour will provoke a breach of the peace. The second arm of the seection "whereby a breach of the peace is likely to be occasioned" —

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92. See J.T. Karcher: "The Case for the Jury System": (1968) 45 Chicago—Kent L.R. 157.
93. K.J. Keith op. cit., n.12 at p. 56.

". . . rests on the principle of risk creation and the test of liability is objective and relates to natural consequences of acts".[94]

A person "must take his audience as he finds them (and) if those words to that audience or that part of the audience are likely to provoke a breach of the peace, then the speaker is guilty of an offence".[95] The test is not to ask what effect the words could have on a "reasonable man" or "ordinary citizen" in the audience but simply whether the speaker's conduct is such that a breach of the peace is likely to be occasioned. Under the English legislation the offence is essentially one of provocation. The breach of the peace requirement introduces a public order element.[96] This allows an assessment of the true nature of the offending conduct. The effect on members of the public present can be gauged. Perhaps more important, the public order element avoids any need to refer to the right-thinking man, as a standard by which to judge behaviour.

Dr. Martyn Finlay, the New Zealand Labour Party's legal spokesman, has suggested that Section 3D be amended by adding the following proviso:—

> Provided that no person shall be guilty of an offence under this section by reason only of the fact that his behaviour was or might have been objected to by other persons and he had no intent to commit, provoke or cause a breach of the peace.

This amendment might remove one of the problems which exists under the English legislation at present. Because the likelihood of a breach of the peace is sufficient to sustain a conviction under Section 5 of the Public Order Act 1936, a hostile audience may prevent a person from expressing unpopular views. Where the speaker produces violent reactions in his audience he may be charged with producing a situation whereby a breach of the peace is likely to be occasioned. (*Jordan* v. *Burgoyne*). Further, if the speaker continues speaking after having been warned to stop by a police constable he may be arrested for obstructing the constable in the execution of his duty. (*Duncan* v. *Jones*,[97] *Burton* v. *Power*[98]).

The view of the United States Supreme Court of the "hostile audience" problem may be instructive here. When the violence or disorder arises solely as a result of audience hostility, the police must ordinarily seek to control the crowd rather than disperse the

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94. Brownlie op. cit. n. 73 at p. 8. For a different method of approach to the interpretation of s.5 of the Public Order Act 1936 see Smith and Hogan *Criminal Law* (2nd Ed. 1969) 541-542.
95. *Jordan* v. *Burgoyne* [1963] 2 Q.B. 744 at 749: [1963] 2 All. E.R. 225 at 227 per Lord Parker C.J.
96. *Ward* v. *Holman* [1964] 2 Q.B. 580: [1964] 1 All. E.R. 729.
97. [1936] 1 K.B. 218.
98. [1940] N.Z.L.R. 305.

demonstration. (*Brown* v. *Louisiana*[99]). The "hostile audience" doctrine proceeds on the assumption that the police will be able to control the crowd. The Supreme Court has not yet decided whether the police may suppress a demonstration when crowd hostility is uncontrollable! It is undesirable that the continuance of a demonstration or speech should depend on a police determination of whether a crowd is uncontrollable.[100]

The American Law Institute has produced a model disorderly conduct statute. It attempts to protect civil liberties while, at the same time, clearly defining conduct that is justifiably declared unlawful. Under Section 250 (1) of the Model Penal Code[101] a person may be guilty of disorderly conduct if, with purpose to cause public inconvenience annoyance or alarm, or with knowledge that he is likely to cause public inconvenience, annoyance or alarm, he:—

(a) engages in fighting, threatening, or violent or tumultous behaviour;

(b) makes unreasonable noise or coarse (indecent) appearance, gesture or display, or addresses abusive language to any person present; or

(c) otherwise creates a hazardous or physically offensive condition which serves no legitimate purpose of the actor.

The American Model Penal Code has a clear public order element. Violations of Section 250 (1) require purpose to cause inconvenience or knowledge that the actor's conduct is likely to cause such a disturbance.[102] Section 5 of the Public Order Act 1936 has a similar requirement. The time has clearly arrived for New Zealand to revise its legislation. A re-introduction of the breach of the peace requirement is required since the pendulum has swung too far in favour of the police. In the political context Section 3D has a repressive and coercive effect on citizens. At present the law is uncertain and where it is certain it is unsatisfactory.

T. J. McBride

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99. 383 U.S 131 (1966)

100. Note "Regulation of Demonstrations": (1967) 80 Harvard L. R. 1772 at 1775: J. Carson "Freedom of Assembly and the Problems of the Hostile Audience: A Comparative Examination of the British and American Doctrines". (1969) 15 New York Law Forum 798.

101. Tentative Draft No. 13 1961.

102. Even the American Model Penal Code s.250 (1) has been criticised on the ground that it fails to distinguish clearly between punishable and non-punishable activity: Meltzer and Trott: "Disorderly Conduct": (1969) 4 Harvard Civil Rights—Civil Liberties L.R. 311.

"If a man can make himself a real master of his art, we may say that he has learned his trade, whatever his trade may be. Let him know how to advertise, and the rest will follow."

Anthony Trollope

Just as a retail store must advertise to increase or retain business, the lawyer must window-dress (to a certain extent) to remind the client of his seriousness of purpose. Dress can imply all manner of attitudes and states of mind. How often in literature is a character's clothing mentioned to discuss personality or status? At Vance Vivian we have capitalised on a society in which "clothing oft proclaims the man" and within that society we feel there is no profession where outward appearance means more than in law. For that reason Vance Vivian are particularly well prepared to suit the lawyer, both starting and culminating a career.

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