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POLITICAL FREEDOM AS AN OUTLAW: REPUBLICAN THEORY AND POLITICAL PROTEST

INTRODUCTION

> Agitators are a set of interfering, meddling people, who come down to some perfectly contented class of the community and sow the seeds of discontent amongst them. That is the reason why agitators are so absolutely necessary. Without them, in our incomplete state, there would be no advance towards civilisation.[1]

THE recent violent scenes outside Parliament House in Canberra shocked Australia. The violence overshadowed the political message of the peaceful majority who were protesting against the Government's budget. The central place of such protests in Australian democracy is beyond doubt.[2] Despite this, both statute and common law restrict political protest without sufficient regard to other paramount interests, such as popular participation in Australian government and the need for free political discussion. The ad hoc nature of the scheme of regulation is itself an argument for a new approach which strikes a different balance.

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1 Wilde, *The Soul of Man under Socialism*, quoted in *Neal v The Queen* (1982) 149 CLR 305 at 316-317 per Murphy J.

2 A survey of 587 electors taken shortly after the demonstration found that 79% of respondents agreed that "[p]ublic demonstrations should be allowed even though there is a risk of violence": Murphy, "Ripe for Revolt" *The Bulletin* 3 September 1996 p19. Allan, "Citizenship and Obligation: Civil Disobedience and Civil Dissent" (1996) 55 *Cambridge LJ* 89 at 89 argues that: "The freedom to criticise government, and even to counsel disobedience or revolt, is widely considered the principal mark of a free society."

Within the Australian legal framework many forms of legitimate political protest are outlawed. Though rarely and selectively invoked, these legal restrictions pose a serious threat to citizens who seek to exercise fundamental political freedoms. This article highlights the limited scope of constitutional protection offered to political protest under the implied freedom of political discussion. It also explores how statutes, the common law and the enforcement culture (that is, the centrality of police discretion) inhibit legitimate forms of political protest. Using perspectives from republican theory, the paper highlights the inadequacies of the existing regulatory framework and proposes that both the law and its enforcement must be refocused towards a new target - a republican conception of liberty (dominion) which values and promotes legitimate forms of political protest.

By drawing upon the concept of dominion it is possible to envisage a different framework for the regulation of political protest. Republican theory has a positive contribution to make, influencing not only law reform but also the enforcement culture, in particular the way in which the police enforce these laws. The key to republican liberty (termed dominion) is not merely to free protesters from arbitrary legal restraints, as an approach based upon classical liberalism might suggest. Rather the legal regime must address and remedy the structural inequalities which prevent people from protesting against governmental or other action.

The High Court's recent derivation of an implied freedom of political discussion goes some way towards remedying the deficiencies in the way that Australian law deals with political protest. However, constitutional law can only be of so much assistance. Although it provides a shield against laws, both statutory and common law, that take inadequate stock of interests such as freedom of political speech or association, as yet it cannot confer any positive rights. Constitutional law may free protesters from arbitrary legal shackles, but is unable positively to facilitate political protest in Australia.

REPUBLICAN DOMINION AND ITS IMPLICATIONS FOR POLITICAL PROTEST

The classical liberal position on liberty, as reflected in the writings of Mill and Dicey, is both *residual* and *negative*.[3] The freedoms of expression, assembly and association are nothing more than a residual freedom to engage in conduct which is not prohibited or restricted by law. Fundamental freedoms, rather than being specifically enumerated in a Bill of Rights or in legislation as positive rights, are protected by interpretive presumptions

3 Mill, *On Liberty* (Penguin Classics, Harmondsworth 1991); Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 10th ed 1959). The right to assembly has been characterised as a residual freedom "comprising the residue of freedom remaining when the restrictions imposed by law are taken into account": Community Law Reform Committee of the Australian Capital Territory, *Public Assemblies and Street Offences* (Issues Paper No 10, 1994) p6.

or implications in favour of liberty.[4] Within this framework, the courts assume an important role in protecting individual rights. However, presumptions and implications in favour of liberty have only limited scope and effect. The steady erosion of fundamental freedoms by statute, coupled with the inability or failure of the courts to protect individual rights, have significantly reduced the residual sphere of liberty within which political protest may lawfully occur.

Classical liberalism offers a conception of freedom which provides only limited opportunities for individuals, either alone or with others, to engage in political protest. Whether presented in a positive or negative form, liberal theory proposes an *asocial* concept of individual freedom in which interference by others must be minimised or eliminated.[5] Republican theory attempts to remedy these deficiencies. In *Not Just Deserts: A Republican Theory of Criminal Justice,* Braithwaite and Pettit envision a republican conception of freedom called "dominion".[6] Although dominion is a negative definition of liberty, it offers a radically different interpretation of the concept:

> Dominion is a republican conception of liberty. Whereas the liberal conception of freedom is the freedom of an isolated atomistic individual, the republican conception of liberty is the freedom of a social world. Liberal freedom is objective and individualistic. Negative freedom for the liberal means the objective fact of individuals' being left alone by others. For the republican, however, freedom is defined socially and relationally. You only enjoy republican freedom - dominion - when you live in a social world that provides you with an intersubjective set of assurances of liberty. You must subjectively believe that you enjoy these assurances, and so must others believe. As a social, relational conception of liberty, by definition it also has a comparative dimension. To fully enjoy liberty, you must have equality-of-liberty with other persons. If this is difficult to grasp, think of dominion as a conception of freedom that, by definition, incorporates the notions of *liberté, égalité,* and *fraternité*; then you have the basic idea.[7]

Dominion is a rival to retributive theories of criminal punishment. Rather than constructing the legal system as a *means* of ensuring offenders receive their just deserts (that is, punishment proportionate to their wrongdoing), republican theory focuses on *ends*.

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4 See *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 per Brennan J.

5 See Braithwaite & Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Clarendon Press, Oxford 1990) p57.

6 In Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, Oxford 1997) Ch 2, the republican concept of liberty is conceived as "freedom as non-domination".

7 Braithwaite, "Inequality and Republican Criminology" in Hagan & Peterson (eds), *Crime and Inequality* (Stanford University Press, Stanford, California 1995) p279. See also Braithwaite & Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* p58.

As a consequentialist theory, the purpose of the criminal justice system, and its integrated sub-systems, should be the maximisation of dominion.

Dominion has three components. A person enjoys full dominion if and only if:

1. The person enjoys no less a prospect of liberty than that which is available to other citizens.

2. This condition is common knowledge among citizens, so that the person and nearly everyone else knows that the person enjoys the prospect mentioned, they and nearly everyone else knows that the others generally know this too, and so on.

3. The person enjoys no less a prospect of liberty than the best that is compatible with the same prospects for all citizens.[8]

As a comprehensive theory, dominion has implications for debates about criminalisation,[9] the limits of criminal investigation, and sentencing principles. However, as a theory it is not confined to criminal justice matters. In this article, we use republican theory to provide a framework for a critical examination of the laws and practices which interfere with political protest.

Republican theorists view the legal system as a complex web of inter-related sub-systems. To achieve this deeper understanding requires an analysis of the intersecting areas of law which impact upon political freedom. Laws (not *just* criminal laws) play an central role in constituting and maximising dominion. For the purpose of our analysis we focus on constitutional law, public order law and criminal law, touching only briefly upon other areas of legal regulation such as international human rights, administrative law and private law.[10] A principal republican objective (or target) is promoting opportunities for

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8 Braithwaite & Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* p65. Dominion is maximised by the use of presumptions relating to (i) parsimony, (ii) the checking of power, (iii) reprobation and (iv) the reintegration of victims and offenders: Ch 6.

9 The theory provides an alternative to the harm principle devised by Mill, *On Liberty* p68 who argued that the principle of liberty requires that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others". Although the harm principle has been instrumental in the reform of offences relating to prostitution and homosexual activity, the central notion of "harm to others" as a limiting concept suffers from unacceptable elasticity and indeterminacy: see Ashworth, *Principles of Criminal Law* (Clarendon Press, Oxford, 2nd ed 1995) Ch 2.

10 Indeed, the civil injunction, coupled with the law of contempt, has greater potential to interfere with political freedom than public law. The Commonwealth Electoral Commission recently obtained an injunction to restrain the defendant from encouraging voters to fill in a ballot otherwise than in accordance with the *Commonwealth Electoral Act*

individuals to enjoy "equality-of-liberty" - this requires the dismantling of structural barriers (including laws) which hamper and restrict the opportunities of minority and marginalised groups to access political freedoms. Republicanism realises that law alone cannot achieve structural change, and moreover it counsels legal restraint through its adherence to a "presumption of parsimony", ie that intervention by the law should be a measure of last resort. Consequently, republican theory emphasises the importance of non-legal forms of regulation (informal social norms and practices) as a means of maximising dominion. Thus, in the final part of this paper we examine the impact of law enforcement culture on political protest (particularly filtered through police discretion) and the prospects for implementing a republican mandate for policing.

Australia prides itself on its culture of political toleration and there is a widespread belief that basic rights to freedom of expression and assembly are protected by law - a belief reinforced by the High Court's use of an implied freedom of political expression in the Constitution. Republican theory highlights the importance of engendering the belief that fundamental freedoms will be protected and respected by others. As the term dominion suggests, freedom is defined in both social and relational terms: individuals must believe they are free, and that belief must be shared as "common knowledge" within the community.[11] However, such belief alone is not sufficient. It is essential that law and practice support this belief. As our research demonstrates, the scope for exercising political freedoms *within the law* is extremely limited. Freedom of political protest is both figuratively and legally an outlaw in Australia.

Republican Ground Rules: A Framework for Resolving Rights Conflicts

The freedoms of expression, assembly and association are not absolute and inevitably some restrictions are necessary to protect the "rights of others". Indeed, the legitimacy of necessary and reasonable restrictions is recognised both under Australian law and international human rights law.[12] The law reports are littered with cases where political freedom has been curtailed because its exercise has been interfered with in order to

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1918 (Cth); the defendant's failure to comply with its terms led to him being imprisoned for contempt: see *Langer v Commonwealth* (1996) 134 ALR 400 (hereafter "*Langer*").

11 "Common knowledge would underwrite the assurance required for perfect liberty": Braithwaite & Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* p64. The authors are drawing on the earlier thoughts of Montesquieu (at 61):

> Political liberty consists in security, or at least in the opinion we have of security. This security is never more dangerously attacked than in public or private accusations. It is therefore on the goodness of criminal laws that the liberty of the subject principally depends.

12 See Articles 19 (freedom of expression) and 21 (freedom of assembly) of the International Covenant on Civil and Political Rights (ICCPR).

preserve public order, prevent crime, uphold public morals or otherwise prevent interference with the "rights of others".[13]

The law, faced with an inevitable rights conflict, resorts to the metaphor of "balancing", a metaphor which acknowledges that while freedom of expression and assembly are important, they are not absolute.[14]

> [T]he power to restrict liberty only arises when it is or appears to be necessary to do so. It is necessary to restrict only when the risk of injury to property or persons, measured by the twin tests of probability of injury and the nature of the threatened injury, is such as to warrant the proposed degree of restraint. *It is always a question of balance, but basically restriction of liberty is for a constable the last resort.* [15]

The police themselves recognise that they are engaged in a balancing exercise:

> The AFP [Australian Federal Police] is very aware of the need for a realistic balance in responding to protest and demonstration activity, between the rights of the citizen on the one hand and its responsibilities and obligations to uphold the law, preserve the peace and protect the safety and dignity of institutions, office holders and other designated individuals.[16]

Policies of restraint, coupled with a presumption in favour of liberty, provide some measure of protection for freedom of expression and assembly. However, the balancing metaphor, even when coupled with rules of reasonableness and proportionality, provides an inadequate legal framework for mediating competing rights claims. Both the police and the courts are required to make decisions about the importance of competing interests within a legal framework which does not attach a relative weighting or significance to each of the interests in competition.

Australian law has only a limited potential to attach *fundamental* significance to the freedoms of expression and assembly through the Constitution. In those areas of law

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13 For an extensive review of the laws in Australia which impact on public protest and freedom of assembly, see Gaze & Jones, *Law, Liberty and Australian Democracy* (Law Book Company, Sydney 1990) Ch 4.

14 Galligan, "Preserving Public Protest: The Legal Approach" in Gostin (ed), *Civil Liberties in Conflict* (Routledge, London 1988) Ch 3 p45.

15 *Innes v Weate* [1984] Tas R 14 at 22 per Cosgrove J (emphasis added). See also *Commissioner of Police v Allen* (1984) 14 A Crim R 244 at 245 per Hunt J.

16 Australian Federal Police Submission in Joint Standing Committee on the National Capital and External Territories, *Inquiry into the Right to Legitimately Protest or Demonstrate on National Land and in the Parliamentary Zone in Particular - Submissions* (1995) Vol 1 p136.

where there is no obvious constitutional dimension, the courts have neither a consistent nor a workable principle for mediating rights conflicts. This deficiency means that decision-making by the courts and police lacks transparency and that behind the balancing metaphor the political nature of the choices open to the police and courts are concealed. Rather than being viewed as another interest which is thrown into a metaphorical balance, republican theory suggests that political freedom should be regarded as fundamental and accorded maximum protection under the law. Under such a framework, any interference with that right must be demonstrated to be necessary and proportionate to its objectives.[17]

THE CONSTITUTION AND POLITICAL PROTEST

The High Court has traditionally interpreted the Australian Constitution in a manner unsympathetic to and unsupportive of the protection of fundamental freedoms such as the ability to protest.[18] Decisions like that in the *Communist Party Case*[19] demonstrate the preoccupation of the Court with the ambit of Commonwealth power rather than any interest in or enthusiasm for the construction of rights and freedoms. While concerns about rights underlie that decision,[20] the Court failed to actively engage in building up explicit rights protection and to promote a legal culture more sensitive to the need to foster rights.

In recent years, the approach of the High Court to the constitutional protection of civil liberties has significantly shifted. The Court has applied more robust and, in some cases, imaginative protection.[21] The primary facets of this shift have been the Court's reinterpretation of s117 of the Constitution,[22] which protects out-of-State residents against "any disability or discrimination", and, perhaps more significantly, the Court's finding that the Australian Constitution contains an implied freedom of political discussion. Though perhaps foreshadowed[23] by Murphy J in decisions such as *Miller v TCN Channel Nine Pty*

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17 In O'Neill & Handley, *Retreat From Injustice: Human Rights in Australian Law* (Federation Press, Sydney 1994) p189 the authors argue that the balancing approach under the common law will require modification in light of the recognition by the High Court of an implied freedom of political communication and the observation by Mason CJ that "ordinarily paramount weight would be given to the public interest in freedom of communication": *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 143 (hereafter "*Australian Capital Television*").

18 See Williams, "Civil Liberties and the Constitution - A Question of Interpretation" (1994) 5 *PLR* 82.

19 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. See Winterton, "The Significance of the *Communist Party Case*" (1992) 18 *MULR* 630.

20 Williams, "Reading the Judicial Mind: Appellate Argument in the *Communist Party Case*" (1993) 15 *Syd LR* 3.

21 In respect of the finding of some judges in *Leeth v Commonwealth* (1992) 174 CLR 455 that the Constitution contains a guarantee of equality before the law, see Rose, "Judicial Reasonings and Responsibilities in Constitutional Cases" (1994) 20 *Mon ULR* 195.

22 *Street v Queensland Bar Association* (1989) 168 CLR 461.

23 Campbell, "Lionel Murphy and the Jurisprudence of the High Court Ten Years On" (1996) 15 *U Tas LR* 22; Kirby, "Lionel Murphy and the Power of Ideas" (1993) 18 *Alt LJ* 253 at

Ltd[24] the implied freedom did not achieve majority acceptance until the Court's decision in *Australian Capital Television Pty Ltd v Commonwealth*.[25] It is this implied freedom, or some derivative therefrom, which offers the greatest scope for the constitutional protection of political protest.

The Implied Freedom of Political Discussion

The Constitution does not expressly provide that the people of Australia possess the freedom to discuss political matters. Sparse treatment is given to individual rights, with provisions such as s80 providing for a right to trial (though limited to trials on indictment) and s116 conferring a measure of freedom of religion. The closest that the express provisions of the Constitution get to any freedoms relating to the electoral or political process are ss7 and 24, which respectively provide that the members of the Senate and the House of Representatives "shall be ... directly chosen by the people".[26]

In *Australian Capital Television* the High Court implied from the Constitution a freedom to discuss political matters.[27] The freedom was based upon the system of representative government created by the text and structure of the Constitution. The primary textual basis was ss7 and 24, although other provisions, such as ss30 and 41, were also relevant. In the opinion of six of the seven judges in *Australian Capital Television*, the system of representative government created by the Constitution, or at least the text of ss7 and 24, necessarily requires for its efficacy and maintenance that the Australian people are able to discuss political matters without undue governmental interference.

In *Australian Capital Television* the High Court applied the implied freedom to strike down parts of the *Political Broadcasts and Political Disclosures Act* 1991 (Cth). That Act banned certain forms of political advertising on the electronic media during election periods. Some free air time was to be provided to participants in the electoral process, although 90% of this time was earmarked for parties represented in the previous Parliament. The ban on political advertising was held to infringe the implied freedom of political discussion and was therefore declared invalid. Mason CJ argued that the Act would favour:

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256. Cf Williams, "Lionel Murphy and Democracy and Rights" in Coper & Williams (eds), *Justice Lionel Murphy - Influential or Merely Prescient?* (Federation Press, Sydney forthcoming).

24 (1986) 161 CLR 556.

25 (1992) 177 CLR 106 (hereafter "*Australian Capital Television*").

26 See also Constitution ss25, 30, 41.

27 See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (hereafter *Nationwide News*). For analysis and discussion of these decisions, see *Symposium: Constitutional Rights for Australia?* (1994) 16 *Syd LR* 145; Cass, "Through the Looking Glass: The High Court and the Right to Speech" (1993) 4 *PLR* 229; Kennett, "Individual Rights, the High Court and the Constitution" (1994) 19 *MULR* 581.

> the established political parties and their candidates without securing compensating advantages or benefits for others who wish to participate in the electoral process or in the political debate which is an integral part of that process.[28]

The implied freedom of political discussion was also recognised in *Nationwide News*, which was handed down on the same day as *Australian Capital Television*. The freedom was subsequently applied and developed in three decisions handed down in October 1994: *Theophanous v Herald & Weekly Times Ltd*,[29] *Stephens v West Australian Newspapers Ltd*[30] and *Cunliffe v Commonwealth*.[31] Each of these cases developed the notion that an implied freedom of political discussion can be derived from the system of representative government created by the Constitution. *Theophanous* applied the implication to override aspects of the common law of defamation. *Stephens* demonstrated that the implied freedom could be applied to State political matters and that a counterpart implication could be derived from the system of representative government created by the Western Australian Constitution.[32]

The High Court's approach to implied freedoms generally was recently refined and narrowed in *McGinty v Western Australia*.[33] In that case, a new majority emerged on the Court consisting of Brennan CJ, Dawson, McHugh and Gummow JJ. While Gummow J

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28 *Australian Capital Television* at 132.

29 (1994) 182 CLR 104 (hereafter "*Theophanous*").

30 (1994) 182 CLR 211.

31 (1994) 182 CLR 272 (hereafter "*Cunliffe*"). For commentary on these decisions, see Jones, "Comment: Legislative Discretion and Freedom of Political Communication" (1995) 6 *PLR* 103; Twomey, "*Theophanous v Herald & Weekly Times Ltd; Stephens v West Australian Newspapers Ltd*" (1994) 19 *MULR* 1104; Trindade, "'Political Discussion' and the Law of Defamation" (1995) 111 *LQR* 199; Williams, "*Engineers* is Dead, Long Live the Engineers!" (1995) 17 *Syd LR* 62.

32 In *Muldowney v South Australia* (1996) 136 ALR 18 it was argued that such an implication might also be derived from the *Constitution Act* 1934 (SA). As the Solicitor-General for South Australia conceded that the South Australian Constitution contains such an implication "in like manner to the Commonwealth Constitution", the High Court did not need to decide the issue: at 23.

33 (1996) 134 ALR 289 (hereafter "*McGinty*"). There was also some discussion of the implied freedom of political discussion in *Langer*. A majority, with Dawson J dissenting, found that s329A of the *Commonwealth Electoral Act* 1918 (Cth) was valid. While the majority dealt briefly with the implied freedom of political discussion and narrowly construed the freedom in finding that it did not invalidate the provision, it was not strictly necessary for the Court to examine the issue as it was not argued by the plaintiff. The implication was argued in the related case of *Muldowney*, in which the Court unanimously found that the implication (derived either from the Commonwealth or State Constitution) did not invalidate s126(1)(b) or (c) of the *Electoral Act* 1985 (SA). See Twomey, "Free to Choose or Compelled to Lie? - The Rights of Voters After *Langer v The Commonwealth*" (1996) 24 *FL Rev* 201; Walker and Dunn, "Mr Langer is not entitled to be agitator: *Albert Langer v Commonwealth*" (1996) 20 *MULR* 909.

was a new appointee, the other members of the majority had all dissented in the earlier decision of *Theophanous*. In *McGinty* this majority narrowed the scope for implying freedoms by emphasising that such freedoms could only be derived where they could be securely based in the text and structure of the Constitution rather than in any underlying notions of representative democracy.[34] In arguing for a shift in approach, the majority did not cast doubt on the implied freedom relied upon in *Australian Capital Television*. However, McHugh J, with some support from Gummow J, suggested that the use of the implied freedom in *Theophanous* to override the common law should be reconsidered. The High Court is currently considering whether it should take up this challenge.[35]

Applying the Implied Freedom of Political Discussion

Determining whether a law infringes the implied freedom involves a two stage process. In order for a law to be declared invalid, it must first be shown that it impinges upon political discussion and secondly that it does not adequately serve, or is disproportionate in its impact upon political discussion in serving, some other legitimate purpose.

The Ambit of "Political Discussion"

"Political discussion" is obviously very difficult to delineate. No clear dividing line between "political" and "non-political" discussion is possible.[36] In *Australian Capital Television*, the ambit of the implied freedom was described variously as being "freedom of communication in relation to public affairs and political discussion",[37] "[f]reedom of discussion of political and economic matters",[38] "freedom within the Commonwealth of communication about matters relating to the government of the Commonwealth",[39] "freedom of political discourse"[40] and the "right of the people to participate in the federal election process".[41] In *Theophanous*, Mason CJ, Toohey and Gaudron JJ described the implication in even wider terms:

> For present purposes, it is sufficient to say that "political discussion" includes discussion of the conduct, policies or fitness for office of

34 Williams, "Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform" (1996) 20 *MULR* 848.

35 On 3-7 March 1997 the Court heard argument in the matters of *Levy v Victoria* M42 of 1995 and *Lange v Australian Broadcasting Corporation* S109 of 1996 on whether the Court should reopen *Theophanous* and *Stephens*.

36 In *Theophanous* at 122, Mason CJ, Toohey and Gaudron JJ spoke of "the absence of any limit capable of definition to the range of matters that may be relevant to debate in the Commonwealth Parliament and to its workings".

37 *Australian Capital Television* at 139 per Mason CJ.

38 At 149 per Brennan J.

39 At 168 per Deane and Toohey JJ.

40 At 212 per Gaudron J.

41 At 233 per McHugh J.

> government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg, trade union leaders, Aboriginal political leaders, political and economic commentators.[42]

The width of the freedom was further demonstrated by their Honours' adoption of Barendt's statement that:

> "political speech" refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.[43]

Australian Capital Television and *Theophanous* demonstrate the potential width of the class of speech or discussion that is constitutionally protected. This was established even more starkly by *Cunliffe*. In that case, a majority of the High Court held that the implication extended to the giving of immigration assistance and the making of immigration representations.[44]

The implied freedom of political discussion is obviously wide enough to encompass many forms of political protest. The implied freedom will offer some protection (or a degree of immunity from legislative or executive action) to public protest concerning the political issues of the day or the suitability of candidates for office. The extent to which that will shield public protesters from regulation will depend on the scope of the particular regulation and whether the High Court sees that regulation as being appropriate and adapted to achieving some other legitimate purpose.

While political discussion has been defined very broadly, it would be unlikely to be interpreted to include forms of protest such as union picketing in industrial disputes (although this might be protected should the High Court develop an implied freedom of association). An intriguing question is the extent to which industrial disputes, such as the Burnie dispute in Tasmania in 1992 or the Weipa dispute in Queensland in 1995, might come to involve political discussion where they become enmeshed in the party politics of the day at either the state or federal level. While the picketing or other industrial protest action giving rise to the political dispute would not seem to be political discussion, and would therefore not be able to gain constitutional protection, comment on the dispute, or any related issue of the day, would be likely to attract the protection of the implied freedom.

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42 *Theophanous* at 124.
43 At 124, quoting Barendt, *Freedom of Speech* (Clarendon Press, Oxford 1985) p152.
44 See Williams, "*Engineers* is Dead, Long Live the Engineers!" (1995) 17 *Syd LR* 62 at 79.

The Test to be Applied

The High Court has applied the implied freedom of political discussion to invalidate statute law and to reshape the common law. In the case of the common law, the implication may craft a new defence more sympathetic to the rationale of the implied freedom and the system of representative government in Australia. The Parliament will not be able to override a constitutionally mandated defence. Where the High Court finds that a statute or the common law unacceptably breaches the implied freedom it cannot be expected that the Court will afford the Parliament "a margin of appreciation".[45]

Statute Law

Even if a statute impinges upon political discussion, the law will not necessarily be declared invalid. It must further be shown that, in trenching upon the freedom, the law does not adequately serve a competing legitimate purpose. Different language was used by the judges in *Australian Capital Television* to describe the test to be applied once it has been determined that a law impinges upon political discussion. Mason CJ suggested that a restriction or prohibition that targets ideas or information will be more difficult to sustain than a restriction or prohibition that targets an activity or mode of communication by which ideas or information are transmitted.[46]

A frequent element in the tests adopted by members of the High Court in *Australian Capital Television* was the concept of proportionality, that is, notions of reasonableness or appropriateness to a legislative purpose. This approach was also widely adopted by members of the High Court in *Muldowney v South Australia*,[47] the most recent decision in the area. Such an approach has been used by the High Court in other areas, such as in determining the ambit of the Commonwealth's implied incidental power, where the exercise of power raises a question of legislative purpose.[48] The proportionality test examines whether a law, in abrogating, restricting or regulating political discussion, can escape invalidity by being appropriate and adapted to some other legitimate purpose, such as the elimination of racial violence or the protection of reputation. To escape invalidity, a law would need not only to be directed to this other purpose but would need to pursue it in a way that is not disproportionate to the consequential restriction of political discussion.

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45 Brennan J, now Chief Justice of the High Court, was the only judge to afford "a margin of appreciation" to the Parliament in the free speech cases. See *Australian Capital Television* at 158-159; *Theophanous* at 156.

46 *Australian Capital Television* at 143.

47 (1996) 136 ALR 18. The European Court of Human Rights has similarly employed the proportionality principle to determine whether restrictions on freedom of expression (guaranteed by Art 10, European Convention on Human Rights) are necessary in a democratic society: *Handyside v UK* [1976] 1 EHRR 737; *Tolstoy Miroslavsky v UK* (1995) 20 EHRR 442.

48 See *Nationwide News*; *Cunliffe*. Cf *Leask v Commonwealth* (1996) 140 ALR 1.

The proportionality test obviously raises issues of "balancing" and "reasonable regulation". To protect political discussion and protest adequately, these interests must be regarded by the High Court as paramount. As Mason CJ recognised in *Australian Capital Television* "ordinarily paramount weight would be given to the public interest in freedom of communication".[49] Political freedom should only be capable of being overridden in compelling circumstances. If the proportionality process does not afford political discussion and protest this weight, the Constitution will afford only minimal protection, despite the significance attached to political discussion by the High Court.

The Common Law

Theophanous demonstrated that the implied freedom of political discussion can impact upon the common law. A majority in that case applied the implication to the common law of defamation and in doing so reshaped that aspect of the common law to better protect political discussion. The leading judgment in *Theophanous* was the joint judgment of Mason CJ, Gaudron and Toohey JJ. The joint judgment developed a new constitutional defence that overrode the common law and any inconsistent statute law. It was held that political discussion involving public figures cannot be attacked by way of a defamation action where the publisher of the speech can establish that:

1. it was unaware of the falsity of the material published;

2. it did not publish the material recklessly, that is, not caring whether the material was true or false; and

3. the publication was reasonable in the circumstances.

Difficult questions arise in regard to the common law as it affects political protest. The High Court's approach in *Theophanous* means that where the common law impinges upon political discussion, whether it be in the form of protest or otherwise, it may be reshaped (or constitutionalised) to achieve a higher level of protection for such discussion. The common law may be modified in line with the implied freedom even where it is long-standing or where it had been thought that the law had come to represent an acceptable balance between diverse interests. The implied freedom has thus established free political discussion as a supra (or paramount) interest that can override the carefully constructed common law balances reached by judges over many years. It is the constitutional freedom that informs the content of the common law rather than vice versa.[50] For this reason, the

49 *Australian Capital Television* at 143 per Mason CJ.

50 Cf *Australian Capital Television* at 217, where Gaudron J stated:

> As the implied freedom is one that depends substantially on the general law, its limits are also marked out by the general law. Thus, in general terms, the laws which have developed to regulate speech, including the laws with respect to defamation, sedition, blasphemy, obscenity and offensive language, will indicate the kind of regulation that is consistent with the freedom of political discourse.

implied freedom is both a potent and a controversial force in the development of the common law.

Broadening the Base of Implied Political Freedoms under the Constitution

The High Court's development of the implied freedom of political discussion builds upon the constitutional right recognised in its earlier decision of *R v Smithers; Ex parte Benson*.[51] In that case, decided in 1912, Griffith CJ and Barton J recognised an implied right of access to government and to the seat of government. Barton J stated that "the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen the right of access to the institutions, and of due participation in the activities of the nation".[52] The constitutional right in *Smithers* might be revived by the High Court to bolster the constitutional protection afforded to protest in the national capital (and perhaps by analogy in State capitals or parliamentary areas for the purposes of a State Constitution).

While not explicitly recognising the need for constitutional protection of the ability to protest, *Smithers* nevertheless shows the importance that the High Court has placed upon Australians having access to their government and the special significance of the national capital. The decision weakens the Commonwealth's power to restrict or proscribe public protest at institutions such as Parliament House in Canberra (particularly where such protest amounts to political discussion - such as in the case of the Aboriginal Tent Embassy). Taken with the implied freedom of political discussion, this might mean that governments may only restrict political protest at national institutions where the restriction is a proportionate response to some other legitimate purpose.

The *Public Order (Protection of Persons and Property) Act* 1971 (Cth) prohibits assemblies involving violence or damage to property.[53] These provisions are unlikely to conflict with the implied freedom of political discussion or implied right of access to national institutions. Restrictions on violent or destructive forms of protest are justifiable, although prior restraint of demonstrations or meetings on the ground that there is a reasonable apprehension of violence or property damage might only be justified where the threats are both serious and imminent.[54] It may be more difficult to justify content-based restrictions (for example, laws preventing offensive or insulting conduct),[55] or restrictions serving lesser public interests (for example, laws preventing obstruction or laws preventing impairment to the aesthetic quality of particular premises).[56]

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51 (1912) 16 CLR 99 (hereafter "*Smithers*").

52 At 109-110. See *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536.

53 *Public Order (Protection of Persons and Property) Act* 1971 (Cth) s6.

54 The potential of preventive powers, particularly the powers to prevent a breach of the peace, to undermine political freedom is explored below in text accompanying n118.

55 See discussion of offensive conduct laws below in text accompanying n90.

56 It is an offence for a person participating in an assembly to cause an unreasonable obstruction, see *Public Order (Protection of Persons and Property) Act* 1971 (Cth) s9.

Some aspects of political protest will not be protected by the implied freedom of political discussion. Accordingly, it is important to examine whether other freedoms might be implied from the Constitution to protect political protest. The scope for further freedoms to be implied from the Constitution was restricted by *McGinty*. However, it would seem likely that further freedoms, such as that to associate, may be implied.[57] McHugh J in *Australian Capital Television*, for example, suggested that Australians might:

> possess the right to participate, the right to associate and the right to communicate. That means that, subject to necessary exceptions, the people have a constitutional right to convey and receive opinions, arguments and information concerning matter intended or likely to affect voting in an election for the Senate or the House of Representatives.[58]

Similarly, Gaudron J stated in the same case that:

> The notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps, freedom of speech generally.[59]

Dicta such as that of McHugh and Gaudron JJ has been taken up in cases argued before the High Court, thus far unsuccessfully. For example, it was argued in *McGinty* that a guarantee of equality of voting power might be implied from the Constitution of Western Australia.[60]

Another possible implication central to the ability to engage in political protest would be a freedom of assembly. Such a development would be consistent with the right of peaceful assembly recognised as a fundamental human right by Article 21 of the International

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Obstruction of a public highway (which includes pedestrian areas) is also an offence: see *Traffic Act* 1937 (ACT). On laws which interfere with political protest in order to preserve the dignity of official diplomatic premises, see regulations enacted under the *Diplomatic Privileges and Immunities Act* 1967 (Cth). To remove the small wooden crosses placed outside the Indonesian Embassy after the Dili massacre, the Minister for Foreign Affairs used his statutory power to authorise the removal of "prescribed objects": see *Minister for Foreign Affairs and Trade v Magno* (1992) 112 ALR 529.

57 Williams, "Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform" (1996) 20 *MULR* 848.

58 At 232. See also at 227.

59 At 212.

60 See *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; Creighton, "Apportioning Electoral Districts in a Representative Democracy" (1994) 24 *UWALR* 78, argued that "a system of representative democracy does require a degree of equality between electoral districts, but not equality in an absolute sense": at 78. See Wiseman, "Defectively Representing Representative Democracy" (1995) 25 *UWALR* 77; Creighton, "Defectively Representing Representative Democracy - A Reply" (1995) 25 *UWALR* 85.

Covenant on Civil and Political Rights (ICCPR).[61] An implied freedom of peaceful assembly may be a natural concomitant of the ability to engage in political discussion. Like free political discussion, the freedom to assemble (as with the freedom to associate) may be essential to the efficacy and maintenance of the system of representative government enshrined in ss7 and 24 of the Constitution.

A Right or a Freedom?

The question of whether the implied freedom of political discussion "could also conceivably constitute a source of positive rights" was left open by Mason CJ, Toohey and Gaudron JJ in *Theophanous*.[62] The issue is an important one because it involves the High Court's conception of the underlying objectives and scope of the freedom.[63] Justices of the High Court have on occasion referred to the implied freedom of political discussion as a right; for example, a "general right of freedom of communication in respect of the business of government of the Commonwealth" and a "right of the people to participate in the federal election process".[64] However, unless the High Court were to hold that the implication can give rise to positive rights, and this would seem highly unlikely given the recent decision in *McGinty*, the implication may be more correctly described as a freedom than as a right. This distinction is highlighted in Brennan J's description of the implication as "an immunity consequent on a limitation of legislative power".[65] This description best fits the Court's current view of the implied freedom.

Brennan J's categorisation of the implication reflects the rights typology developed by Hohfeld.[66] Hohfeld noted that the legal use of the term "right" denotes at least four distinct conceptions. Each of these concepts defines a relationship between the right-bearer and at least one other person and can be summarised as follows:

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61 The High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 may give rise to a legitimate expectation that statutory, and possibly common law, discretions affecting the ability to assemble peacefully will be exercised in conformity with the right to peaceful assembly guaranteed in Art 21 of the ICCPR.

62 *Theophanous* at 125. See *Nationwide News* at 50-51, 76. See Gageler, "Implied Rights" in Coper & Williams (eds), *The Cauldron of Constitutional Change* (Centre for International & Public Law, ANU, Canberra 1997) pp85-86.

63 See, on the critique of rights debate, Morgan, "Equality Rights in the Australian Context: A Feminist Assessment" in Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, ANU, Canberra 1994) p123; Pritchard, "The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice" (1995) 2 *Aust J Hum Rts* 3.

64 *Australian Capital Television* (1992) 177 CLR 106 at 233 per McHugh J. See Bailey, "'Righting' the Constitution without a Bill of Rights" (1995) 23 *FL Rev* 1 at 6.

65 *Australian Capital Television* at 150.

66 Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Greenwood Press, Westport 1919). See Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell, London 1986) Ch 8.

1. *Claim-right* - involves an affirmative claim as against another person. Correlatively, the other person owes a "duty" to the right-bearer (for example, X has a claim-right not to be assaulted, thus Y has a duty not to assault X). The opposite concept to a claim-right is where there is an absence of duty ("no right") on the other person.

Arguably, republican theory suggests that the right to public protest should be a "claim-right" whereby Parliament or its law enforcement officers owe a positive "duty" to respect, and perhaps even facilitate, the free exercise of this right. The current interpretation of the implied freedom of political discussion does not achieve this.

2. *Privilege* (or "liberty") - means that a person is free from the claim or right of another. There is an absence of a duty *not* to do the act in question.

To the extent that the right to engage in public protest is protected only by residual common law rights (relating principally to trespass against the person or property) and not by the implied freedom of political discussion, it may be characterised as a "privilege". Thus, a protester might not be breaking any law by engaging in peaceful protest since he or she owes no duty and infringes no claim-right. However, this does not mean that Parliament has a duty not to interfere. Parliament clearly has the "power" to do so. Outside the sphere of constitutional protection for political freedom, Parliament may enact laws relating to matters such as offensive behaviour, obstruction of public places, noise pollution or trespass, which may prevent the free exercise of the "privilege" to engage in public protest.

3. *Power* - the ability to alter legal rights and duties, or legal relations generally. The person whose legal relations are altered by the exercise of the power is said to be under a "liability". A "power" is different to a claim-right because there is no correlative duty imposed upon another person.

4. *Immunity* - where a person is not under a liability to have his or her legal relations altered by another. Correlatively, the person who lacks the power to alter the protester's legal relations is said to be under a "disability".

The implied freedom of political discussion is an "immunity" from intervention. Like the Bill of Rights in the United States Constitution, the implication means that, within a defined area of conduct, a person is not subject to the "power" of Parliament to alter his or her legal rights and duties.

The implied freedom of political discussion currently exists as an "immunity" and not as a higher level "claim-right". This categorisation of the implied freedom reveals the limited scope of the High Court's conception of the extent to which political discussion should be constitutionally protected. It also reveals how the Court has so far viewed the implication only as a limitation upon power, a status which renders it unable to meet a republican

agenda. The freedom of political discussion is a negative phenomenon capable of striking down regulation that transgresses into the area of the "immunity".

The distinction between claim-rights and freedoms/immunities is critical to the capacity of the Constitution to facilitate political protest. The fact that only immunities from power are likely to be discovered in the Constitution means that constitutional law will be unable to fulfil the requirements of republican theory for a legal regime that will foster equality of opportunity or other goals in political protest. Inconsistent laws will fall in the face of an implied freedom, but nothing will be erected in their place. The contrast is illustrated by envisaging the difference between a freedom to vote and a right to vote. The former would invalidate laws restricting the ability to vote, but would not, perhaps unlike the latter, require the Parliament to provide ballot boxes to indigenous people in isolated areas.

For these reasons, constitutional law may satisfy a traditional liberal agenda in protecting the freedoms of protesters from erosion, but it cannot (or is unlikely to be interpreted to) meet the demands of a republican approach to the regulation of political protest. A republican agenda therefore requires both statute law and common law to be called into play to create an adequate legal regime.

While the implied freedom of political discussion may be negative in its legal impact it can have a wider, positive effect when considered more broadly. Like the guarantee of free speech in the First Amendment to the United States Constitution, the implication has the potential to act beyond its legal bounds. When viewed in the context of the republican social or relational conception of liberty, the implication has the scope to operate as a positive cultural symbol. The knowledge that Australians have a freedom to engage in political discussion and protest can shape attitudes and promote tolerance through its social and political force. Like the First Amendment, it might act as a cultural symbol invoked outside the legal regime that has "persuasive power despite the legalities".[67] It has the scope to ameliorate the social pressures that drive individuals and groups towards social conformity. Of course, the catch is that if Australians are unaware of the implied freedom, and there is data to suggest that this is so,[68] the cultural impact of the freedom will be minimal.

In the next part of this article we examine the statutes and common law which impinge upon political protest. Some statutory offences may be constitutionally invalid under the implied freedom of political discussion because they permit no room for the peaceful exercise of political freedoms. Other statutes may restrict political protest yet be valid because they represent an appropriate and adapted pursuit of a legitimate purpose. Thus,

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67 Shiffrin, *The First Amendment, Democracy, and Romance* (Harvard University Press, Cambridge 1990) p88. See Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford University Press, Oxford 1986).

68 See Civics Expert Group, *Whereas the People: Civics and Citizenship Education* (AGPS, Canberra 1994).

laws which regulate political protest by imposing appropriate criminal sanctions for violent behaviour and serious property damage (or serious, imminent threat thereof) are unlikely to be in any danger of invalidity flowing from the implied freedom.[69] Laws which proscribe offensive conduct have the potential to interfere with political protest, but such restrictions may be justifiable in order to promote other public interests such as banning of the incitement of racial hatred. As our examination in the next part reveals, the present laws in Australia which impact upon political protest do not reach an appropriate balance between other legitimate public interests and the fundamental importance of political protest.

STATUTORY OFFENCES, COMMON LAW POWERS AND POLITICAL PROTEST

In both a legal and a practical sense, the police and other specialised peace-keeping agencies (such as the Australian Protective Services) play an important role in defining the scope and limits of political freedom in Australia. In every jurisdiction, the law equips these agencies with broad powers (both statutory and common law) to regulate and control political demonstrations. A recent parliamentary inquiry into the right to protest or demonstrate in the vicinity of Parliament House in Canberra identified more than twenty offences under Commonwealth and Australian Capital Territory statutes which potentially impact upon protest activity.[70] The inquiry identified several obscure and largely dormant offences which have the capacity to interfere with many forms of peaceful political protest, such as those prohibiting interference with political liberty and unlawful assembly. However, the focus of the inquiry on statutory offences and powers provides only a partial picture of the legal framework governing political protest, ignoring both the extensive common law powers used by the police to regulate and control demonstrations, and the important role of police discretion in managing political protest.[71]

This part of the article provides a critique, from a republican theoretical perspective, of the key statutory offences which may be used to police political demonstrations (that is,

69 See Submission by Walker in Aust, Parl, Joint Standing Committee on the National Capital and External Territories, *Inquiry into the Right to Legitimately Protest or Demonstrate on National Land and in the Parliamentary Zone in Particular - Submissions* Vol 1 (1995) p244.

70 The inquiry received many submissions highlighting the broad range of offences (both Commonwealth and Australian Capital Territory) which adversely impact on the freedom of expression and assembly and that within this framework the existing policy of "toleration" provided an unacceptable degree of discretion in the policing of political protest: see Aust, Parl, Joint Standing Committee on the National Capital and External Territories, *The Right to Protest or Demonstrate on National Land: Background Information* (1995) and *Submissions* Vols I and II (1995).

71 For an extensive examination of common law and police discretion: see Bronitt, "Peaceful Protest as a Threat to Public Order? (Or Who is Policing the Peacekeepers?)" in Aust, Parl, Joint Standing Committee on the National Capital and External Territories, *Inquiry into the Right to Legitimately Protest or Demonstrate on National Land and in the Parliamentary Zone in Particular - Submissions* Vol 1 (1995) p43.

interference with political liberty, unlawful assembly, offensive behaviour and conduct obstructing the police) and the common law powers to prevent a breach of the peace.[72]

"Political Offences": Interference with Political Liberty

Perhaps the most unusual law to directly impact upon the exercise of political freedom in Australia is contained in the *Crimes Act* 1914 (Cth):

> **Interfering with political liberty**
> 28. Any person who, by violence or by threats or intimidation of any kind, hinders or interferes with the free exercise or performance, by any other person, of any political right or duty, shall be guilty of an offence. Penalty: Imprisonment for 3 years.[73]

Section 28 is an extraordinary measure with an extraordinary penalty. Tucked away in the *Crimes Act,* the offence has never been prosecuted and thus has received scant attention from constitutional lawyers. Legislative history, in particular the parliamentary debates of the time, sheds some light on its purpose and context. The offence was enacted as part of a package of Commonwealth offences reflecting concerns about political instability in Australia at the outbreak of World War I. The offence is modelled on a provision of the *Commonwealth Electoral Act* 1918 (Cth), which makes it an offence to interfere with political rights or duties created specifically by the Act.[74]

During parliamentary debates on the Bill, the clause was presented as an uncontroversial measure designed to protect political freedom throughout Australia; in particular the offence would prevent individuals from obstructing Members of Parliament who were attending to their political duties.[75] During debates on the Bill, objections to the creation of such "political offences" were raised, including the fear that some forms of protest, such as interrupting a political meeting or picketing in furtherance of an industrial dispute, would now constitute serious offences under the Act. As Senator Keating concluded:

> It seems to me that the Bill is regarded as a sewer, into which all objectionable matters may run. We are now dealing with political

72 For a broad review of the laws which impinge on the freedoms of expression and assembly, see O'Neill & Handley, *Retreat From Injustice: Human Rights in Australian Law* Chs 11 and 13.

73 It appears that the offence is modelled on a provision in the Queensland Criminal Code: *Criminal Code Act* 1899 (Qld) s78; see also *Criminal Code Act* 1913 (WA) s75. Our research has not uncovered any prosecutions of these offences.

74 *Commonwealth Electoral Act* 1918 (Cth) s327(1) provides "A person shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election under this Act. Penalty: $1,000 or imprisonment for 6 months, or both."

75 See Aust, Senate, *Debates* (1914) Vol 75 at 352.

> offences, and we are treating them as if they are of no account. Yet there is a penalty of three years' imprisonment attaching to them.[76]

From a republican perspective, such an offence, although purporting to uphold political liberty, in fact has the potential to restrict severely the freedoms of expression and assembly. The offence applies irrespective of the blameworthiness of the individual; it is an offence of strict liability (requiring neither an intention nor recklessness on the part of the defendant) accompanied by a draconian maximum penalty of imprisonment for three years. By not defining "interference", the offence potentially outlaws any political protest which causes inconvenience to an individual who is exercising a "political right or duty", a term which is not defined in that Act.[77] The resort to amorphous concepts like "interference" brings the attendant risk that the offence may be used against individuals engaging in peaceful protest who inadvertently cause inconvenience to individuals who are attempting to exercise political rights or duties. A similar offence exists in the Australian Capital Territory prohibiting misbehaviour at public meetings, which is defined as behaving "in a manner that disrupts, or is likely to disrupt, the meeting".[78]

Republican theorists recognise that protecting the political process from violence and disorder is essential to dominion: "Maintaining public order and thereby preventing crimes from occurring can be an important means of promoting dominion".[79] At the same time, republican theory counsels restraint in the use of criminal sanctions through its application of a "presumption of parsimony", a presumption which favours less rather than more criminalisation.[80] Claims for criminalisation therefore must be carefully scrutinised.

Section 28 criminalises both violent and non-violent conduct. However, the law of assault already permits police intervention (including in the last resort arrest) against those individuals who use force or threats of violence to disrupt the political activity of others.[81] The law of assault is even broad enough to allow preventive police action, since it criminalises threats which cause others reasonably to apprehend the application of

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76 As above.

77 As Senator Keating noted at 353: "The clause is very vague, and should be expressed less vaguely, in order that the Courts and the community generally may be able to determine where an offence under it has been committed. Different persons may regard various things as interference with their political rights."

78 See *Crimes Act* 1900 (ACT) s482: penalty $1000 or imprisonment for 6 months. The police also have the power to remove such a person on the request of the person presiding over the meeting under s482(2).

79 Braithwaite & Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* p96.

80 At p87.

81 *Zanker v Vartzokas* (1988) 34 A Crim R 11. Cf, the draft Model Criminal Code for Australia proposes that *only* threats to kill or cause serious harm should be made criminal: see Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Non Fatal Offences Against the Person - Discussion Paper* (August 1996) p34.

imminent unlawful force.[82] But unlike s28, the legal requirements of reasonableness, imminence and mens rea operate as a significant check on the exercise of police power.[83]

The case for criminalising non-violent interference with political rights or duties is equally difficult to justify. In general terms, non-violence at political protests should be encouraged rather than criminalised. Restrictions should only be contemplated where the non-violent conduct prevents (not merely interferes with or disrupts) others from exercising their political rights and duties, and is accompanied by intention. Admittedly, the difference between prevention, interference and disruption is only a matter of degree. But these gradations are significant as they attempt to convey the high degree of tolerance toward non-violent protest which the law should require from its citizens. Section 28 fails to communicate this standard.

From a republican perspective, *extraordinary* laws which may be used to punish morally blameless conduct and target only specific types of parliamentary or electoral protest cannot be justified and therefore should be abolished.

Unlawful Assembly

Participation in a public assembly with intent to commit crime by open force or to carry out a common purpose (whether lawful or unlawful) which causes others to apprehend a breach of the peace is a common law misdemeanour.[84] Restrictions on public meetings and demonstrations which involve violence or threats of imminent violence are necessary restrictions on the freedom of assembly. However, in some Australian jurisdictions, laws have been enacted that are specifically directed to assemblies with "political purposes". This type of offence may, if applied to restrict peaceful protest, be susceptible to challenge under the implied freedom of political discussion. The *Unlawful Assemblies Ordinance* 1937 (ACT) defines "unlawful assembly" as a meeting or assembly of twenty or more persons within 90 metres of Parliament House:

> for the purpose of doing anything unlawful, or for the purpose or on the pretext of making known their grievances, or discussing public affairs, or considering, preparing or presenting any petition, memorial, complaint, remonstrance, declaration or other address to His Majesty, or to the

82 The checking of power is another republican presumption: Braithwaite & Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* pp87-88. Note however that both imminence and reasonableness are concepts which may be construed in a manner which inhibits rather than promotes dominion: see Pt 3.

83 For a republican analysis of strict and absolute liability, see Braithwaite & Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* pp99-100.

84 *R v O'Sullivan* (1948) 65 WN (NSW) 155 at 156 per Jordan CJ. Some jurisdictions have enacted a statutory offence of unlawful assembly: *Public Order (Protection of Persons and Property) Act* 1971 (Cth) s6; *Unlawful Assemblies Ordinance* 1937 (ACT) s3(2); *Unlawful Assemblies and Processions Act* 1958 (Vic) ss3 and 4; *Crimes Act* 1900 (NSW) s453C.

> Governor-General, or to both Houses or either House of the Parliament, or to any Minister or Officer of the Commonwealth, for the repeal or enactment of any law, or for the alteration of matters of State.[85]

Presence at such a meeting or assembly is an offence punishable by fine or imprisonment for six months.[86] The offence, which is modelled on a 19th century English law against sedition, restricts the content as well as the manner and form of public assemblies and meetings. Peaceful meetings or demonstrations which attract more than a handful of protesters calling for legislative change are outlawed. The offence is also one of strict liability and so does not require an intention to intimidate or otherwise harass any other person. Although rarely invoked,[87] the existence of these blanket restrictions on the ability to engage in core aspects of political discussion is inconsistent with the implied freedom of political discussion and Articles 19 and 21 of the ICCPR.[88]

Not all laws restricting public assemblies are susceptible to challenge on the grounds of constitutional invalidity or incompatibility with the ICCPR. For example, the *Peaceful Assembly Act* 1992 (Qld) offers an alternative model of regulation. The Act recognises the right of peaceful assembly and provides some immunity from prosecution for certain street offences which would otherwise restrict the exercise of the right. Under the Act the right of assembly is subject to restrictions (as are necessary and reasonable) in the interests of (i) public safety, (ii) public order, and (iii) the protection of the rights and freedoms of other persons. The police have the power to refuse approval to a proposed assembly on these grounds, but participating without approval, however, is not an offence: organisers and participants merely forfeit their limited immunity from prosecution for certain street offences. This type of regulation of protest - manner and form, rather than content - is less likely to offend the implied freedom of political discussion under the approach of the High Court in *Australian Capital Television* or be inconsistent with Articles 19 and 21 of the ICCPR.[89]

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85 *Unlawful Assemblies Ordinance* 1937 (ACT) s3(2).

86 A similarly worded provision has been enacted in Victoria: *Unlawful Assemblies and Processions Act* 1958 (Vic) ss3 and 4.

87 There have been no charges or convictions recorded in relation to this enactment since 1971: Community Law Reform Committee of the Australian Capital Territory, *Public Assemblies and Street Offences* (Issues Paper No 10, 1994) p10.

88 The potential constitutional invalidity of this provision has been raised by the Australian Capital Territory Community Law Reform Committee and the Commonwealth Attorney General's Department: Aust, Parl, Joint Standing Committee on the National Capital and External Territories, *Inquiry into the Right to Legitimately Protest or Demonstrate on National Land and in the Parliamentary Zone in Particular - Submissions*, Vol 1 (1995) p136 and *Additional Submissions* p354, respectively. On the potential conflict with the ICCPR, see Human Rights Commission, *Additional Submissions*, p334 and Community Law Reform Committee of the Australian Capital Territory, *Public Assemblies and Street Offences* (Issues Paper No 10, 1994) p10.

89 Indeed, the wording of the restrictions in the Act follows closely the language of Art 21 of the ICCPR.

Offensive Conduct Crimes: Police as Victim, Judge and Jury

A common ground for curtailing or restricting political protest is the need to prevent offense to others. Under international human rights law, restrictions on the freedoms of expression and assembly are permitted in order "to protect morals".[90] From a liberal theoretical perspective, permitting restrictions on fundamental rights for "moral protection" without any need to establish harm to others constitutes a serious weakness in current international human rights conventions.[91] Traditional liberal theorists, however, attempt to accommodate offensive behaviour within a category of legally recognised harm to others; causing offense to others' deeply held moral beliefs may be treated as a form of personal harm which can be legitimately restricted.[92] Republican theorists, by contrast, reject the need for the criminalisation of offensive language:

> Making unseemly or offensive language criminal is a clear threat to freedom of speech, providing a weapon for those who wish to use the power of the state to trample upon the dominion of others.[93]

In Australia, the laws prohibiting offensive conduct and language are not tied to causing harm to others or to property, and consequently can be deployed in a broad range of situations.[94] Empirical studies on the operation of offensive conduct laws in Australia and England demonstrate clearly that these laws impact disproportionately on minority groups, being used primarily to deal with individuals who swear at the police or otherwise demonstrate disrespect to authority.[95]

The potential for offensive conduct laws to curtail peaceful forms of political protest is apparent in the Australian Capital Territory decision of *Ball v McIntyre*.[96] As part of an anti-Vietnam protest the defendant, a university student, climbed on a statue of George V outside Parliament House and hung a placard that read "I will not fight in Vietnam". The defendant refused to remove the placard or climb down when requested to do so by the

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90 Restrictions to protect morals are permitted under the ICCPR: see Articles 19 (freedom of expression), 21 (freedom of assembly) and 22 (freedom of association).

91 See Feldman, *Civil Liberties and Human Rights in England and Wales* (Clarendon Press, Oxford 1993) p523.

92 See generally, Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (Oxford University Press, New York 1985).

93 See Braithwaite & Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* p95.

94 See, for example, *Crimes Act* 1900 (ACT) s546A; *Summary Offences Act* 1988 (NSW) ss4 and 4A. Offensive conduct is also an element of other crimes, such as aggravated trespass on Territory, Commonwealth or diplomatic premises: see *Public Order (Protection of Persons and Property) Act* 1971 (Cth) ss11(2)(b), 12(2)(b) and 20(2)(b).

95 For a survey of recent Australian research, see Walsh, "Offensive Language" in Eades (ed), *Language in Evidence* (University of New South Wales Press, Sydney 1995) and for United Kingdom research, see Brown & Ellis, *Policing Low-level Disorder: Police Use of Section 5 of the Public Order Act 1986* (HMSO, London 1994).

96 (1966) 9 FLR 237 (hereafter "*Ball*").

police. When he came down he was arrested, charged and convicted of behaving in an offensive manner in a public place contrary to s17(d) of the *Police Offences Ordinance* 1930-1961 (ACT).[97]

The charge against the defendant was constructed around the offence he had caused to the two police officers in attendance at the demonstration. The care with which the police constructed "the offence" in this case reveals much about the political sensitivity and divided community feeling concerning Australia's involvement in Vietnam. The police who arrested the defendant emphasised that neither the political nature of the demonstration nor the defendant's refusal to obey police instructions had caused them offence.[98] Rather the police alleged that it was the defendant's act of climbing on a public monument and hanging a placard (in effect, using it for a non-designated purpose) which had caused them offence.

In *Ball*, the crucial issue was whether the defendant's behaviour was "offensive", a term which is not defined in the legislation. In England, the courts consistently refused to define the elements of offensive or insulting conduct, leaving it to the "common sense" judgment of the tribunal of fact.[99] The Australian Capital Territory Supreme Court by contrast formulated a definition which attempts to delineate offensive conduct from other types of conduct which cause emotional discomfort or annoyance. Kerr J defined offensive behaviour as behaviour "calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person".[100] The most significant aspect of this formulation is the application of an objective standard for offensiveness - the alternate subjective standard would have the undesirable effect of creating a "hecklers' charter" where the scope of freedom of expression is determined solely by reference to the hostile "feelings" or other emotional responses (however unreasonable) experienced by the audience.[101] Also, by applying an objective test, the political context of the defendant's behaviour can be introduced as a relevant factor bearing on the issue. As Kerr J acknowledged,

> The average man, the reasonable man, being present on such an occasion, would readily see that the defendant was engaged in a political demonstration. He would doubtless think that climbing on the pedestal

97 The offence is now contained in *Crimes Act* 1900 (ACT) s546A.

98 At trial, a police constable testified that to a minor degree the defendant's disobedience had offended him. Other persons present at the demonstration, including journalists and university students, gave evidence that they did not find the defendant's conduct offensive: Kerr J discussed this evidence in *Ball* at 238.

99 *Brutus v Cozens* (1972) 56 Cr App R 799; *Director of Public Prosecutions v Orum* [1983] 3 All ER 449; *R v Ball* (1990) 90 Cr App R 378; *Director of Public Prosecutions v Clarke and Others* (1992) 94 Cr App R 359.

100 *Ball* at 243.

101 The dangers of a "hecklers' charter" are particularly apparent in relation to the powers to prevent a breach of the peace: see discussion below in text accompanying fn 112.

> and placing the placard on the statue was rather foolish and a misguided method of political protest, that it offended against the canons of good taste, that it was in that sense improper conduct, but I do not believe that the reasonable man seeing such conduct to be truly political conduct, would have his feelings wounded or anger, resentment, disgust or outrage roused.[102]

However, the difficulty remains that objective standards in law, though purportedly neutral, may operate in a highly discretionary and discriminatory manner, reinforcing the standards of propriety and good order defined by the police and the judiciary.[103] Indeed, the courts depend heavily on police evidence in determining the reactions of the "reasonable person".[104] But as Kerr J acknowledged, the reasonable person must be attributed with sufficient maturity to tolerate spontaneous political protests:

> I recognize that different minds may well come to different conclusions as to the reaction of the reasonable man in situations involving attitudes and beliefs and values in the community, but for my part I believe that a so-called reasonable man is reasonably tolerant and understanding, and reasonably contemporary in his reactions.[105]

Provided that both the police and the courts attribute to the reasonable person a strong commitment to political freedom and toleration, the objective standard for offensive behaviour offers some measure of legal protection for those individuals participating in political demonstrations. Protection for the offender could be further enhanced by requiring mens rea (ie, an intention to arouse feelings of anger, resentment, disgust or outrage) - an approach which is now adopted for the equivalent offence in England.[106] The adoption of any broader interpretation of offensive conduct in Australia may be inconsistent with the implied freedom of political discussion in the Constitution.[107]

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102 *Ball* at 244.

103 See generally, Lacey, Wells & Meure, *Reconstructing Criminal Law* (Weidenfeld & Nicolson, London 1990) Ch 2. Empirical research undertaken in Australia suggests that in two thirds of prosecutions for offensive language, the police were the victims, that is, the insulting language was directed to the police, or towards the police and another person: Egger & Findlay, "The Politics of Police Discretion" in Findlay & Hogg (eds), *Understanding Crime and Criminal Justice* (Law Book Co, Sydney 1988) p218.

104 This link is often explicitly drawn by the courts. In *Ball*, the police claimed not to be offended by the political nature of the action, or the insult to a long dead monarch. In this respect, Kerr J held that "the sergeant's approach is that of a reasonable man": at 240.

105 At 245.

106 See *Public Order Act* 1986 (UK) s6(4). Although not expressly required, Australian courts have interpolated a requirement of mens rea, especially where the offence carries a penalty of imprisonment: see *Jeffs v Graham* (1987) 8 NSWLR 292.

107 See above discussion.

The present law confers limited protection to offensive conduct which occurs in the context of communicating political ideas. As our analysis reveals, offensive conduct laws have the potential to interfere with many forms of political protest, particularly where individuals seek to express unpopular minority views in public. Moreover, these laws, which are neither clearly defined nor consistently applied, create a state of unpredictability that, in turn, prevents the whole community from sharing "common knowledge" about their rights and the limits of political freedom. Republican theory requires radical revision of these laws - it requires the legislature, the courts and the police to adopt an alternate interpretive strategy in which offensive conduct laws are both constructed and applied in a manner which promotes rather than restricts political freedom.

Breach of the Peace: A Threat to Peaceful Protest?

Breach of the peace is not an offence per se - it is merely the criterion which justifies the use of broad powers ("preventive powers") to restore public order.[108] Although occupying a central place in public order law, there is still uncertainty as to its precise meaning and scope. With its open-ended definitions and powers, breach of the peace confers upon the police a flexible "on the spot" legal resource for dealing with new threats to public order.[109] The flexibility of the common law is attractive to the police and there is evidence that greater use is being made of preventive common law powers to control public disorder.[110]

From a human rights perspective, the uncertainty, breadth and lack of transparency surrounding the use of the preventive powers poses a significant threat to the right to engage in peaceful political protest.[111] There has been little reform of preventive powers and that which has occurred has merely supplemented, rather than codified, existing common law powers.[112]

The uncertainty in the present law is compounded by the lack of Australian authority on the definition of breach of the peace. The definition of breach of the peace which has been

108 See generally, Williams, *Keeping the Peace* (Hutchinson, London 1967). Williams, "Arrest for Breach of the Peace" [1954] *Crim LR* 578; Flick, *Civil Liberties in Australia* (Law Book Co, Sydney 1981); Thornton, *Public Order Law: Including the Public Order Act 1986* (Financial Training, London 1987) Ch 5.

109 In this respect, the judicial approach resonates with the legal approach to obscenity; judges are elusive in drawing a definition, content to rely on a "know it when I see it" approach: see *Jacobellis v Ohio* (1964) 387 US 184 at 197 per Stewart J.

110 See Community Law Reform Committee of the Australian Capital Territory, *Public Assemblies and Street Offences* (Issues Paper No 10, 1994) Appendix 1: Comments by Australian Federal Police p41.

111 See Human Rights Commission, *The Right of Peaceful Assembly in the ACT* (Occasional Paper No 8, 1985).

112 The concept of "breach of the peace" has been built into a series of statutory preventive powers in the Australian Capital Territory designed to facilitate entry to private premises in emergency situations: see *Crimes Act* 1900 (ACT) ss349A-C.

widely accepted in Australia relies on the following dicta from the English decision of *R v Howell*:[113]

> There is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.[114]

In formulating this definition, the English Court of Appeal made no attempt to justify it by reference to authority:

> [t]he older cases are of considerable interest but they are not a sure guide to what the term is understood to mean today, since keeping the peace in this country in the latter half of the 20th century presents formidable problems which bear upon the evolving process of the development of this branch of the common law.[115]

The particular social forces at work in shaping English public order law in the mid-1980s, namely a spate of inner-city riots and the violent clashes arising out of the Miners' Strike, were not paralleled in Australia. Notwithstanding this significant variation in local conditions, the definition of breach of the peace in *Howell* has been accepted as a correct statement of the common law in Australia.[116] The Australian courts have accepted the *Howell* definition notwithstanding its potential to stop protest activities which fall short of causing actual harm - under the above definition it is sufficient if someone is put in fear of harm to person or to property in the presence of the owner. The extension of breach of the peace to include harm to "property" is perhaps the most controversial aspect of the definition - a significant extension of the law which places harm to a person's property on the same level as personal harm.[117]

Breach of the Peace: Hostile Audience and Hecklers' Charter?

As the definition of breach of the peace encompasses apprehended as well as actual harm to persons or property, the police have broad powers to intervene in demonstrations before disorder has occurred. Not only does the law confer a range of preventive powers, but police action may be directed to individuals who are engaging in conduct which, though lawful and peaceful, is likely to provoke others to do harm to persons or property.

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113 [1981] 3 WLR 501 (hereafter "*Howell*").

114 At 509 per Watkins LJ.

115 At 508.

116 See *Innes v Weate* [1984] Tas R 14; *Panos v Hayes* (1987) 44 SASR 148.

117 This devaluation of political liberty, when compared with economic interests, is apparent in the *Public Order Act* 1986 (UK) ss12(1)(a) and 14(1)(a) which permit police to stop or impose conditions in demonstrations which "may result in serious public disorder, serious damage to property or serious disruption to the life of the community".

The law governing breach of the peace has the potential to operate as a "hecklers' charter". In both England and Australia, the courts have authorised the use of preventive powers against the lawful and peaceful conduct of protesters on the ground that their conduct is likely to provoke a violent response from an opposing group. The problem of the "hostile audience", and the law's potential to operate as a hecklers' charter, is apparent in *Jordan v Burgoyne*.[118] In this case, a speaker for the National Front (a neo-NAZI political party) addressed a large rally in Trafalgar Square, London. In the course of his speech, he directed racially inflammatory remarks ("Hitler was right, etc") at a small group within the audience who were attempting to disrupt his speech. The group of hecklers was comprised, in the words of the court, "Jews, CND [Campaign For Nuclear Disarmament] supporters and communists". The Divisional Court of the Queen's Bench had to determine whether the speaker's conduct constituted offensive conduct likely to provoke a breach of the peace contrary to s5 of the *Public Order Act* 1936 (UK). Delivering the judgment of the court, Lord Parker CJ held that the test of whether conduct is likely to provoke a breach of the peace is a subjective one:

> [T]here is no room here for any test as to whether any member of the audience is a reasonable man or ordinary citizen ... [the defendant] 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.[119]

This decision predates the enactment of racial vilification laws in the United Kingdom.[120] In policy terms, the police action against the defendant in *Jordan* is a justifiable restriction on the freedoms of expression and assembly.[121] However, this application of the well-known common law principle of tort and criminal law that defendants must "take their victims as they find them" has serious ramifications for those individuals who wish to express political ideas to a potentially hostile audience. The preferable republican model for breach of the peace would interpose a requirement that the likelihood of violence must be determined objectively, framing the issue in terms of whether a reasonable or ordinary person would be provoked to violence. There is some Australian dicta supporting an objective test, but the matter has not been fully argued before an appellate court.[122]

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118 [1963] 2 WLR 1045 (hereafter "*Jordan*").

119 At 1047-1048.

120 Now see *Public Order Act* 1936 (UK) s5A, as amended by *Race Relations Act* 1976 (UK) s70.

121 Indeed, Art 20(e) of the ICCPR provides that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

122 *The Commissioner of Police for the State of Tasmania; ex parte Nth Broken Hill Ltd* (1992) 61 A Crim R 390. Wright J at 396 held that the issue was whether actions of the protesters "should give rise to a reasonable apprehension of a breach of the peace on the part of reasonable men and women".

The potential for breach of the peace laws to operate as a "hecklers' charter" is evident in the Australian decision of *Forbutt v Blake*.[123] The defendants, who were members of the organisation "Women Against Rape", attempted to participate in the Canberra ANZAC parade. The group, dressed in black and carrying placards "Soldiers are phallic murderers", "Patriots Kill" and "Heroes Rape", assembled to march about 500 metres (5 or 6 minutes' walk) from the Australian War Memorial. The police stopped them marching on the ground that their behaviour was likely to provoke a breach of the peace. When the group refused to disperse, the women were arrested, charged and convicted with obstructing a police member in the execution of his duty contrary to s64 of the *Australian Federal Police Act* 1979 (Cth).

The use of the obstruction charge by the police provided the Australian Capital Territory Supreme Court with an opportunity to examine the common law powers to prevent a breach of the peace. Connor ACJ noted that the sole basis for the police intervention in this case "was that some members of the public might be provoked into committing acts against the group which would constitute a breach or breaches of the peace".[124] The issue raised at the appeal was whether the police had the power to stop lawful and peaceful conduct merely because it was likely to provoke violence by others. The Court was referred to *Duncan v Jones*,[125] an English decision which had upheld convictions for obstructing a police officer where protesters had refused to comply with police orders in a similar situation. However, Connor ACJ declined to follow this English line of authority, ruling that the charge of obstructing a police officer in the execution of his duty was not available in this particular situation. By drawing a distinction between those powers which derived from the common law preventive jurisdiction (breach of the peace) and those which are conferred by statute (obstructing the police), he concluded that the police "in executing their duty to keep the peace, were restricted to the means recognised in that jurisdiction".[126] These concerns about conceptual purity were subsidiary to the dangers inherent in any alternative construction of the offence; Connor ACJ acknowledged that adopting a broad interpretation of obstruction could lead to "quite extraordinary results", including that Members of Parliament could be forbidden to address hostile audiences during election campaigns. Having regard to the seriousness of the offence of obstruction, Connor ACJ concluded:

> I am quite unable to attribute an intention to the legislature to expose a person to such a penalty for disobeying a police order to cease a lawful

123 [1981] 51 FLR 465 (hereafter "*Forbutt*").

124 At 469.

125 [1936] 1 KB 218. As Galligan, "Preserving Public Protest: The Legal Approach" in Gostin (ed), *Civil Liberties in Conflict* at pp54-55 observes, "[t]he trouble with this approach is that it gives insufficient importance to the freedom of protest; if it is vulnerable to the disruptive tactics of opposing groups, that freedom is of slight weight."

126 *Forbutt* at 475.

> activity in circumstances *where the only relevant police duty is to prevent a breach of the peace by other citizens against him.* [127]

The decision provides only limited protection for protesters who are engaging in lawful and peaceful protest. Although disobedience of the police in such situations may not constitute the offence of obstruction, a demonstrator who is engaged in a lawful and peaceful protest may still be liable to other types of intervention, including arrest, to prevent a breach of the peace.[128] Another unresolved question is whether a charge of obstruction is available where the preventive powers are derived from statute. For example, in the Australian Capital Territory the charge is probably available to deal with instances of obstruction where the police are exercising their statutory powers to enter and remain on premises to prevent the commission of an offence, to prevent a breach of the peace, or to protect life or property.[129] It is unclear whether a person who obstructs or hinders a police member who is exercising statutory rather than common law preventive powers can rely on *Forbutt* and avoid liability for obstruction.

The interpretive strategy employed in *Forbutt* is certainly imaginative, but it hardly provides a secure legal foothold for the freedoms of expression and assembly (a more secure foothold might be provided by modification of the common law through the operation of the implied freedom of political discussion). Significantly, Connor ACJ attempted to further buttress his decision by referring to the following dicta from a 19th century Irish decision:

> If danger arises from the exercise of lawful rights resulting in a breach of the peace, the remedy is the presence of sufficient force to prevent the result, not the legal condemnation of those who exercise those rights.[130]

This cautionary note against prior restraint resonates with an earlier English decision, *Beatty v Gillbanks*,[131] where it was held that a lawful assembly is not converted into an unlawful assembly merely by the presence of hostile elements. Presumably, the solution for the police in dealing with protesters facing hostile and disruptive elements is the

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127 At 475. Emphasis added.

128 Connor ACJ contemplated this possibility (at 476) observing, strictly obiter, that the most the police could legally have done was to arrest the women (presumably because their conduct threatened a breach of the peace) in order to bring them before a court to be bound over to keep the peace.

129 See *Crimes Act* 1900 (ACT) ss349A-C.

130 *Forbutt* at 475, citing *R v Londonderry Justices* (1891) 28 LR Ir 440 at 450 per O'Brien J.

131 (1882) 9 QBD 308. But *Beatty v Gillbanks* is regarded as a "dead letter" in English law: see Lacey, Wells & Meure, *Reconstructing Criminal Law* p114. The values underlying the decision have been lost and the decision has been distinguished in later cases: see *Wise v Dunning* [1902] 1 KB 167, where the court held that individuals may be arrested and bound over where their lawful and peaceful conduct is likely to provoke violence from others.

presence of sufficient numbers to ensure that the individuals threatening violence can be contained. Although this is a desirable outcome, in operational terms such a solution may place intolerable financial and human resource burdens on the police.[132]

The simple strategy proposed by Connor ACJ is not only impractical, it also fails at a more fundamental level. The principle in *Beatty v Gillbanks* offers no guidance to the police or the courts in situations where *both* groups of protestors legitimately claim to be exercising lawful rights. Also, the principle is difficult, if not impossible, to apply where the opposing groups are comprised of both peaceful and hostile elements. The lack of guidance on how the police and courts should prioritise lawful rights in cases of conflict is apparent in a recent decision reviewing the legality of police action at a picket line in Burnie, Tasmania. In *North Broken Hill*,[133] the Supreme Court directed the police to remove the picket line on the ground that workers, who were exercising their lawful right to work, were being obstructed by picketers. Wright J referred to *Forbutt* (and the old Irish dicta) discussed above. In his view, it made no difference that the picketers were acting in a peaceful and lawful manner - obstruction involving face to face confrontation is likely to provoke violence on the part of the workers who were exercising their lawful right to work. In this case, the right to work trumped the picketers' freedoms of expression, assembly and association.[134] Significantly, Wright J did not refer to the freedoms of expression, assembly or association, noting that "persons picketing in furtherance of an industrial dispute have no special rights in the eyes of the law".[135] It is difficult to say whether Wright J would have altered his opinion of the common law in light of the High Court's recognition of an implied constitutional freedom of political discussion later that year. What is remarkable is that three fundamental human rights, namely the freedoms of expression, assembly and association, can be "lost" within the interstices of the common law. To ensure that this does not occur, the law ought to provide explicit guidance (both to the police and the courts) as to how the exercise of *competing* lawful rights should be accommodated and how those rights should be prioritised.

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132 However, in *North Broken Hill* (1992) 61 A Crim R 390, Wright J held that neither the industrial origins of the dispute nor the lack of sufficient resources were legitimate reasons for declining to take steps to prevent a threatened breach of the peace. Wright J at 398 considered the argument that police lacked adequate resources to be a "truly frightening proposition".

133 (1992) 61 A Crim R 390.

134 The decision, though controversial, does represent the present legal position with regard to picketing. It has been suggested that Australian law effectively prohibits picketing and consequently denies individuals the rights protected under the ICCPR: see Hale, "Peaceful Picketing in Australia: The Failure to Guarantee a Basic Human Right" in Human Rights Commission, *The Right Of Peaceful Protest Seminar* (Occasional Paper No 14, 1986) p354.

135 (1992) 61 A Crim R 390 at 395.

Breach of the Peace: Reasonable Preventive Powers

Under the common law every person has the power to arrest without warrant anyone who is committing or is threatening to commit a breach of the peace.[136] A person who is arrested may be brought before a court and required to enter into a recognisance, with or without sureties, to "keep the peace and be of good behaviour".[137] The courts, however, stress that such formal intervention (involving arrest, charge or binding-over) should be used only as a measure of last resort.[138] By encouraging restraint, the courts compel the police to resort to informal powers such as persuasion.[139] Backed ultimately by the threat of formal intervention, the common law has conferred on the police informal "move on" powers which are broader and more flexible that their statutory counterparts. Indeed, the statutory "move on" power in the Australian Capital Territory provides that the power to direct a person to leave the vicinity applies *only* where the police officer has "reasonable grounds for believing that a person in a public place has engaged, or is likely to engage, in violent conduct in that place".[140]

Where persuasion or other informal action fails, the police have an extensive range of formal powers to prevent a breach of the peace. By carving out immunities for civil and criminal actions for assault, trespass to persons or property and unlawful imprisonment, the common law has developed a range of transitory preventive measures which can be invoked on both public or private property.[141] These measures include dispersal, confiscation of property from protesters (such as loudhailers), even restricting participation

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136 *R v Howell* [1982] QB 416 at 427 (English Court of Appeal).

137 A person can be bound over without having committed an offence. As Connor ACJ pointed out in *Forbutt* at 476:

> a binding over order may be available against a person who has not committed any offence in circumstances where the consequence of his lawful conduct is likely to produce a breach of the peace by other persons.

Binding over powers have been placed on a statutory footing in Australia. The common law residual powers to bind over in cases where there is no conviction (though technically extant) are rarely used by Australian courts.

138 See *Innes v Weate* [1984] Tas R 14 at 22; *Nicholson v Avon* [1991] 1 VR 212 at 223; *North Broken Hill* at 396.

139 A preference for "persuasion" as a means of encouraging picketers to move away was highlighted in *North Broken Hill* at 397.

140 *Police Offences Act* 1930 (ACT) s35, as amended by *Police Offences (Amendment) Act* 1989 (ACT). To accommodate concerns about the potential interference with the freedoms of expression and assembly, the powers do not apply to individuals who are (a) picketing a place of employment; (b) demonstrating or protesting about a particular matter; or (c) speaking, bearing or otherwise identifying with a banner, placard or sign or otherwise behaving in a way that is apparently intended to publicise the person's view about a particular matter: s35(3).

141 *Humphries v Connor* (1864) 17 1 CLR 1; *O'Kelly v Harvey* (1883) 15 Cox CC 435; *Thomas v Sawkin* [1935] 2 KB 249; *Albert v Lavin* [1981] 3 WLR 955; *Minot v McKay (Police)* [1987] BCL 722.

on industrial picket-lines.[142] In Australia, there is authority which suggests that the police not only have the power but are under a duty to deploy appropriate measures to prevent breaches of the peace which occur in their presence.[143] The list of measures available to prevent a breach of the peace is not closed. Indeed, the House of Lords has held that every person in whose presence a breach of the peace occurs or is reasonably apprehended has the right to take "reasonable steps" to prevent an actual or threatened breach of the peace.[144] Within this broad and open-ended framework, the only limit upon the further development of preventive measures is the ingenuity and imagination of the police and the judicial acceptance that the steps taken are "reasonable" in the circumstances.

The judicial reluctance to sanction coercive measures against protestors, except as a matter of last resort, satisfies the republican presumption of parsimony; however, the use of such informal powers conflicts with the other republican presumption which requires the checking of power. Protestors are rarely in a position to challenge preventive action (unlike arrest) because of its lack of formality and visibility.[145] Within the discretionary framework of preventive powers, police decision-making lacks transparency.[146] There is also a danger that police and prosecutors will regard the act of intervention (eg deprivation of liberty or property confiscation) as sufficient punishment for the protester's alleged misconduct and not proceed with the matter further - the process has become the punishment, rather than the usual course of punishment following an open and accountable process which has first determined the person's guilt. Such prosecution policies, whether adopted formally or informally, inevitably raise concern about possible violations of human rights.[147]

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142 *Piddington v Bates* [1961] 1 WLR 162 (power to limit number of picketers); *Moss v McLachlan* [1984] IRLR 76 (power to use road blocks to prevent "flying pickets" participating in industrial action). See Handley, "Preventive Powers and NUM Pickets" (1986) 10 *Crim LJ* 93.

143 *North Broken Hill* at 398.

144 *Albert v Lavin* [1981] 3 WLR 955 at 958 per Lord Diplock.

145 Notably, when police resort to preventive powers which do not involve arrest, protesters are deprived of the normal procedural safeguards such as informing the person of the reasons for the arrest, the right to legal counsel, or bail: Community Law Reform Committee of the Australian Capital Territory, *Public Assemblies and Street Offences* (Issues Paper No 10, 1994) p28.

146 See Williams, "Criminal Law and Administrative Law: Problems of Procedure and Reasonableness" in Smith (ed), *Criminal Law: Essays in Honour of JC Smith* (Butterworths, London 1987).

147 See Human Rights Commission, *Civil Disobedience and the Use of Arrest as Punishment: Some Human Rights Issues* (1986). The report criticised the Commonwealth DPP Guidelines for Civil Disobedience which stated that arresting a person engaged in civil disobedience may "provide a sufficient penalty for the conduct in question" because of the deprivation of liberty caused by arrest. The Commission found that this use of arrest as an extra-judicial punishment is incompatible with the guarantee against arbitrary arrest and detention contained in the ICCPR.

While policies of restraint are clearly desirable from a republican perspective, it is essential that the limits of police power are both known and knowable, and that this power is exercised within a framework that provides adequate checks. The common law is deficient in this regard and should be replaced (not merely augmented) with statutory powers governing intervention to prevent disorder, powers which define the circumstances where intervention is permitted and accord adequate protection to freedoms of expression, assembly and association.

A REPUBLICAN REGULATORY STRATEGY FOR POLITICAL PROTEST

Law Enforcement Culture: Police Discretion and Independence

The complex web of criminal laws and public order powers which impinge upon political protest is coupled with a framework of discretionary powers relating to police action with which the courts are notoriously reluctant to interfere.[148] The lack of an effective framework for judicial review is apparent in those few cases where litigants have sought legal orders to restrain or compel police action.

Administrative law provides some means of checking police action through its application of "reasonableness" standards. In the context of breach of the peace, the courts have imposed two requirements of reasonableness: first, that the preventive action may only be deployed where police have reasonable grounds to believe that a breach of the peace is "imminent" and, secondly, that the preventive action must, as well as being necessary, be reasonable in the circumstances. In *Forbutt*, the Supreme Court held that "a mere statement by a police constable that he anticipated a breach of the peace is not enough to justify his taking action to prevent it: the facts must be such that he could reasonably anticipate not a remote, but a real, possibility of a breach of the peace".[149] The legal recognition that police action is a "conditional authority" offers some measure of protection to the freedoms of expression and assembly.[150] This approach permits protesters or any other person affected by the police action to seek its review on these grounds and permits the courts to make appropriate orders.

In practice, however, it proves extremely difficult for individuals to challenge the reasonableness of the assessment by the police that a breach of the peace is "imminent". As imminence is treated simply as a question of fact, the courts are reluctant to interfere with the assessment of the police who were "on the spot". In assessing whether there are

148 The uncertain relationship between administrative law and the criminal law has been explored by Williams, "Criminal Law and Administrative Law: Problems of Procedure and Reasonableness" in Smith (ed), *Criminal Law: Essays in Honour of JC Smith* and Galligan, "Regulating Pre-Trial Decision" in Lacey (ed), *A Reader On Criminal Justice* (Oxford University Press, Oxford 1994).

149 *Forbutt* at 469, referring to *Piddington v Bates* [1961] 1 WLR 162.

150 Williams, "Criminal Law and Administrative Law: Problems of Procedure and Reasonableness" in Smith (ed), *Criminal Law: Essays in Honour of JC Smith* p177.

reasonable grounds for a belief that a breach of the peace is imminent, the police are not limited to their first-hand knowledge of the situation. For example, in *Forbutt*, the court held that it would be reasonable for the police to rely on external sources (in this case the fears of the ANZAC parade organisers and media reports) in order to determine the imminence of a breach of the peace. Paradoxically, it was the media report of the protesters' own fears of a hostile reception which provided the evidence upon which the constable formed the belief that a breach of the peace was imminent and which ultimately led to their arrest.[151] By determining imminence in this way, the law is again allowing the potential hostility of opposing groups to define the limits of the freedoms of expression and assembly.

If applied in an objective way, the concept of imminence does have the potential to prevent unnecessary restrictions upon the freedoms of speech, assembly and association. In the United States, where freedom of speech and assembly are constitutionally protected by the First Amendment to the Constitution, the test of imminence restricts the scope for prior restraint of the freedoms of expression and assembly. The Supreme Court has held that abridgment of these constitutional rights is only justified where there is a "clear and present danger" of harm.[152] By contrast to its American cousin, the Anglo-Australian concept of imminence is a very poor relation. As the Australian Capital Territory Supreme Court in *Forbutt* observed, "[i]mminence must be a relative concept".[153] The relativity of imminence allows the police considerable latitude in determining whether a breach of the peace is likely to occur. The implied freedom of political discussion might be applied, in a case involving a restriction upon political discussion, to achieve a common law concept of imminence much closer to that developed in the United States.

Another deficiency of the present law is that the exercise of preventive powers occurs within a legal framework which discourages effective judicial supervision of the police. When called upon to review the legality of police action or policy, the courts reaffirm the constitutional independence of the police from the Crown.[154] The police are accountable to the law, and the law alone. An unfortunate side-effect of the judicial deference to police independence is that "the political, organisational and industrial determinants of discretion

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151 The Court noted that the police constable had read an article in the *Canberra Times* in which a spokeswoman for Women Against Rape expressed fear that the protest might evoke a response "so hostile that we'll get our heads bashed in": *Forbutt* at 470.

152 See for example *Whitney v California* 274 US 357 (1927), discussed in Gaze & Jones, *Law, Liberty and Australian Democracy* pp171-172.

153 *Forbutt* at 471.

154 The constitutional importance of police independence is affirmed in *R v Metropolitan Police Commissioner; ex parte Blackburn* [1968] 2 WLR 893 at 902-903 per Denning MR; followed in *R v Metropolitan Police Commissioner; ex parte Blackburn (No 3)* [1973] 2 WLR 43. This principle emerged from an earlier line of authority establishing, for the purpose of tort law, that the police are not servants of the Crown: *AG (NSW) v Perpetual Trustee* [1955] AC 457.

are not recognised, articulated or regulated".[155] Even in Australia, where the legal culture exhibits greater tolerance toward the judicial review of official action, the courts have held that policies of selective law enforcement at demonstrations (particularly decisions relating to arrest or prosecution) are not readily amenable to judicial review.[156] The only exception is where police action (or inaction) can be characterised as a complete dereliction of their duty to enforce the law or to preserve the peace.[157]

Police independence, though much revered, is not an aspect of the separation of powers doctrine and consequently Parliament has the power to impose accountability provisions. Indeed, in most jurisdictions there is legislation which confers upon the relevant Minister the power to direct and guide the police.[158] In practice, this power to direct the police, whether vested in Parliament, the Minister or some other designated body, is exercised with considerable restraint. Republican theory would make greater use of the democratic process in order to define explicitly the policy goals for the criminal justice system.[159] Imposing restraints on police action through external policies is consistent with the republican presumption in favour of the checking of power. However, according to republican theory, policies that remove rather than guide police discretion, such as mandatory arrest or prosecution policies, must be avoided since the principle of parsimony counsels in favour of discretionary policing.[160]

Human Rights and the Republican Police Mandate

Republican theory emphasises the important role that non-legal and social norms play in the promotion of dominion. Police independence is significant in organisational and cultural terms. There is little research on how the doctrine of independence translates

155 Egger & Findlay, "The Politics of Police Discretion" in Findlay & Hogg (eds), *Understanding Crime and Criminal Justice* p211.

156 See *Wright v McQualter* (1970) 17 FLR 305 (Australian Capital Territory Supreme Court) where Kerr J held at 318 that the policy of selective enforcement is "a matter within police discretion and is hardly likely to raise a legal issue in the courts". Although the court accepted that policies of selective enforcement may be discriminatory, this was a problem for "other parts of the structure of democratic institutions in society" to resolve, namely, the legislature and not the courts: at 320.

157 Although an order of mandamus is available, the courts are reluctant to grant it where the failure of the police to intervene resulted from a misapprehension of the law and not a deliberate flouting of the law: see *North Broken Hill* at 397.

158 See generally Bersten, "Police and Politics in Australia" (1990) 14 *Crim LJ* 302.

159 Discretion within the criminal justice system should be subjected to greater democratic supervision and accountability through the use of "guidelines" enacted by the legislature: see Galligan, "Regulating Pre-Trial Decisions" in Lacey (ed), *A Reader on Criminal Justice.*

160 Braithwaite & Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* p111. In England, to promote consistency in the application of public order laws the Crown Prosecution Service and the police have recently adopted guidelines (called Charging Standards): see "Editorial" [1996] *Crim LR* 534.

precisely into an hierarchical structure where discipline is enforced by orders and targets imposed from above.[161] Police educators have themselves doubted the relevance and value of a framework of accountability which emphasises independence rather than *inter-dependence*.[162] In their view, the police mandate, which should be made explicit in police education policy documents, is grounded in democratic theory: "Police power in a democracy is nearly always derived from the public they serve."[163] A republican policing mandate must be developed which requires the police not only to protect fundamental democratic freedoms but also to assume a positive role in promoting such freedoms.[164] As our analysis reveals, the police play an important role in creating the *spaces*, both in a legal and physical sense, in which fundamental political freedoms may be exercised and promoting opportunities for individuals to enjoy "equality-of-liberty".

There is scope for this transformation to occur within the framework of the present law through the explicit incorporation of human rights standards into decision-making processes within the police service. In recent years, Australian law has recognised that the judicial review of administrative decisions has an international law dimension. A decision maker must give realistic and genuine consideration to the merits of a person's case, including relevant issues (such as compliance with international law) raised in argument by any person affected or aggrieved by the decision.[165] Even in cases where the treaty or convention is not raised by the affected or aggrieved person, the law may require the consideration of such arguments by the decision-maker. In *Minister of State for Immigration and Ethnic Affairs v Teoh*[166] the High Court held that provisions of international law which have been ratified by Australia (though not necessarily incorporated into domestic law) can be made relevant to the administrative decision-making process through the doctrine of "legitimate expectation".[167] The majority went on

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161 Bradley, "Policing" in Hazlehurst (ed), *Crime and Justice* (Law Book Company, Sydney 1996) p359.

162 Pitman & Barrow, "Queensland Police Education Policy Development (1989-1993) - The Untold Story" (1995) 6 *Criminology Aust* 15 at 16.

163 At 18.

164 There is scope to introduce republican objectives and presumptions into the statements of values, missions and corporate objectives of the police: see Braithwaite, "Good and Bad Police Services and How to Pick Them" in Moir & Eijkman (eds), *Policing Australia: Old Issues, New Perspectives* (Macmillan, South Melbourne 1992) Ch 1.

165 *Hindi v Minister of Immigration and Ethnic Affairs* (1988) 91 ALR 586, 597. The English courts, rather than use legitimate expectations, have applied the *Wednesbury* test of "reasonableness" and the doctrine of "irrationality" to decisions which infringe human rights: see *Ex parte Smith* [1996] 1 All ER 257; see case comment in [1996] *Pub L* 590.

166 (1995) 183 CLR 273 (hereafter "*Teoh*"). The majority consisted of Mason CJ, Deane, Toohey and Gaudron JJ. McHugh J dissented.

167 In *Teoh* at 365 Mason CJ and Deane J characterised the doctrine thus:

> [I]f a decision maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the person affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.

to recognise that ratification of a convention is an adequate foundation for a legitimate expectation and held that the decision-maker in this case had denied procedural fairness by failing to give notice to the person affected that the proposed decision would be inconsistent with the terms of the Convention on the Rights of the Child and providing an opportunity to present a case against such a course of action. The decision surprised and alarmed the Federal Government, prompting remedial action in the form of a Bill, which has now lapsed, to reverse the decision with retrospective effect.[168]

The implications of *Teoh* are far-reaching and it has been suggested that it may provide a new ground for reviewing police decisions at demonstrations based on the legitimate expectations arising from the provisions of the ICCPR which protect freedoms of expression, assembly and association.[169] According to this view, it is not necessary for the protesters to have an actual expectation that the police would comply with ICCPR provisions; all that would be required is that the existence of the expectation be reasonable in the circumstances.[170]

Republican models of regulation recognise the importance of non-legal standards, both ethical and cultural, in realising "equality-of-liberty" opportunities. This focus on non-legal regulation has the greatest potential to achieve change within police culture, an organisational culture which has been effective in resisting and subverting unwelcome law reform initiatives.[171] Culture should not be conceived as a "rule book" directing police action; rather it should be viewed as a resource which enables action and constitutes

168 See Administrative Decisions (Effect of International Instruments) Bill 1995. Note prior to the introduction of the Bill, the Government issued a Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch, on 10 May 1995, entitled "International Treaties and the High Court Decision in *Teoh*" (*Ministerial Document Service* No 179/94-95, 11 May 1995, pp6228-6230). That statement provided an executive indication, and foreshadowed a legislative intention, that treaties should not give rise to a "legitimate expectation". The legal effect of the Statement, which is intended to restore the law to its previous position, is uncertain: see Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's Case* and the Internationalisation of Administrative Law" (1995) 17 *Syd LR* 204 at 237-241. This statement has recently been replaced by a further Joint Statement by the Minister for Foreign Affairs, Alexander Downer, and the Attorney-General, Daryl Williams, dated 25 February 1997: "The Effect of Treaties in Administrative Decision-Making", *Commonwealth of Australia Gazette*, No 569, 26 February 1997.

169 The possible effect of *Teoh* is raised by Evatt in her submission, "The Right to Demonstrate", made to the Joint Standing Committee on the National Capital and External Territories, *Inquiry into the Right to Legitimately Protest or Demonstrate on National Land and in the Parliamentary Zone in Particular - Submissions* Vol 1 (1995) pp182-189.

170 *Teoh* at 365 per Mason CJ and Deane J; at 373 per Toohey J.

171 For an examination of "cop culture" in the United Kingdom, see Reiner, *The Politics of the Police* (Harvester Wheatsheaf, London, 2nd ed 1992) Ch 3; McConville, Sanders & Leng, *The Case for the Prosecution* (Routledge, London 1991) Ch 10. On Australian police culture, see Bradley, "Policing" in Hazlehurst (ed), *Crime and Justice* pp369-372.

identities.[172] The "stories" that pervade police culture instruct and educate, but they also allow scope for improvisation and creativity. A republican strategy for reform recognises the importance of "story-telling" to the acculturation of police recruits and that "new stories" which are sensitive to republican concerns must be fostered, told and retold.

This republican strategy must begin with the reshaping of the "official" rules and norms, as expressed in the statement of values, missions and corporate objectives of the police. Traditionally, the police goal has been narrowly conceived in terms of preserving the peace, protecting life and property and preventing and detecting crime.[173] A republican mandate for policing would require the police to develop a broader ethical framework which explicitly acknowledges their role in protecting human rights.[174] At the international level, the importance of human rights to the law enforcement role has been acknowledged in the *United Nations Code of Conduct for Law Enforcement Officials,*[175] Article 2 of which provides:

> In the performance of their duty, law enforcement officials shall respect and protect human dignity and uphold the human rights of all persons.

Notwithstanding its adoption more than 15 years ago, the impact of the Code of Conduct on Australian policing has been negligible. It does not appear to inform ethical debates in police education or discussions about the future direction of policing in Australia.[176] Following *Teoh*, however, international human rights standards (based on the Code of

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172 See Shearing & Ericson, "Culture as Figurative Action" (1991) 42 *Brit J of Sociology* 481.

173 These traditional, narrowly defined objectives are reflected in the *National Code of Ethics for the Police in Australia* (1981) which identifies the following objectives for the police: (i) the preservation of the peace; (ii) the protection of life and property; and (iii) the prevention and detection of crime. This "mission statement" has been included in police strategic/corporate plans (Australian Federal Police), statement of values (South Australia Police) and in some jurisdictions has even been enacted in legislation: *Police Service Act* 1990 (NSW) s6, discussed in Bradley, "Policing" in Hazlehurst (ed), *Crime and Justice* pp353-354.

174 See Ashworth, *The Criminal Process* (Clarendon Press, Oxford 1994) Ch 3 for an examination of criminal justice ethics, principally those derived from the European Convention of Human Rights.

175 Adopted by the UN General Assembly on 17 December 1979.

176 The negligible impact of human rights and ethics on policing theory and practice may be gauged by reviewing recent literature on police leadership in Australia. A recent collection of essays by senior police and policing experts paid only scant attention to human rights and ethical matters, focusing instead on the future challenges posed by, and responses to, white collar, hi-tech and transnational forms of crime: Etter & Palmer (ed), *Police Leadership in Australasia* (Federation Press, Sydney 1995). Kleinig, *The Ethics of Policing* (Cambridge University Press, Cambridge 1996) notes the lack of effect of the United Nations' Code: "in the member states it has never achieved the acceptance that was sought for it": p237.

Conduct and the ICCPR provisions) may ground a legitimate expectation argument, or at least provide fertile material for the further development of common law principles.[177]

CONCLUSION

Republican theory subscribes to decrementalism, that is, a strategy for reform which requires the gradual removal of laws which are dominion reducing and, conversely, the enactment of offences only where there is evidence, supported by empirical research, that such measures are necessary to promote dominion for all.[178] Republican decrementalism suggests not merely less law, but the adoption of laws which satisfy, both in content and form, the republican commitment to maximising freedom. The freedom of political discussion implied from the Constitution, with its capacity to invalidate statutes and reshape the common law where either impinges on political discussion, can be regarded as structurally decremental.[179] The implied constitutional freedom of political discussion may also bolster interpretive strategies, applied to both statute and common law, which promote dominion. The recognition within the constitutional framework of the paramount value of certain political freedoms is likely to stimulate the imagination of judges to further enhance the protection of political protest at the level of the common law and in the interpretation of statute law. As one commentator has suggested: "The assertion of rights can have great symbolic force for oppressed groups within a society offering a significant vocabulary to formulate political and social grievances which is recognised by the powerful."[180]

However, the Australian Constitution can only partially assist the republican enterprise, providing only an immunity and as yet no claim-right. Unlike the enactment of a positive right in the *Peaceful Assembly Act* 1992 (Qld), it fails to establish a right to protest which is capable of educating individuals about the fundamental importance of political protest to Australian democracy. Such a strong legal commitment, which must be mirrored in the common law to be effective, has the capacity to play a central role in shaping the place of political protest within Australia.

In addition to reforming laws that constitute an unreasonable interference with political protest, it is also necessary to promote equality of opportunity in political protest in order to advance a republican agenda. In this regard, non-legal strategies involving education about human rights are essential. Republicanism suggests that such strategies are vital, as

177 The High Court has held that the ICCPR is a legitimate influence on the development of the common law: *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Dietrich v The Queen* (1992) 177 CLR 292. See generally, Mason, "The Influence of International and Transnational Law on Australian Law" (1996) 7 *PLR* 20.

178 Braithwaite & Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* pp140-145.

179 By contrast, the common law is regarded as being "structurally incremental": at 136.

180 Charlesworth, "The Australian Reluctance about Rights" in Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, Canberra 1994) p49.

law reform is insufficient by itself to promote common knowledge about rights both among protesters and law enforcement officials. Republican theory is multi-pronged in its approach. If political freedom, and particularly political protest, is no longer to be an outlaw within the Australian legal system, institutions will require remodelling to achieve the republican objectives outlined above. Recent constitutional developments reflect and shape an emerging social movement, both domestically and internationally, which recognises the importance of fundamental political freedoms. From a strategic perspective, it is essential to harness this momentum and reshape it to meet republican objectives - as Braithwaite and Pettit conclude themselves, we may not be able to change the wind, but we can always adjust the sails![181]

181 Braithwaite & Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* p139.