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SPECIAL CONFERENCE ISSUE
THE NEW ZEALAND BILL OF RIGHTS ACT

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Fleur Adcock
Richard Boast
Petra Butler
Andrew Geddis
Claudia Geiringer

Kris Gledhill
Rt Hon Judge Sir Kenneth Keith
Janet McLean
Rt Hon Sir Geoffrey Palmer
Alicia Cebada Romero
Hon Mr Justice Rabinder Singh

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The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
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DISSENT, THE BILL OF RIGHTS ACT AND THE SUPREME COURT

*Andrew Geddis**

*New Zealand's Supreme Court has on two occasions been required to consider the legal boundaries that apply to forms of dissenting behaviour. In *Brooker v Police* and *Morse v Police*, the Court simultaneously expands the judicial role in drawing the line between acceptable and unacceptable forms of dissent, and presents its conclusions as the relatively straightforward outcome of standard forms of statutory interpretation. This article explores why the Court felt this two-fold task was necessary, and examines the way in which it was achieved.*

This article has four parts. The first examines, in a general fashion, the concept of "dissent" – that is, the expression by word or deed of ideas or opinions that challenge widely accepted social truths or practices – and the reasons why such behaviour commonly is said to need a special measure of legal protection. My reason for doing so is to highlight how the justifications for such protection are inherently unstable and, as such, that there is no simple answer as to the circumstances in which the law should say dissent ought to be tolerated and in which it legitimately may be proscribed. The second part looks at how the enactment of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) has impacted upon the legal treatment of dissent in this country. It concludes that the main effect has been to shift the judiciary's role from ostensibly applying limits to dissent derived from the existing views of the New Zealand public, to defining the limits of dissent in terms of what "appropriately tolerant" citizens *ought* to put up with. Given that the Bill of Rights Act has resulted in this somewhat expanded judicial role, issues regarding its justification then arise. The third part examines the two occasions on which the Supreme Court has confronted the issue of dissent and its limits – *Brooker v Police* and *Morse v Police*.¹ I argue that these cases simultaneously expand the judicial role in drawing the line between acceptable and unacceptable forms of dissent, while at the same time presenting their conclusions as the relatively straightforward outcome of standard forms of statutory interpretation. Thus, the new job of the courts is legitimised in terms of them doing what it is they always do. The fourth part is by way of a brief conclusion, where I

* Professor, Faculty of Law, University of Otago.

1 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91; and *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

suggest that perhaps the Supreme Court's approach can be understood as illustrative of "law's two stories", whereby the law simultaneously presents itself as stable and predictable yet open to transformation and contestation.

I DISSENT

The concept of "dissent" is central to the kind of free, open and tolerant society that New Zealand prides itself on being and that the Bill of Rights Act was intended to help safeguard. That is to say, the rights and freedoms that the vast majority of us regard as fundamental to each individual, and consequently are recognised in the Bill of Rights Act, are considered to have their greatest value when they are claimed by an individual or group viewed with a measure of animus because of the challenge they pose to the ideas or practices of those holding social or political power. Of course, it is not *only* dissenting individuals or groups who may seek the protection afforded by these rights and freedoms. The organisers of a public rally to demonstrate their love for fluffy kittens and adorable puppies may invoke their rights to freedom of expression, peaceful assembly and association in the face of a local council reluctant to let them use the main street for their gathering due to the traffic disruption involved. However, at least in a society that has properly functioning methods of democratic accountability,² one of the key reasons for prioritising such a group's right to demonstrate their views publicly over the social inconvenience caused by their actions is based not on the importance of allowing lovers of cute animals to share their passion with the world, but rather because unless such unremarkable and inoffensive things can be said in an inconvenient fashion, then the position of those who *really* need to have their rights recognised and affirmed will be undermined. In short, we protect those who hold popular or conventional views in part because doing so better ensures that those who hold unpopular or challenging views will be able to be heard.³

Why exactly we would want to give unpopular or challenging views a measure of special protection is then a question with multiple possible answers. In part, it serves as a cultural marker; the fact that we do so is just part and parcel of "who it is that we are" as a society. Such a cultural commitment is revealed in the words of the Prime Minister of Norway, Jens Stoltenberg, in the wake of Anders Behring Breivik's murderous rampage: "Our answer is more democracy, more

2 That is to say, where a council or other decision-making entity is answerable to the voters for their actions in deciding when and where popular speech may take place, there is no particular reason to fear that they will be unable to balance the benefits and costs in an appropriate manner. If they do not do so, public pressure (and eventual electoral defeat) can be expected to rectify the problem. So, if only popular or conventional forms of expression existed, there would be no real need to place a finger on the scales in favour of "free speech".

3 Steven Shiffrin *The First Amendment, Democracy, and Romance* (Harvard University Press, Cambridge (Mass), 1990).

openness to show that we will not be stopped by this kind of violence."⁴ However, allowing presently unpopular or challenging views to be expressed and unpopular groups to gather publicly also may lead to a range of socially beneficial outcomes.⁵ It may help generate a vibrant "marketplace of ideas" from which the best suggestions about how to proceed, as a society or individually, can rise to the top.⁶ It may serve as an aid to self-government, in that it enables individuals to make informed decisions about who is best fitted to serve as lawmaker.⁷ It may help lessen the potential for violence that marginalised groups might otherwise revert to (the "blowing off steam" rationale).⁸ It may help to inculcate virtues of tolerance, open-mindedness and patience with others that it is desirable for citizens in a liberal democracy to possess.⁹ Finally, such tolerance may be viewed as a necessary part of a just or legitimate system of government, stemming from some broader normative theory of how state power ought to be exercised with respect to individual citizens. Each individual should be permitted to express him or herself as he or she wishes, and join with others in pressing those views on others, because the state is required to recognise and respect each individual's autonomy even where this is exercised in unpopular or challenging ways.¹⁰ Efforts to silence or halt such activity are therefore illegitimate, in that they exceed the morally justifiable scope of the state's power over individual actions.¹¹

4 The event referred to was the murder of 77 people in Norway on 22 July 2011 by a self-described "modern day crusader" (and likely paranoid schizophrenic).

5 For an overview of the various justifications given for protecting freedom of speech, see Kent Greenawalt "Free Speech Justifications" (1989) 89 Colum L Rev 119; Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, Oxford, 2005) at 1–38.

6 This rationale is commonly traced to Justice Holmes' dissent in *Abrams v US* 250 US 616 (1919) at 630:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

However, the actual term "marketplace of ideas" was coined by Justice Brennan in *Lamont v Postmaster General* 381 US 301 (1965).

7 Alexander Meiklejohn *Free Speech and its Relation to Self-Government* (Harper Brothers Publishers, New York, 1948).

8 Joel Schwartz "Freud and Freedom of Speech" (1986) 80 Am Pol Sci Rev 1227.

9 Lee C Bollinger *The Tolerant Society* (Oxford University Press, New York, 1986).

10 Robert C Post *Constitutional Domains: Democracy, Community, Management* (Harvard University Press, Cambridge (Mass), 1995).

11 Kent Greenawalt *Speech, Crime and the Uses of Language* (Oxford University Press, New York, 1989) at 30–31.

However, we may question whether these explanations for the heightened protection granted to dissenting speech and behaviour in a society like New Zealand's provide a particularly strong foundation for this commitment. It may be true that, in the words of the late Michael King, "most New Zealanders, whatever their cultural backgrounds, are good-hearted, practical, commonsensical and tolerant."¹² The existence of such "national cultural capital" then provides some measure of support for the practice of dissent, in that we Kiwis simply are prepared to let it happen out of the goodness of our hearts. However, as I have argued elsewhere,¹³ there are other strands to be found in our social *tukutuku* that tell a different tale. John Ip summarises these thus:¹⁴

Historically, New Zealand was not particularly open to the activities of those who sought to challenge the status quo. New Zealand society was relatively small, isolated, and homogeneous. It accordingly favoured conformity in its people.

These competing narratives can combine to produce a somewhat dissonant approach to dissenting words and deeds. So it was that in 1967, McCarthy J could on the one hand indignantly proclaim that:¹⁵

Unquestionably, freedom of opinion, including the right to protest against political decisions, is now accepted as a fundamental human right in any modern society which deserves to be called democratic. Its general acceptance is one of the most precious of our individual freedoms. It needed no Charter of the United Nations to make it acceptable to us; it has long been part of our way of life.

Yet even after affirming this importance of "freedom of opinion" to "our way of life", McCarthy J proceeded to uphold the conviction for disorderly conduct of anti-war protestors who had chained themselves to the pillars of Parliament, on the basis that their actions infringed upon the right of Members of Parliament to "freedom from interference at the doorway of their House and the right freely to entertain their visitors within that House unembarrassed by unseemly behaviour on the part of intruders."¹⁶ For McCarthy J, our way of life in 1967 was such that the asserted right to register one's outrage at New Zealand's involvement in an overseas conflict could not stretch to causing the nation's good and great to lose face before their peers.

Equally, the asserted instrumental benefits associated with tolerating unpopular or challenging views or actions do not necessarily provide a secure basis for protecting such forms of expression or

12 Michael King *The Penguin History of New Zealand* (Viking, Auckland, 2004) at 520.

13 Andrew Geddis "The State of Freedom of Expression in New Zealand: An admittedly eclectic overview" (2008) 11 *Otago L Rev* 657 at 658.

14 John Ip "What a Difference a Bill of Rights Makes? The Case of the Right to Protest in New Zealand" (2010) 24 *NZULR* 239 at 242.

15 *Melser v Police* [1967] NZLR 437 (CA) at 445.

16 At 446.

behaviour. If the supposed benefit of dissent lies in its contribution to a marketplace of ideas that enables us to differentiate between better and worse claims, then forms of dissent that fail to contribute to or even undermine such a marketplace not only attract limited protection, but actually may need to be suppressed.¹⁷ Equally, a "promoting self-governance" rationale may require the active suppression of forms of dissenting expression that threaten this end-goal,¹⁸ as (for instance) is argued by those who support the criminalisation of forms of hate speech.¹⁹ The "blowing off steam" rationale flounders where such dissenting activities actually increase the risk of violent action taking place,²⁰ as has been suggested in the wake of Anders Behring Breivik's actions in Norway²¹ or Timothy McVeigh's in Oklahoma.²² Rather than inculcating virtues of tolerance and open-mindedness,

17 So, for example, the United States Supreme Court in *Chaplinsky v New Hampshire* 315 US 568 (1942) at 572 exempted from First Amendment protection:

... utterances [that] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

See also *Gertz v Robert Welch Inc* 418 US 323 (1974) at 340 (holding that "there is no constitutional value in false statements of fact"). Furthermore, forms of dissent that pose a "clear and present danger" of causing immediate harm may legitimately be suppressed even under a marketplace of ideas model; as Justice Holmes stated in *Abrams v United States* 250 US 616 (1919) at 630:

I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

See also *Holder v Humanitarian Law Project* 130 US 2705 (2010) (upholding the criminalisation of forms of advice and counsel to terrorist entities).

18 Or, as Ivan Hare puts it (Ivan Hare "Is the Privileged Position of Political Expression Justified?" in Jack Beatson and Yvonne Crips (eds) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press, Oxford, 2000) 116 at 116):

... political expression is so important to the proper functioning of government and the democratic process that it may be legitimate to regulate it to a greater degree than would be permissible with other forms of speech.

19 Richard Moon "The Regulation of Racist Expression" in Raphael Cohen-Almagor (ed) *Liberal Democracy and the Limits of Tolerance: Essays in Honour and Memory of Yitzhak Rabin* (University of Michigan Press, Ann Arbor, 2000) 182 at 182; Jeremy Waldron "Dignity and Defamation: The Visibility of Hate" (2010) 123 Harv L Rev 1596.

20 Owen Fiss "Freedom of Speech and Political Violence" in Raphael Cohen-Almagor (ed) *Liberal Democracy and the Limits of Tolerance: Essays in Honour and Memory of Yitzhak Rabin* (University of Michigan Press, Ann Arbor, 2000) 70 at 70.

21 See Cyrus Farivar "More online surveillance needed, officials in Europe say" *Deutsche Welle* (online ed, Germany, 26 July 2011).

22 See Gary Kamiya "The Patriot" (8 April 2001) Salon <www.salon.com>.

requiring all forms of expression to be heard may fail to respect those harmed by the expression and sap communities of the ability to self-govern.²³ Furthermore, these instrumental benefits do not bear precise weight that enables them to be nicely balanced against the harms associated with any particular instance of dissent. That is to say, they represent at most a long-term bet that permitting certain forms of dissent to take place at some immediate cost will result in overall better outcomes for society as a whole than will preventing it. There is, however, no telling whether this wager will be a good one in any given case, meaning that the weighing up of asserted positive outcomes and negative results can only ever be tentative and contingent in nature.²⁴

Finally, normative theories regarding the legitimate scope of the state's regulatory reach over the individual do not really help to define precisely the limits of permissible dissent. For one thing, it is not clear why an individual's right to choose to engage in unpopular or challenging speech or behaviour ought to be more protected than his or her right to choose to do anything else.²⁵ Why, for example, is it a worse or less legitimate infringement of an individual's autonomy for the state to intervene in her or his decision about what to say and how to say it than it is for the state to determine what drugs she or he may ingest? Secondly, while the state may be required to respect the autonomy of the individual, it also is required to protect individuals from causing harm to the rights of others. As it is relatively easy to turn any harm caused by an act of dissent into an infringement of another's rights – as we shall see when the case of *Brooker v Police* is discussed in the third part of this article – the issue will then devolve back into a contingent balancing of consequences. Finally, any normative theory establishing the legitimate use of state power contains within it proscriptions upon certain forms of dissent. As Larry Alexander has argued:²⁶

... the requirement of evaluative neutrality is the core of any right of freedom of expression, but evaluative neutrality cannot coexist with *any* normative theory. Any normative theory, liberal or not, will perforce take positions on what ought to be done given our best judgement of what the world is like. To the extent that expression ... threatens to produce states of affairs inconsistent with those the normative theory prescribes, to that extent the normative theory must, as a matter of logical consistency, rule the expression to be pernicious and of negative value.

23 Michael J Sandel *Democracy's Discontent: America in Search of a Public Philosophy* (Belknap Press, Cambridge (Mass), 1998) at 88–89.

24 Hence Lord Cooke's observation that "in this tract of the common law the hard questions are once again, as in many other fields, not being answered by hard-and-fast rules. ... As so often, it all reduces to a question of fact and degree": Lord Cooke of Thorndon "Shoreham-by-Sea" in Jack Beatson and Yvonne Crips (eds) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press, Oxford, 2000) 202 at 202.

25 Frederick Schauer "Must Speech be Special?" (1983) 78 Northwest U L Rev 1284.

26 Larry Alexander *Is There a Right of Freedom of Expression?* (Cambridge University Press, New York, 2006) at 177. See also Stanley Fish *There's No Such Thing as Free Speech and it's a Good Thing, Too* (Oxford University Press, New York, 1994) at 110–111.

None of the above is intended to form a claim that a society like New Zealand is wrong or misguided in according some measure of legal protection to dissenting words and behaviour. Instead, I simply want to point out that there is no straightforward answer as to the appropriate level of that protection, as well as when it should and should not apply. In particular, when we move from asking "should we protect dissent in the abstract?" to "should we protect *this* particular form of dissent in *this* particular situation?", our reasons for answering the former question in the affirmative may not prove very useful in the latter. Consequently, we will see a variety of reactions to dissent even within a society that regards this phenomenon as not only necessary but also desirable. This variety may occur over time, in that a reaction thought appropriate or justified in one era may come to be regarded as inappropriate or misguided in another. But equally, we may see differing reactions to particular contemporary instances of dissent. Some people, including some members of the judiciary, will think that this is just the sort of speech or behaviour that we must protect if our theoretical commitment to allowing dissent is to be actualised in practice. Other people, again including some members of the judiciary, will believe that a theoretical commitment to allowing dissent simply does not extend to permitting *this* sort of speech or activity to take place.

The result of such disagreement is an area of law that is somewhat uncertain and changeable, with the result of particular decisions being heavily dependent upon the way the underlying facts of the matter are understood. This is particularly true for those "hard cases" that are viewed as lying in the border regions between conventionally accepted forms of dissent and forms of dissent currently deemed unacceptable. That is to say, where individuals or groups wishing to see social or political change push at the boundaries of what has until now been regarded as permissible expression, the question repeatedly arises whether that boundary should remain in place, or should be shifted to accommodate the dissenting practice. The decision on that matter will then involve a mix of social and legal factors: an assessment of the present nature of New Zealand culture and the role that dissent ought to play within it; an estimation of the likely harms that may result from the dissenting activity; as well as the application of the particular legal techniques that have been adopted to decide these questions. Given the rather contingent nature of these factors, there is no particular reason to think that they are amenable to a single, universally agreed resolution.

II THE BILL OF RIGHTS ACT

From a purely legal standpoint, the enactment of the Bill of Rights Act might have been expected to represent something of a sea change in the treatment of dissent in New Zealand. After all, for the first time, New Zealand's domestic law gained a positive affirmation of the rights traditionally associated with dissenting activity – freedom of expression,²⁷ freedom of peaceful

27 New Zealand Bill of Rights Act 1990, s 14.

assembly,²⁸ freedom of association,²⁹ freedom of movement³⁰ – rather than treating these as residual matters that exist where statutory or common law remains silent. The legislature's instruction to the courts to prefer interpretations of statutes that are consistent with these rights (always provided that such interpretations "can" be given) gives them some additional force where parliamentary restrictions have been applied.³¹ Furthermore, the apparently strong injunction that dissent rights "may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society" significantly increases the state's burden when it considers whether some form of dissent ought to be proscribed.³² Of course, a number of factors also circumscribe the new legislation's effect. Most obviously, the Bill of Rights Act's explicit retention of parliamentary sovereignty via s 4 restricts its potential impact. Statute law, enacted by elected representatives, continues in the final analysis to determine where the line between permissible and impermissible dissenting activity lies. The fact that the Bill of Rights Act only purports to affirm rights that, in McCarthy J's formulation, have "long been part of our way of life" also reduced the chances of any radical change occurring in its wake.³³ Insofar as New Zealand courts already had been playing the game of balancing between individual rights and the reasons for limiting such, the Bill of Rights Act may not have been quite the innovation it first appeared. Finally, as noted in the first part of this article, giving greater legal recognition to dissent rights need not necessarily produce a "pro-dissent" outcome in any given case, because our very reasons for recognising those rights necessarily entail restrictions upon their exercise.

Consequently, John Ip concludes his overview of the Bill of Rights Act's impact on judicial treatment of the right to protest – his term for the right to dissent that I am discussing here – by observing that the Act constitutes "not exactly a revolution, but [has made] a considerable difference nonetheless."³⁴ The chief consequences he identifies as flowing from the legislation's adoption and application are a shift in the sources of jurisprudence considered by the courts when confronting instances of dissent; a new (but unevenly applied) method of analysing and applying the limits on dissent; and a discernable (but by no means universal) move towards permitting more dissenting activities to occur. While not disagreeing with any of this analysis, I would suggest that perhaps the

28 Section 16.

29 Section 17.

30 Section 18(1).

31 Section 6. See Andrew Geddis and Bridget Fenton "Which is to be Master?" – Rights-Friendly Statutory Interpretation in New Zealand and the United Kingdom" (2008) 25 *Ariz Jnl of Int'l and Comp L* 733 at 749–754.

32 Section 5.

33 *Melser v Police*, above n 15, at 445.

34 Ip, above n 14, at 262.

single most important difference between the pre- and post-Bill of Rights Act eras is that, to paraphrase *The Simpsons*, "a Bill of Rights Act embiggens the smallest court."³⁵ While the Bill of Rights Act may not have introduced anything particularly new in terms of individual rights, or authorised the courts to do anything that they in theory could not already do using existing common law techniques, its very existence has been taken to give the judiciary greater licence to act. Hence, although the courts always could (and did) strike a balance between dissent and its limits through the common law and apply common law presumptions of statutory interpretation to ameliorate the effect of legislative restraints on dissenting activities, their preparedness to do so whilst in the Bill of Rights Act's shadow is markedly greater (even if not, as Ip notes, universally applied).³⁶

This change is one I shall return to when considering the Supreme Court's contribution in the next part to this article, but for now my point can be made by noting that cases like *Hopkinson v Police*³⁷ or *Police v Beggs*³⁸ almost certainly would have been decided differently in a pre-Bill of Rights Act world. Absent this legislation's legitimising effect, it is difficult to imagine a court deploying the principle of legality to turn the word "dishonour" into "vilify" so as to protect the dissenting act of flag-burning,³⁹ or reading in a "reasonableness" requirement where the Speaker of the House of Representatives seeks to exercise her or his power to trespass protestors from Parliament's grounds.⁴⁰ Underpinning this qualitative shift in the specific legal techniques used is a change in judicial self-understanding. Whereas in the pre-Bill of Rights Act era the courts generally were content to portray their function as drawing the line between permissible and impermissible dissent according to society's existing mores or attitudes, the post-Bill of Rights Act era has seen judges adopt a more vanguard role. The trick here is not just to work out what the actual citizens of the nation will accept in terms of dissent, but rather what the ideal citizens of a properly functioning liberal democratic society ought to be prepared to put up with. If the actual citizens of New Zealand find that dissent too extreme for their taste – the message or means of conveying it falls beyond their comfort zone – then it is the obligation of those citizens to develop a more appropriately tolerant attitude, rather than the dissenter to comport him or herself in a more restrained manner.

Of course, the reality is that the courts always *were* in the business of making value judgements regarding the boundaries of acceptable dissenting activity. The very nature of the decisions required – what does "disorderly" or "offensive" mean? how does one "dishonour" a flag? what constraints (if any) are there on a public official exercising private property rights to curtail dissenting

35 See "Lisa the Iconoclast" (2011) Wikipedia <<http://en.wikipedia.org>>.

36 Ip, above n 14.

37 *Hopkinson v Police* [2004] 3 NZLR 704 (HC).

38 *Police v Beggs* [1999] 3 NZLR 615 (HC).

39 See *Hopkinson*, above n 37.

40 See *Beggs*, above n 38.

activities? – makes such judgements unavoidable. However, in the pre-Bill of Rights Act era such judgments were disguised simply as ensuring adherence to those "values of orderly conduct which are recognised by right-thinking members of the public"⁴¹ and punishing behaviour that met with "the disapproval of well-conducted and reasonable men and women".⁴² Packaged in this way, the collective views of the dissenter's fellow citizens (in the guise of a "right-thinking" or "reasonable" simulacrum) restrained the dissenter's activity, not a judicial view regarding what is proper or improper dissenting conduct. However, a post-Bill of Rights Act approach sees the judiciary openly discussing and deciding what an "appropriately tolerant" public must put up with in a "properly" free and democratic society. This decision may then have little connection to what the public thinks in fact ought to constitute acceptable or not acceptable dissent – indeed, the very question "what does the public think about this?" may need to be avoided precisely to ensure that conventional prejudices do not impermissibly restrict the proper scope for such activities.

Two questions then arise from this shift in the judicial role. First, why has it occurred? Secondly, is it desirable that it has taken place? As noted earlier, the passage of the Bill of Rights Act provides a large part of the answer to the first question. The interpretative command in s 6, as well as the explicit requirement to engage in the balancing of values under s 5, cannot help but change the way the courts operate. Through these provisions, Parliament appears to have told the courts that they need to act in a different fashion when confronting an issue of fundamental individual rights. However, the Bill of Rights Act's adoption did not take place in a vacuum. It is a local manifestation of a wider shift in legal thinking, described by Keith Ewing as "the great cascade of human rights from the international to the national level throughout the common law world."⁴³ In joining that movement, New Zealand has opened itself to a far greater degree to the influence of decisions made not only by international human rights bodies, but also by the courts of societies that share with us liberal democratic values (and rights instruments that permit judicial interpretation of those values). New Zealand courts increasingly look to such sources for guidance, and they see their function as being in part to ensure that our law meets the "best practice" standards revealed by such comparators.⁴⁴ In short, decisions taken under the Bill of Rights Act are not only responsive to local New Zealand conditions, but also to the opinions expressed by judicial and quasi-judicial bodies beyond its borders. And insofar as New Zealand judges see themselves as engaged in a transnational quest for the correct rights-consistent solution to these matters, the target audience for their

41 *Melser v Police*, above n 15, at 443 per North P.

42 At 445 per Turner J.

43 Keith Ewing "Human Rights" in Peter Cane and Mark Tushnet (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford, 2003) 298 at 298.

44 James Allan, Grant Huscroft and Nessa Lynch "The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?" (2007) 11 *Otago L Rev* 433 at 436.

decisions has shifted from "right-thinking" New Zealanders to the "properly tolerant" citizens of the liberal democratic world.

If there is any element of truth to the above analysis, then the inescapable question is whether this development is a good or bad thing. After all, the point of the first part of this article is that questions about the rationale for permitting dissent and the proper limits that apply to it are not amenable to easy or necessarily right answers. Consequently, the idea that viewing the matter through a rights-based framework can produce a definitively correct outcome is unlikely to be borne out in practice, especially in those borderline cases that tend to make it to trial. Why, then, should the adopted solution be the one that the judiciary (informed by the views of other judicial figures from around the globe) thinks is best? Whilst I recognise that the judiciary always has, in the final analysis, had the last say on such matters (as cases such as *Melser v Police*,⁴⁵ *Wainwright v Police*,⁴⁶ *Derbyshire v Police*⁴⁷ and *Olds v Police*⁴⁸ demonstrate), at least in the pre-Bill of Rights Act era there was the pretence that such decisions reflected the actual views of those in whose name the law was made and enforced. A post-Bill of Rights Act approach that is based overtly on what New Zealanders *ought* to tolerate loses even this fig leaf of legitimisation. Without recourse to the public's values to ground their decisions, what can the courts stand on when making such judgement calls?

One argument is that the courts simply are ensuring that the limits to dissent are those that the New Zealand people would want, if we really turned our minds to the importance of permitting it rather than just responding in a knee-jerk or emotionally clouded fashion to examples that upset us. Consequently, the courts are not actually imposing *their* views of the matter, but rather are helping us to achieve *our own* best views (even if we may not realise it at the time). However, this strikes me as a somewhat tendentious claim. Of course New Zealand has, for example, now moved to a position where we accept that burning the national flag is a permissible form of expressing political dissent. But it is not necessarily a view that accords with the general public's "best view" of dissent and its limits; I suspect a relatively large section of the population remains unhappy that it has been adopted (if, indeed, they are aware of it at all). Rather, we have had no option but to become tolerant of this activity, given the High Court's decision in *Hopkinson v Police* and (to a lesser degree) the Supreme Court's ruling in *Morse v Police*.⁴⁹ So to pretend that anything other than a judicial imposition of values upon a population that may or may not accept them has occurred is, it seems to me, somewhat duplicitous.

45 *Melser v Police*, above n 15.

46 *Wainwright v Police* [1968] NZLR 101 (SC).

47 *Derbyshire v Police* [1967] NZLR 391 (SC).

48 *Olds v Police* [1986] 1 NZLR 637 (HC).

49 *Hopkinson v Police*, above n 37; and *Morse v Police*, above n 1.

Which returns us to the question – why does the judiciary get to do this? The answer must be that even "right-thinking" contemporary New Zealanders, burdened as we are with the historical cultural baggage we carry with us, simply cannot be trusted to be appropriately tolerant of dissent. Therefore, in order for us to become all that we can be as a people, it is necessary to have an institution that leads us (even if against our immediate preferences) into a better place. The courts can thus justify their vanguard role not in terms of what we "really" are like as a people (if we were to sit down and think hard about the issue) but rather what we need to become.

Of course, such an explicitly transformative role raises the problem of how one discerns what is the "proper" or "appropriate" degree of tolerance for dissenting speech, given the uncertainties discussed in the previous section to this article? What qualifies the judiciary to make that decision for New Zealand society as a whole? This challenge then leads to an apparent paradox whereby the courts present their decisions as simply an exercise in applying traditional legal techniques to the issue at hand. What the courts are doing is applying "the law" as it (properly understood) always has been. Thus, the judicial role is simultaneously transformative and conservative, in that the courts fill a vanguard role in determining where the boundaries of acceptable dissent lie but buttress their leading position through appeals to legal orthodoxy and established convention.

III THE SUPREME COURT

Since coming into being in 2005, the Supreme Court has on two occasions confronted directly the issue of dissent and its limits. The first, *Brooker v Police*, involved a lone man disrupting the sleep of a police officer with whom he had a grievance by playing a guitar and singing protest songs from the pavement outside of the officer's house.⁵⁰ The second, *Morse v Police*, involved a protestor who participated in a group demonstration at the Anzac Day dawn service in Wellington by setting fire to the New Zealand flag.⁵¹ Each instance of dissent was met with an arrest, charge and conviction under s 4(1)(a) of the Summary Offences Act 1981: for "disorderly behaviour" in Mr Brooker's case and "offensive behaviour" in Ms Morse's case.⁵² I have discussed the Supreme Court's rulings in each case elsewhere⁵³ so, rather than again recount the details here in full, I wish to focus on two aspects foreshadowed in the previous section. The first is the way in which the Court sought in these cases to move the boundary for acceptable protest by focusing on the requirement for greater tolerance of dissent by the New Zealand public. The second is the way in which the Court's reading of the necessary elements of the respective offences was presented as a

50 *Brooker v Police*, above n 1.

51 *Morse v Police*, above n 1.

52 The precise wording of the relevant offence is: "Every person is liable to a fine not exceeding \$1,000 who ... in or within view of any public place, behaves in an offensive or disorderly manner."

53 Geddis, above n 13, at 671–674; Andrew Geddis "Brooker v Police" (2008) 8 OUCJLJ 117; and Andrew Geddis "Flag Burning, Offensive Behaviour and the Right to Protest in New Zealand" (2011) 22 PLR 163.

standard exercise in statutory interpretation. And while the Bill of Rights Act provided support for the former claim, the latter process was presented as not requiring any particular reliance on the Bill of Rights Act at all. Consequently, the Court's approach is simultaneously to inflate the judicial role whilst grounding their decision on apparently orthodox forms of legal reasoning.

A Expanding the Scope for Dissent

Both *Brooker v Police* and *Morse v Police* required the Supreme Court to consider offences with a lengthy pedigree, which had in the past been applied in a way that criminalised dissenting activities such as chaining oneself to the pillars in front of Parliament,⁵⁴ laying a wreath with an anti-war message at an Anzac Day ceremony,⁵⁵ repeatedly using the word "fuck" in a public speech⁵⁶ and calling out "the Treaty is a fraud!" at a reception in the Beehive.⁵⁷ These outcomes were the consequence of a judicial approach to the relevant offences that emphasised that the limits of acceptable dissent were reached once a message or behaviour so annoyed or upset "right-thinking members of the public" as to justify the imposition of a criminal sanction,⁵⁸ or was "such as (to be) calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person".⁵⁹ The reason why, it seems to me, the Supreme Court agreed to hear two appeals from what were after all convictions for quite trivial offences attracting minimal fines was to undo this approach and replace it with one that it considered to be more appropriately tolerant of dissenting activities.

A majority in *Brooker v Police* achieved this end by first expressly disapproving of the previously orthodox test for disorderly behaviour laid down by the Court of Appeal in *Melser v Police*,⁶⁰ which found the offence proven where behaviour was so annoying that "right-thinking members of the public" could not be expected to tolerate it.⁶¹ Elias CJ thought this test inappropriate because, echoing Douglas J's observations in *Terminiello v City of Chicago*:⁶² "Unpopular expression will often be unsettling and annoying to those who do not agree with it."⁶³ Criminalising

54 *Melser v Police*, above n 15.

55 *Wainright v Police*, above n 46.

56 *Jeffrey v Police* [1994] 11 CRNZ 507 (HC).

57 *Caithness v Police* (1986) 2 CRNZ 201 (HC).

58 *Melser v Police*, above n 15, at 443, 444 and 446; *Wainright v Police*, above n 46, at 103.

59 *Ceramalus v Police* (1991) 7 CRNZ 678 (HC) at 683 as cited in *R v Rowe* [2005] 2 NZLR 833 (CA) at [23].

60 *Melser v Police*, above n 15.

61 *Brooker v Police*, above n 1, at [12] per Elias CJ, [63] per Blanchard J, [84] per Tipping J and [113] per McGrath J.

62 *Terminiello v City of Chicago* 337 US 1 (1949) at 4.

63 *Brooker v Police*, above n 1, at [12].

dissent on the ground that it proves "annoying" at any level is thus at odds with its very nature. Also discarding "annoyance" as a valid basis for criminalising behaviour, Blanchard J believed that dissenting behaviour could only be criminally "disorderly" where that conclusion is a demonstrably justified limit on the Bill of Rights Act rights involved.⁶⁴ Tipping J likewise believed that "some level of tolerance may be required of one so that the activities of another are not unreasonably circumscribed",⁶⁵ and that the amount of tolerance required will vary depending on whether the allegedly disorderly behaviour has a dissenting purpose.⁶⁶ McGrath J further emphasised the importance of freedom of expression,⁶⁷ with an exercise of this freedom only becoming "disorderly" if that conclusion can be justified under s 5 of the Bill of Rights Act.⁶⁸ Consequently, for a majority of the Court in *Brooker v Police* the limits of dissent were found by a judicial determination of how tolerant an audience must be, through balancing the importance of the dissenting activity against its deleterious effects (provided always that these effects amount to more than generating mere annoyance at the behaviour exhibited).

However, having disposed of *Melser v Police* and its focus on the creation of "annoyance", the Court did not then expand much further on the issue of tolerance beyond stating that dissenting behaviour will only become "disorderly" (and thus unlawful) when a court concludes that this designation is a justified limit on the dissenter's rights. In part, this is because the majority believed that Mr Brooker's actions fell completely outside of the ambit of the particular offence irrespective of any rights concerns or need to protect dissenting activities from public opprobrium. So for the majority there was no real issue to confront at all – Mr Brooker's actions were so inconsequential that there was no need to consider whether their dissenting nature required any extra degree of tolerance from the officer exposed to it. For the minority, the issue was not so much one of public tolerance of dissent as it was a conflict between Mr Brooker's expressive rights and the asserted privacy right of the police officer subjected to his protest. The issue of tolerance cuts both ways in this analysis, as Mr Brooker's actions threatened the rights of the officer he targeted in her home. Insofar as he was intruding his speech into her private realm, the minority concluded that it was Mr Brooker who was failing to display proper respect for his target's right not to be interfered with in that sanctuary, thus making his conviction a demonstrably justified limit on his expressive right.⁶⁹

Consequently, it is only in *Morse v Police* that the Court addresses in depth the question of tolerance and its limits. The particular facts of the case makes that issue unavoidable: must the

64 At [59].

65 At [89].

66 At [91].

67 At [114]–[117].

68 At [130].

69 At [136]–[147] per McGrath J and [274]–[283] per Thomas J.

public put up with the destruction of the nation's symbol at an official ceremony to mourn its war dead or can such behaviour legitimately be proscribed on the ground that it is "offensive" in terms of the Summary Offences Act? While the Court actually does not provide a conclusive answer to this specific question, it does set out what it sees as being the appropriate way to approach it. Elias CJ established the general starting point: "Tolerance of the expressive behaviour of others is expected of other members of the public resorting to public space because of the value our society places on freedom of expression."⁷⁰ The real question, then, is where the limits to that tolerance give out. Is it when the people who actually witness the dissenting activity decide they have had enough – their tolerance for the activity is exhausted in fact – or is it at some level beyond that which may be displayed by the real flesh-and-blood individuals present?

The Court in *Morse v Police* came down firmly on the side of the latter position. For Elias CJ, the proper degree of tolerance cannot be derived even by reference to how a putative "reasonable person" would respond to the dissenting activity – especially where that reasonable person is defined in terms of those actually subject to the behaviour.⁷¹ Applying such a standard would risk imposing an audience veto on dissent by limiting it to whatever a viewer feels comfortable with viewing. Equally, Tipping J was explicit as to whose view of the acceptable limits of dissent ultimately counts: "Tolerance to the degree *thought appropriate by the Court* is the pivot on which the law reconciles the competing interests of public order and freedom of expression."⁷² McGrath J also indicated that before dissenting activity can be criminally punished, "the degree of interference [with those exposed to it] must go beyond what a society respectful of democratic values is reasonably expected to tolerate."⁷³ What such a society does or does not tolerate is then for the judiciary to determine in the particular circumstances of the case.

Admittedly, Blanchard J differed slightly from his colleagues, in that he believed the question of whether a particular instance of dissent ought to be tolerated must be answered with some reference to the identity and characteristics of the actual persons exposed to it. However, those actual persons are to be considered in a highly abstracted form. For Blanchard J, the point of view to be adopted when determining the limits to dissent is "the hypothetical reasonable person (of the kind affected) ... who takes a balanced, rights-sensitive view, conscious of the requirements of s 5 of [the Bill of Rights Act] and therefore not unreasonably moved to wounded feelings or real anger, resentment, disgust or outrage, particularly when confronted by a protestor."⁷⁴ Blanchard J even goes on to say that a member of the Klu Klux Klan would be expected to display such qualities of tolerance when

70 *Morse v Police*, above n 1, at [40] per Elias CJ and [70] per Tipping J.

71 At [38].

72 At [72] (emphasis added).

73 At [103].

74 At [64].

confronted with a protest against her or his views,⁷⁵ raising the question whether the actual individual persons exposed to the dissent have any content other than that ascribed to them by the Court. Not surprisingly, therefore, Blanchard J believed that, in practice, adopting his approach rather than that of his colleagues was unlikely to lead to any real differences in practical outcome.⁷⁶

Consequently, the limits on dissenting activity imposed by the Summary Offences Act's blanket requirement not to act in a "disorderly" or "offensive" manner in public, ultimately rest on a judicial assessment of what the New Zealand public ought to have to put up with. While the actual subjective reactions of persons exposed to a dissenting activity are not *irrelevant* to the Court's determination, these carry only the weight that the Court ascribes to them after considering whether or not they are warranted. If the Court considers that the subjective reaction is a "proper" one for an appropriately tolerant, tough-minded and resilient citizen of a democratic society to have, then it counts as a justified reason for limiting dissenting activities. However, if the Court considers the subjective reaction to be inappropriate given the need for the public to be tolerant, tough-minded and resilient, then it must not be allowed to prevent dissent from taking place. Therefore, the mere fact that the dissent has provoked an audience reaction of any particular kind is not determinative of its lawfulness or otherwise – it is only once a court has validated that subjective reaction that the dissent is unlawful.

Of course, what *kind* of audience reaction will render dissenting behaviour "disorderly" or "offensive" is then a different question. In other words, precisely what is it that s 4(1)(a) of the Summary Offences Act 1981 proscribes? As already noted, the Court in *Brooker v Police* was quick to overturn the earlier *Melser v Police* approach, which regarded generating annoyance (albeit of sufficient intensity) as being sufficient to render dissenting activities "disorderly" and thus unlawful. But if mere annoyance is not enough, then what is? And are the elements of "offensive behaviour" the same as those for "disorderly behaviour"? This basic interpretation question – what *sort* of reaction must the dissenting activity provoke to fall foul of the statute – is separate from the question of how *much* the audience is expected to tolerate and was answered by the Court in a decidedly different fashion.

B Interpreting s 4(1)(a) of the Summary Offences Act

The cases of *Brooker v Police* and *Morse v Police* came before the Supreme Court as appeals from convictions entered (and upheld) by the lower courts. Consequently, the Supreme Court in each case was required to assess whether the lower court's interpretation and application of the relevant statutory provision was correct. Insofar as the Court found the lower courts to be in error, it was then required to set out what it regarded as the correct reading of the provision in the context of each case. Given that this interpretative task involved rights contained in the Bill of Rights Act, the

75 At [65].

76 At [66].

injunction provided by s 6 of that enactment would seem central to its execution. And seeing as the Court in *Hansen v R* established something of a template for approaching the interpretative task under s 6, we might have expected to see that template applied when the Court came to say what s 4(1)(a) means.⁷⁷ However, that is not what happened. Despite the two cases being decided conterminously, *Hansen v R* is mentioned only briefly in footnotes in the *Brooker v Police* decision.⁷⁸ In *Morse v Police*, only Tipping J cites the case – and then only in order to indicate that he believes that its interpretative approach is inappropriate for the present situation.⁷⁹ So instead of conducting a full *Hansen*-inspired search for a Bill of Rights Act-consistent interpretation of the words used in s 4(1)(a), a majority of the Court was content to approach its interpretative task by using the standard techniques for reading a statute. The Bill of Rights Act then was relegated to ensuring that the application of this interpretation in specific cases of dissent provides for the proper degree of audience tolerance.

Therefore, in *Brooker v Police*, Elias CJ noted that *all* the tricks in the statutory interpretation canon point to the term "disorderly behaviour" meaning "behaviour seriously disruptive of public order."⁸⁰ She reiterated this point later in her judgment: "I think it clear from the structure and language of the Summary Offences Act that the offence of disorderly behaviour protects public order."⁸¹ Taking this statement at face value, Elias CJ is saying that courts in New Zealand prior to 2007 simply had read the relevant statutory provision incorrectly when they stated that mere annoyance was sufficient to prove the offence. A true reading, established after applying the full range of statutory interpretation techniques in the right way, actually reveals that Parliament did not mean to proscribe behaviour on that basis; rather, "[t]o constitute disorderly behaviour under s 4(1)(a) there must be an objective tendency to disrupt public order, by behaviour or because of the effect of words used."⁸² This approach is not sourced in s 6 of the Bill of Rights Act as is made clear in *Morse v Police* where Elias CJ reiterates it in the context of interpreting "offensive behaviour".⁸³ Certainly, she states in *Morse v Police* that s 6 requires any reading of s 4(1)(a) to be consistent with the right to freedom of expression in s 14 of the Bill of Rights Act.⁸⁴ However, it is only *after* Elias CJ applies standard interpretative techniques⁸⁵ to determine what "offensive

77 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

78 *Brooker v Police*, above n 1, at [92], n 101, [107], n 107, and [130], n 140.

79 *Morse v Police*, above n 1, at [68].

80 *Brooker v Police*, above n 1, at [24].

81 At [36].

82 At [41].

83 *Morse v Police*, above n 1, at [12].

84 At [17].

85 At [26]–[36].

behaviour" means that she then notes that this particular reading is consistent with that right,⁸⁶ thus resulting in no conflict with the Bill of Rights Act.

Similarly, the other majority judges in *Brooker v Police* did not rely upon the Bill of Rights Act when endeavouring to give a meaning to s 4(1)(a). Both Blanchard and Tipping JJ rejected the existing *Melser v Police* approach to "disorderly behaviour" as inappropriate for *all* situations, before finding that Mr Brooker's actions fell short of creating the necessary reaction in his audience *irrespective* of any Bill of Rights Act considerations.⁸⁷ Thus, they concur with Elias CJ that the "ordinary" reading of s 4(1)(a), achieved without reference to s 6, requires more than mere annoyance on the part of those witnessing dissenting behaviour. This approach is carried over to *Morse v Police*, where Blanchard J reiterates his interpretative reasoning in *Brooker v Police* without any s 6 analysis,⁸⁸ while Tipping J notes that the "crucial factor" in both offences under s 4(1)(a) is the behaviour's "impact on public order".⁸⁹ McGrath J, who joined the majority in *Morse v Police*, likewise established that "offensive behaviour" required some "interference with the use by others of the public place" without having recourse to s 6.⁹⁰

Therefore, when it comes to deciding what kinds of behaviour s 4(1)(a) proscribes, the Court simply says that the relevant offence (read correctly in its statutory context) requires that behaviour result in some measure of disruption to "public order".⁹¹ And the important point for present purposes is that this reading is presented as the correct one – the one that Parliament intended when passing the statute – without overt reliance on the interpretative command in s 6 of the Bill of Rights Act. Certainly, this reading may be *consistent* with s 6 as being one that is more protective of the rights in the Bill of Rights Act. But it is not *required* or *justified* by s 6. It is only the *degree* of disruption of public order required for dissenting behaviour to become disorderly or offensive that must be viewed in a Bill of Rights Act context. For Elias CJ, the behaviour must amount to "intimidation, victimisation, or bullying"⁹² or be "attacking or aggressive"⁹³ before it can justifiably be punished in law. For Blanchard, Tipping and McGrath JJ, the disturbance of public order is criminally punishable when it would be demonstrably justified to make it so, as per s 5 of the Bill of Rights Act. That application will still involve a measure of judicial choice. But it is choice that takes place within the parameters set by Parliament when it enacted the Summary Offences Act – with

86 At [37].

87 *Brooker v Police*, above n 1, at [63] and [69] per Blanchard J, at [90] and [93] per Tipping J.

88 *Morse v Police*, above n 1, at [61].

89 At [73].

90 At [103].

91 See also *Wakim v Police* HC Auckland CRI-2011-404-93, 10 November 2011 at [16]–[24].

92 *Brooker v Police*, above n 1, at [45].

93 *Morse v Police*, above n 1, at [34].

those parameters identified through reading the relevant statutory provision in accordance with generally accepted methods of interpretation.

IV CONCLUSION

By suggesting that the Supreme Court followed two different strategies in *Brooker v Police* and *Morse v Police*, I do not mean to claim that it has acted dishonestly or duplicitously. Rather, I think these cases neatly illustrate what Michael Robertson calls "the law's two stories".⁹⁴ He argues that in order to carry out "the institutional functions which Western societies have assigned to law", it must be able to be simultaneously malleable and inconsistent; rational and predictable.⁹⁵ That is to say:⁹⁶

The orthodox story ascribes attributes to law (rationality, coherence, certainty and predictability) which allow law to satisfy deep desires which the Enlightenment and liberalism have made central to Western societies. The orthodox story, with its stress on the neutrality of legal reasoning and principles, can also do the job of achieving political fraternity when there is a need to reconcile some group in society to legal decisions which do not favour its values and goals. The unorthodox story emphasizes that law contains inconsistent goals and values, and this helps law to maintain social order in pluralistic societies by allowing those groups with incompatible fundamental commitments to see their commitments reflected somewhere in the law. The unorthodox story also ascribes attributes to the law (malleability, the availability of rules and principles which pull in opposite directions) which allow it to achieve results in particular cases that exhibit a fine-grained appreciation of context and consequences, ie, "situation sense".

By telling both stories at once, the law is able to reconcile the competing need to be concrete and stable and yet open to transformation and redefinition. And the ability to satisfy both needs is a key function that permits the law to actually do the job that we want it to do.

If this is the case, then it may be a mistake to view the courts' role in policing the boundaries of dissent as raising any particular legitimacy problems. In defining the line between allowable and not-allowable dissent, the judiciary is just doing what it must do in our society. It is applying uncertain and malleable forms of legal regulation in highly specific fact situations with the end goal of reconciling values and factors that cannot easily be compared. Decrying the judiciary for making these decisions is thus to miss the point: it is just carrying out one of law's necessary functions. But in order to make that role socially acceptable, the decisions taken by the courts must be shown to be a part of the woven texture of the law and not some personal intervention based upon the judiciary's personal preferences. That requires the process leading to the decision to be presented as based upon traditional, orthodox modes of legal reasoning. Such presentation is not a false or illusory exercise

94 Michael Robertson "Telling the Law's Two Stories" (2007) 20 CJLJ 429.

95 At 429.

96 At 451.

in ex-post rhetorical justification, however. It rather is the way in which the law provides constraints upon the freedom of individual decision-makers which, in turn, enables another of law's necessary functions to occur.