IN THE COURT OF APPEAL OF NEW ZEALAND

CA530/2008
[2009] NZCA 623

THE QUEEN

v

VALERIE MORSE

Hearing:	11 August 2009
Court:	William Young P, Glazebrook and Arnold JJ
Counsel:	A Shaw and S J Price for Appellant C L Mander and C J Curran for Crown
Judgment:	22 December 2009 at 10.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

ARNOLD J

Introduction

[1] The appellant participated in a protest at the Dawn Service at the Cenotaph on 25 April 2007, Anzac Day. As part of the protest she burnt a New Zealand flag. She was charged with offensive behaviour (the burning of the flag) contrary to s 4(1)(a) of the Summary Offences Act 1981 (SOA) and was convicted and fined following a summary trial before Judge Blaikie: DC WN CRI 2007-085-2806 23 November 2007.

[2] In the High Court Miller J dismissed the appellant's appeal against conviction and sentence: HC WN CRI 2007-485-154 29 May 2008. By a judgment dated 4 March 2009, this Court granted her special leave to appeal on the following question:

> Whether the conclusion of the High Court judge [upholding the appellant's conviction for offensive behaviour] is consistent with ss 5 and 14 of the New Zealand Bill of Rights Act 1990.

[3] Section 14 of the New Zealand Bill of Rights Act 1990 (NZBORA) provides:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

In terms of s 5 of NZBORA, this right may be subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[4] The question is then whether the appellant's burning of the New Zealand flag was offensive behaviour within the meaning of s 4(1)(a) of the SOA. In determining that question, the Court must consider whether her conduct was expressive behaviour protected by s 14, and if so, whether the restriction of that right was a reasonable limit demonstrably justified in a free and democratic society.

Factual background

[5] Around 6 am on 25 April 2007 some 5000 people had gathered at the Cenotaph in Wellington to attend the Anzac Day Dawn Service. Anzac Day is a day of commemoration of the part taken by New Zealand servicemen and servicewomen in various wars. It is held on the anniversary of the first landing of troops from the United Kingdom, Australia and New Zealand on the beaches of the Gallipoli Peninsula in 1915: see Anzac Day Act 1966, s 2.

[6] A small group of protesters from "Peace Action Wellington", including the appellant, had gathered on the edge of the crowd, inside the fence line of the adjacent Law School grounds. About 50 to 80 members of the crowd were also there, but most of the crowd was on the other side of the fence from the appellant's group, on the street beside and in front of the Cenotaph, which was the focal point of the commemoration. The group were protesting New Zealand's participation in the war in Afghanistan, but also had a broader anti-war message. They had attended the Anzac Day commemorations in previous years, but had adopted a low-key approach, attending a mid-morning ceremony, laying wreaths and serving free refreshments to those attending, accompanied by a "Food, not Bombs" message.

[7] However, in respect of the 2007 Anzac commemoration the group had decided that they needed to bring their views "much more to the fore". They decided to attend the Dawn Service rather than the mid-morning commemoration because, as the appellant said in evidence, it was a much more solemn and widely attended event. They passed out leaflets, and held up banners reading "Lest we forget, already forgotten, Afghanistan, East Timor, and the Solomon Islands, NZ Troops out now" and "Conscientious objectors – the real war heroes". When a former Secretary for Defence, Mr Fortune, who was described by Judge Blaikie as the keynote speaker, began to speak several members of the group blew horns and two others, including the appellant, set fire to New Zealand flags. The noise was sufficient to prevent Mr Fortune from being heard. At that stage the police moved in to stop the horn-blowing and flag-burning. The appellant and one of the horn-blowers were arrested. The appellant was charged with offensive behaviour under s 4(1)(a) of the

SOA, and her colleague with intentionally obstructing, and resisting, a constable in the execution of his duty under s 23(a) of the SOA.

[8] Sections 3 and 4(1) of the SOA provide:

> **3 Disorderly behaviour**
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> Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $2,000 who, in or within view of any public place, behaves, or incites or encourages any person to behave, in a riotous, offensive, threatening, insulting or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue.
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> **4 Offensive behaviour or language**
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> (1) Every person is liable to a fine not exceeding $1,000 who,–
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> (a) In or within view of any public place, behaves in an offensive or disorderly manner; or
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> (b) In any public place, addresses any words to any person intending to threaten, alarm, insult or offend that person; or
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> (c) In or within hearing of a public place,–
>
> (i) Uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by those words; or
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> (ii) Addresses any indecent or obscene words to any person.

[9] At trial in the District Court before Judge Blaikie both the appellant and her colleague were convicted. In relation to the appellant, the Judge recorded that a number of witnesses gave evidence to the effect that they found the protestors' actions, including the burning of the flag, shocking and outrageous in the particular context of the Anzac Day commemoration: at [10]. He noted the evidence of one of the police officers involved that he was concerned about a likely breach of the peace: at [12]. He also accepted that the appellant's views were genuinely and strongly held: at [13]. He considered *Brooker v Police* [2007] 3 NZLR 91 (SC), in particular the judgment of Blanchard J, and noted the requirement for a balancing exercise. He then said:

> [23] In conducting the balancing exercise, I make these following observations. The burning of the New Zealand flag, in these circumstances,

> is an act of considerable symbolism. Others may say extreme symbolism, others may say desecration. That act is capable of evoking wounded feelings, real anger, resentment, and outrage. Indeed, that has been the extent of emotional feelings expressed in the evidence before this Court.
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> [24] The defendant Ms Morse, has acknowledged that she wanted to burn the flag as a protest, and I deduce from her evidence that she wanted her actions to have maximum impact and effect. I note that the defendant and her colleagues made a decision to attend the dawn service on this occasion rather than the mid-morning services, which I understand she and her colleagues had attended in previous years.
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> [25] There is evidence, beyond reasonable doubt, of the behaviour and motives of the defendant. There is evidence to a similar standard of the wounded feelings of those in attendance, the members of the public, which as I have said, includes considerable anger and outrage. I have reached the clear conclusion in this case that the protest action of the defendant, in burning the flag, not only constitutes offensive behaviour – and I note that that is probably conceded – but in all the circumstances, in the balancing exercise, cannot be protected by the Bill of Rights.
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> [26] I stress the particular circumstances, and note the evidence, which has included the forms of protest such as handing out pamphlets and the provisions of food and beverages. In my view that should not be the subject of criticism. To me, the threshold is passed when a New Zealand flag is burned, as a symbolic protest at an Anzac service in the nation's capital – that service being an event of significant importance to the country and the people in attendance. Accordingly, the charge has been proved.

The Judge imposed a fine of $500, court costs of $130 and a half share of the civilian witnesses' expenses.

[10] On appeal Miller J upheld the appellant's conviction and sentence. Having referred to the judgments of the majority in *Brooker*, he summarised the essential approach as follows:

> [32] Following *Brooker*, it is necessary to determine whether a reasonable person might think the behaviour offensive, in that it would wound feelings or arouse real anger, resentment, disgust or outrage. If so, then it is necessary to balance the competing interests of those attending the ceremony against those of the protestors in exercising their freedom of expression. Because the protestors were expressing genuine political opinions, a high value must be attached to their freedom of expression in this case. Indeed, there was no dispute that some forms of protest were acceptable at the dawn parade. The balancing exercise accordingly requires careful examination of the circumstances.

[11] Having examined the circumstances, Miller J considered that Judge Blaikie was entitled to conclude that the appellant's conduct offensive. He concluded:

> [41] The Judge paid close attention to the circumstances of the protest, and recognised that the right to freedom of expression was engaged. He balanced the competing considerations appropriately in reaching the conclusion that while aspects of the protest were not offensive, the act of burning the flag was. I agree with his conclusions. The protest was genuine, and directed in part at political decisions that continue to put servicemen and women in harm's way. But by burning the flag as part of a strategy of disrupting the service [the appellant] went too far. To allow the appeal would be to attach no weight at all to the interests of those attending what they regarded as a memorial service.

Accordingly, he dismissed the appellant's appeal.

Basis for appeal

[12] Mr Shaw and Mr Price argued the case for the appellant. They submitted that this case was about criminal punishment for expressing ideas. They identified the key issue as being whether the Crown could establish that the appellant's conviction was a rational and proportionate response to an important social objective.

[13] In assessing the interests at stake, they noted the critical importance of the right of free speech, particularly political speech, and emphasised that free speech often involved offending, shocking or disturbing others. They emphasised that the appellant's behaviour was brief, did not create any danger nor provoke any disturbance. They submitted therefore that a criminal conviction was an unjustified and disproportionate restriction on the appellant's right to protest on a matter of public interest.

[14] Counsel argued that s 4(1)(a) should be interpreted in a way consistent with NZBORA. This could be achieved by:

(a) limiting the offence to conduct that was obscene or indecent;

(b) requiring that the behaviour create a serious or substantial disruption to public order or, in the alternative, to public decency;

(c) limiting its ambit to conduct not already penalised (flag-burning is an offence under the Flags, Emblems and Names Protection Act 1981).

In any event, a high threshold should be set for the offence.

[15] On this approach, the appellant could not properly have been convicted and the appeal should be allowed.

Discussion

[16] The starting point must be the decision of the Supreme Court in *Brooker*. Mr Brooker wished to express his annoyance against a particular police constable who had been involved in executing a search warrant at his property late one evening. Knowing that she had come off nightshift around 7 am one morning, he went to her house and knocked on her door. It was shortly after 9 am. The constable woke up and came to the door. When she told Mr Brooker to leave, he retreated to the footpath outside her gate (a short distance) and began to play his guitar and sing protest songs, as well as displaying a placard protesting her conduct. The constable called the police. When they arrived Mr Brooker refused to leave and was arrested. The incident lasted at least 15 minutes and perhaps longer. Mr Brooker was convicted of disorderly behaviour under s 4(1)(a) of the SOA, a conviction which was upheld on appeal to the High Court and Court of Appeal, but overturned by a majority in the Supreme Court.

[17] Although the Court was split as to the result, all members acknowledged the critical importance of freedom of speech and the right to protest to a functioning democracy: see particularly at [12] per Elias CJ, at [114] – [117] per McGrath J and at [234] – [240] per Thomas J (the latter emphasising the need to for a contextual approach). Obviously, I accept that freedom of speech is a value of fundamental importance in a democratic society.

[18] The focus of the judgments in *Brooker* was on disorderly behaviour. However, two members of the majority, Blanchard J and Tipping J, did comment on the offence of offensive behaviour, albeit in the latter case very briefly.

[19] Blanchard J addressed offensive conduct in the following paragraphs:

> [54] Section 4(1)(a), like s 3, distinguishes between behaviour which is offensive and that which is disorderly. The two words are not synonyms but obviously some behaviour could be both disorderly and offensive at the same time. In terms of maximum penalty the sections treat each type of conduct as of potentially the same seriousness.
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> [55] Both words bear their ordinary meanings in everyday speech. *Behaviour which is offensive is behaviour in or within view of a public place which is liable to cause substantial offence to persons potentially exposed to it. It must, in my view, be capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs*.
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> [56] Disorderly behaviour is not necessarily offensive in that way. It is behaviour which disturbs or violates public order. To fall within s 4(1)(a) it must be behaviour in or within view of the public place which substantially disturbs the normal functioning of life in the environs of that place. It must cause a disturbance of good order which in the particular circumstances of time and place any affected members of the public could not reasonably be expected to ensure because of its intensity or its duration or a combination of both those factors.
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> (Footnote omitted. Emphasis added.)

[20] Later the Judge said:

> [61] In considering whether behaviour in the nature of a protest is disorderly in terms of s 4(1)(a), a Court should weigh the manner but not the content of the expression. If the concern is that what was said and done was offensive to those affected by the protest in the sense described in para [55] above, the charge should be offensive behaviour. …

[21] The italicised passage at [55] of Blanchard J's judgment reflects the approach that had been taken in previous cases: see *R v Rowe* [2005] 2 NZLR 833 at [22] – [24], [34], [37] and [40] (CA) (the Supreme Court refused leave to appeal: [2005] NZSC 40); *O'Brien v Police* HC AK AP219/92 12 October 1992 at 6 – 8; *Ceramalus v Police* (1991) 7 CRNZ 678 at 682 – 683 (HC) and in this Court, CA 14/96 17 July 1996 at 4 – 6. I note three features of Blanchard J's description of offensive behaviour:

(a) First, offensive behaviour is described by reference to its likely impact on persons potentially exposed to it. Unlike disorderly conduct, there is no requirement of a tendency to disturb or violate public order.

(b) Second, the subjective reactions of those actually exposed to the conduct are not determinative. Rather, the test incorporates an objective element by requiring that the conduct be capable of causing "substantial offence" by affecting the minds of reasonable persons in one of the ways described. But the "reasonable persons" are the same type of people as those actually subjected to the conduct.

(c) Third, in assessing the reasonable reaction, the circumstances in which the conduct occurs must be taken into account.

[22] Tipping J's brief comment about offensive behaviour is, as far as it goes, consistent with the approach taken by Blanchard J. When describing the background to the case, Tipping J noted that John Hansen J had said in upholding Mr Brooker's conviction that right thinking members of the public would have been "seriously offended" by his behaviour. Tipping J then said at [79]:

> It is necessary to recall at this point that Mr Brooker was not charged with behaving in an offensive manner. The question of the level to which members of the public, right-thinking or otherwise, would be offended was not the ultimate issue.

Again, the focus is on the reaction of others to the conduct.

[23] Returning to Blanchard J's judgment, having described the essential elements of offensive and disorderly behaviour, the Judge then addressed conduct which involves the exercise of a right protected by NZBORA. Blanchard J said that a defendant's behaviour could not be characterised as disorderly without an assessment against the overriding requirement in s 5 of NZBORA. He said at [59]:

> … The value protected by the Bill of Rights must be specifically considered and weighed against the value of public order. The Court must ask itself whether treating the particular behaviour in the particular circumstances as disorderly constitutes a justified limitation on the defendant's exercise of the right in question. As a result, public order will less readily be seen to have been disturbed by conduct which is intended to convey information or express an opinion than by other forms of behaviour. The manner in which the defendant chose to exercise the right and the time and place are of course relevant to that inquiry.

[24] Although the Judge was speaking of disorderly behaviour, it is clear that a similar approach should be adopted where the charge is offensive behaviour.

[25] Tipping J also said that in cases engaging rights protected by NZBORA the balancing approach should be adopted: see [90] – [91]. The Judges in the minority also considered that a balancing approach was required, although they gave greater weight to the constable's privacy interests than did the majority: see [130] – [135] per McGrath J and [274] – [277] per Thomas J.

[26] Before leaving *Brooker*, I note that in her judgment Elias CJ placed particular emphasis on the need to show that behaviour had a tendency to disrupt public order before it could be described as "disorderly" within the meaning of s 4(1)(a). As I have said, the appellant in the present case argued that a similar requirement should be applied in relation to offensive behaviour. Without such a requirement, the scope of "offensive behaviour" would be too wide and had the potential to stifle legitimate expression, contrary to s 14 of NZBORA.

[27] However, I consider that the objective element which Blanchard J identified in relation to offensive behaviour – namely, that it must offend a reasonable person of the type actually subjected to it – provides the appropriate limiting mechanism. Plainly, the subjective reactions of those who are subjected to the impugned conduct could not be the appropriate measure of what is offensive under s 4(1)(a). That would place too much power in the hands of the audience and constitute too great a restraint on the expression of unpopular opinions. The objective element allows an assessment of what members of the community should be expected to bear (to use Tipping J's language in relation to disorderly behaviour: see *Brooker* at [90] – [91]). Given the importance of freedom of speech, there needs to be a wide measure of community tolerance.

[28] I find some support for this in the Supreme Court's refusal of leave to appeal against this Court's decision in *Rowe*. As I noted at [21] above, in *Rowe* this Court adopted the same approach to offensive behaviour as that set out in Blanchard J's judgment in *Brooker*. In particular, although acknowledging that offensive behaviour is a public order offence, the Court did not include in its articulation of the

applicable test any requirement for a threat to public order as is the case with disorderly behaviour: see the references to *Rowe* at [21] above. In declining leave, the Supreme Court did not suggest that the approach adopted by this Court was wrong, but rather noted that counsel were in broad agreement that it was the correct approach. The Court said that the case involved the application of the test to the particular facts. The "objective assessment of the time, place and circumstances in issue" was not appropriate for a further appeal: see [5].

[29] Turning to the present case, for the reasons which follow I consider that the appellant was properly convicted of offensive behaviour, even though she was exercising her NZBORA-protected right of free speech, a right which includes expressive conduct such as burning a flag: see *Hopkinson v Police* [2004] 3 NZLR 714 at 711 (HC).

[30] I begin with the occasion and manner of the appellant's exercise of her s 14 right. Anzac Day is an important day of commemoration for New Zealanders. It does not simply commemorate the more than 2,700 New Zealanders who died at Gallipoli. Rather, it has become an occasion on which the sacrifices of those New Zealanders who died or suffered injury in all wars are remembered and acknowledged. Anzac Day has become part of our national psyche. The Dawn Service at the Cenotaph is a solemn and increasingly well-attended occasion. Indeed, that is why, according to the appellant, she and her colleagues decided to protest at it. It gave their protest maximum impact.

[31] At such a commemoration, the national flag assumes a special symbolic importance, representing our national identity. Again, as her counsel acknowledged, the appellant recognised this. As they put it, the appellant wished to utilise "the unique potency of the flag" as a protest symbol. Burning the flag in protest on such an occasion is, in our view, well capable of being regarded as offensive, that is, "wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it". This arises from the purpose and nature of the Dawn Service, to which I have already referred, and from the type of people who were in attendance. These included returned servicemen and servicewomen, the relatives of those who served in war, some of

whom were killed, and other members of the public, including children. For such people on such an occasion, the national flag would reasonably have had special significance.

[32] Other forms of protest (holding up banners with anti-war messages or handing out pamphlets to similar effect) are unlikely to be treated as capable of being offensive on such an occasion given the necessary balancing of interests. But the burning of the flag is in a different category (as is the blowing of the horns). This is reflected in the evidence of several of those who found the flag-burning offensive. They did not object to the protest as such, or to its message. Rather, they said that they found the flag-burning and horn-blowing offensive given the nature of the occasion. I note that one of the witnesses, who had taken his young son to the commemoration, said:

> The protestors were lucky that they were on the other side of the fence and that the police were there. I think the crowd would have hurt them otherwise.

[33] The appellant argued that the fact that she could have exercised her right to freedom of expression in another way was irrelevant, relying on *Texas v Johnson* 491 US 397 at 408 (1989). She noted that free speech is often at its most potent when it shocks and annoys: see, for example, Elias CJ in *Brooker* at [12].

[34] But at this point context becomes important. Although the appellant was charged on the basis of burning the flag, I think it relevant to have regard to the fact that the flag-burning occurred in the context of a protest which also involved other activities, including the blowing of horns. That is, it was part of protest activity that was deliberately disruptive of the commemoration. It is only by having regard to that broader context that the message that the appellant was attempting to convey through her expressive behaviour becomes clear. By itself, the flag-burning had no particular meaning (except perhaps being anti-state). It derived its meaning from its association with the other activities of the protestors. In particular, the banners and leaflets expressed the anti-war message with which the appellant associated herself when burning the flag. The objective of the flag-burning and the horn-blowing was to draw attention to that message by disrupting Mr Fortune's speech. In disrupting Mr Fortune's speech the appellant and her colleagues interfered with his free speech

rights, as well as those of his audience. The right of free speech in s 14 includes the right to receive information and opinions from others as well as to express them, as was emphasised in *Television New Zealand v Rogers* [2008] 2 NZLR 277 (SC), see at [36] per Elias CJ, at [45] per Blanchard J, at [75] per Tipping J and at [141] per Anderson J.

[35] This was not an occasion on which the members of the crowd who did not wish to receive the appellant's message could simply pass by or avert their eyes: see the discussion in *Hill v Colorado* 530 US 703, especially at 716 – 717 (2000). Exercising their right of freedom of association, the crowd had gathered at a specific place for a specific purpose. Given the means chosen to convey the message, they could not remove themselves from having to receive it without abandoning their legitimate purpose. This feature has been recognised as justifying some limit on the right of freedom of expression: see, for example, *Phelps-Roper v Strickland* 539 F 3d 356 (2008) (USCA, 6th Cir), esp at 362 – 366, where the Court accepted that the state could properly place limits on the right of free speech in relation to funerals.

[36] It might be thought that this consideration carries little weight given that, when balancing the relevant competing interests in *Brooker*, the majority gave greater weight to Mr Brooker's right of free expression than to the constable's privacy interests:

(a) Elias CJ expressed misgivings about whether the courts were entitled to adjust rights enacted by Parliament (such as free speech rights) by balancing them against values not contained in NZBORA, such as those relating to privacy: at [40]. This was in the context of her emphasis on the need to show that the conduct was disruptive of public order: see [11], for example.

(b) Blanchard J emphasised what he considered to be the relatively minor nature of the privacy intrusion resulting from Mr Brooker's behaviour: at [69] – [70].

(c) Tipping J did not regard the intrusion as going beyond what a reasonable citizen in the constable's position should be expected to bear: at [93] – [95].

[37] The present case is different, however. Here, rights protected by NZBORA have been interfered with by the actions of the appellant and her fellow protestors in burning the flag and blowing the horns as a means of drawing attention to their message. The right of free expression does not include a right to a captive audience: see the discussion in *R v Spratt* (2008) 235 CCC (3d) 521 at [82] – [84] (BCCA). The protestors could have, and in the past did, express their views in a way that did not interfere to any substantial extent with the protected rights of others. In respect of those other forms of protest, if attendees at the Dawn Service did not wish to receive the group's message they could simply have ignored the banners and declined to take a pamphlet. Accordingly, treating the burning of the flag as being, in the circumstances, offensive behaviour does not prevent the appellant from exercising her right of freedom of speech. Rather, it limits the means of expression that may be used on the particular occasion.

[38] Finally, I come to the point that the appellant's flag-burning was of short duration as the police intervened immediately it commenced to stop it. The majority in *Brooker* took the short duration of Mr Brooker's protest into account in the balancing exercise: see at [50] per Elias CJ, at [69] per Blanchard J and at [95] per Tipping J. Presumably this reflected the need to show that the particular conduct had a tendency to disrupt public order before it could be classified as "disorderly".

[39] A possible difficulty with emphasising this feature, however, is that Mr Brooker's protest was short-lived because the police arrested him when he would not desist, thus bringing it to an end. But the effect of the Court's decision is, of course, that the police were not entitled to arrest Mr Brooker for disorderly behaviour. Accordingly, they wrongly ended his protest and he had the right to continue it for a longer period. The majority seem to accept that had Mr Brooker's protest continued, it would at some point have crossed the line into disorderly behaviour (see, for example, Blanchard J at [70]), but quite when is unclear. As Tipping J said at [92]:

> … There must, however, come a point at which the manner or some other facet of the exercise of the freedom [of expression] will create such a level of anxiety or disturbance that the behaviour involved becomes disorderly under s 4(1)(a) and, correspondingly, the limit thereby imposed on the freedom becomes justified under s 5. No abstract guidance can be given as to when that level will be reached. That decision is a matter of judgment according to all the relevant circumstances of the individual case.
>
> (Footnote omitted.)

[40] Here the police intervened quickly, so that the disruption of the Dawn Service, and the interference with the rights of the speaker and his audience, was short-lived. It might be said either that the disruption of the commemoration was so brief that no reasonable person of the type present could have been offended, or that a conviction was a disproportionate response.

[41] As to the first point, the burning of the flag at the Dawn Service was either offensive behaviour or it was not. The length of time the flag took to burn hardly seems relevant (that may not apply to the horn-blowing of course).

[42] As to the second point, the implications for the ability of the police to intervene in potentially difficult situations must be considered. Police officers have powers to arrest those found committing, or reasonably suspected of having committed, breaches of the peace (see ss 42(2) and 315(2)(a) and (b) of the Crimes Act 1961) and can intervene to prevent the continuation of a breach of the peace (s 42(1)). In addition, where there is a genuine and reasonable apprehension of a breach of the peace, the police may give anyone directly involved a reasonable instruction to avoid it. If the person does not comply with the instruction, he or she may then be arrested for obstruction: see *Minto v Police* (1991) 7 CRNZ 38 at 40 (HC) and the authorities discussed therein. I acknowledge that those powers provide scope for police intervention in circumstances such as those at issue. But they do depend on the existence or apprehension of a breach of the peace, and will not cover situations where conduct constitutes offensive behaviour but is unlikely in the particular circumstances to cause a breach of the peace.

[43] In any event, while there is no requirement in relation to offensive conduct that there be a tendency to disrupt public order, I consider that there was such a tendency here. If the police had allowed the conduct to continue, I consider it at

least likely that some of the crowd who wished to participate in the commemoration would have taken matters into their own hands. Accordingly, in the present case, I do not consider the brevity of the disturbance to be decisive.

Decision

[44] For these reasons, I would dismiss the appeal.

WILLIAM YOUNG P

[45] I am of the view that the appeal should be dismissed.

[46] I agree with Glazebrook J at [113] below that the Judges in the District Court and High Court correctly stated the test. However, I am of the view that the evaluative question whether, on the application of that test to the facts, the appellant's behaviour was offensive is a question of fact, rather than a mixed question of fact and law (compare the comments of Glazebrook J at [111] below). I am distinctly unenthusiastic about any alternative approach under which every public disorder case which engages rights protected under the New Zealand Bill of Rights Act 1990 (NZBORA) must be resolved by an evaluative exercise which is legal in character and thus capable of being re-litigated through the appeal system.

[47] The issue whether the appellant's behaviour was offensive was resolved against the appellant both at trial in the District Court and on an appeal to the High Court which, under s 119(1) of the Summary Proceedings Act 1957 was by way of rehearing. The further appeal to this Court is confined to questions of law (see s 144 of the Summary Proceedings Act). It is not the equivalent of an appeal under s 385(1)(a) of the Crimes Act 1961, which was in issue in *R v Owen* [2008] 2 NZLR 37 (SC) and *R v Munro* [2008] 2 NZLR 87 (CA), which are the cases referred to by Glazebrook J at [112] below.

[48] In the course of argument, I pressed Mr Price for the appellant to identify an error of law made in the Courts below. His answers were variations on the theme that the outcome was simply wrong. This rather makes me think that the

fundamental challenge to the conviction turns on the factual accuracy of the findings made in the District Court and High Court. But such a challenge, at least in simple terms, is off limits in this Court in a second appeal under s 144.

[49] I accept that a finding of fact which was not reasonably available to a judge may be categorised as an error of law. Associated with this is the possibility of identifying an issue of law in terms of whether the conduct in question was capable of being offensive (cf *R v Brooker* [2004] NZAR 680 at [12] (CA)). But this is something of a slippery slope as it makes it very easy for this Court to substitute its view of the facts for those reached in the courts below, something which is contrary to the policy of the statute.

[50] The best that can be said for the appellant's case is that there is scope for a difference of legitimate opinion as to whether her conduct was relevantly offensive having regard to her right to freedom of expression. To my way of thinking, the corollary of this is that the conclusions reached by the Judges in the District Court and High Court were open to them. Accordingly I see no basis for treating their factual finding as erroneous in law.

[51] In any event, and largely for the reasons given by Arnold J, I think that the appellant's conduct was offensive. The appellant set out deliberately to disrupt a ceremony which was by way of commemoration of those who died in the service of New Zealand and to honour returned servicemen and women. Her burning of the flag and what was on the banner could be regarded as particularly disrespectful to those who died on active service and their friends and families. Her conduct also had the tendency to disturb public order. The whole effect would have been to detract seriously from the occasion for those (including children) who came to the ceremony for commemorative reasons. The appellant is demanding a right to freedom of expression so extensive that it entitled her to disrupt the rights of others under ss 14 and 16 of NZBORA. I accept that there must be a fair degree of give and take in a free and democratic society but, given the solemnity of the occasion on which she chose to act in this way and the responses which her behaviour could be expected to evoke from those present, I think that what she did was properly categorised as offensive.

GLAZEBROOK J

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A flag burns

[52] On Anzac Day morning, 25 April 2007, Ms Morse burnt the New Zealand flag in view of those at the Dawn Service. This was part of a genuine anti-war protest.

[53] The majority consider that Ms Morse was rightly convicted of behaving in an offensive manner pursuant to s 4(1)(a) of the Summary Offences Act 1981 (SOA). I write separately because I do not agree with that conclusion. I would have allowed the appeal and quashed the conviction.

[54] I first set out the factual and legislative background. I then examine the leading case on s 4(1)(a) of the SOA in some detail (*Brooker*), followed by an

analysis of principles discerned from cases (both here and offshore) on protest and flag burning in particular. I then attempt to articulate what I see as the appropriate principles and finally to apply those principles to this case.

Factual background

[55] I adopt the description of the factual background in Arnold J's judgment but would add that it is important to note that not all witnesses viewed Ms Morse's act of burning the flag as offensive in itself. It is apparent that there were differing views as to the level of offensiveness of the burning of the flag. For example, one witness stated that the horn blowing offended him more than the flag burning, as the flag burning was "a bit childish and just simply not good public relations". Another witness stated that "it was more the fact [of the horn blower] resisting the arrest and the noise that was going on that sort of upset the whole thing and my children".

The legislation

[56] Section 4 of the SOA is one of a group of sections under the heading "Offences Against Public Order". Sections 3 and 4(1) of the SOA are set out at [8] of Arnold J's judgment. For ease of reference I repeat s 4(1)(a) here:

> **4 Offensive behaviour or language**
>
> (1) Every person is liable to a fine not exceeding $1,000 who,—
>
> (a) In or within view of any public place, behaves in an offensive or disorderly manner; or
>
> …

[57] The right to freedom of expression is enshrined in s 14 of the New Zealand Bill of Rights Act 1990 (Bill of Rights). This is set out at [3] of Arnold J's judgment. Again for ease of reference I repeat it here:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[58] Section 5 of the Bill of Rights (referred to at [3] of Arnold J's judgment) provides:

> **5 Justified limitations**
>
> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[59] As pointed out by Elias CJ in *Brooker* at [3], s 14 was enacted to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights" (ICCPR). This provides in art 19:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (order public), or of public health or morals.

The leading case

[60] As noted above, the leading case on the relationship between s 4 of the SOA and s 14 of the Bill of Rights is *Brooker*: see at [16] of Arnold J's judgment for a summary of the salient facts in that case.

[61] While *Brooker* dealt with the offence of behaving in a disorderly manner, some comments on offensive behaviour were made in the course of the decision. However, much of the reasoning is generic and likely to apply to s 4(1) offences generally. There was, however, no single test articulated by the Supreme Court. It is therefore necessary to examine each judgment in turn in order to discern the test applied by the majority of the judges.

The Chief Justice's judgment

[62] The Chief Justice considered it insufficient to make behaviour disorderly if it annoys or even wounds the feelings of the person addressed unless it is disruptive of public order. In her view, mere words, unless indecent or obscene, cannot be an offence under s 4(1)(a) of the SOA unless there is the identified intent or recklessness required for offences under s 4(1)(b) or (c) or unless there is something additionally disruptive to public order about the manner of expression: see at [35]. Significantly, the Chief Justice explicitly rejected the balancing test to be undertaken when Bill of Rights considerations were engaged, a test that was favoured by the other judges: at [11] and [40].

[63] While the Chief Justice did not deal explicitly with the word "offensive", it is likely that the same reasoning would apply to the offensive behaviour offence as disorderly and offensive behaviour are both contained within s 4(1)(a).

Blanchard J's judgment

[64] Blanchard J also saw the offence of disorderly behaviour as expressly linked to the substantial disturbance of public order: at [56]. He agreed that causing annoyance and even considerable annoyance to citizens does not suffice.

[65] In his view, where Bill of Rights considerations are not engaged, the Court merely determines whether, bearing in mind the seriousness of any criminal conviction, in all the circumstances the defendant's conduct in or in view of the particular public place can properly be described as causing a substantial disturbance to persons in the environs of that place at the time in question: at [58].

[66] When the behaviour involves an exercise of the right to freedom of expression, however, he accepted that there is a further consideration: an assessment against the overriding requirement of s 5 of the Bill of Rights that the exercise of any guaranteed right may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. This means that the right protected by the Bill of Rights must be specifically considered and weighed

against the value of public order. The manner in which the defendant chooses to exercise the right and the time and place are relevant to that inquiry. However, public order will less readily be seen to have been disturbed by conduct which is intended to convey information or express an opinion than by other forms of behaviour: at [59].

[67] Blanchard J recognised that the test is not easy to apply and that, until a body of case law post-Bill of Rights had built up in this area, there will be room for judges to differ as to results: at [63] – [64] .

[68] Blanchard J was one of two judges to make a comment specifically on offensive behaviour. He stated that unlike disorderly behaviour where a Court weighs the manner but not the content of the expression, offensive behaviour is to do with the content of expression: at [61].

[69] As noted by Arnold J at [19], Blanchard J defined offensive behaviour as behaviour in or within view of a public place which is liable to cause substantial offence to persons potentially exposed to it. It must, in his view, be capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs: at [55].

Tipping J's judgment

[70] Where the Bill of Rights is not engaged, Tipping J considered that conduct in a qualifying location would be disorderly if, as a matter of time, place and circumstance, it causes anxiety or disturbance at a level which is beyond what a reasonable citizen should be expected to bear. Unless that is so, he did not consider that the conduct will warrant the intervention of the criminal law. If conduct passes that threshold, the public has a legitimate interest in proscribing the behaviour, and thereby protecting citizens from it. In this way public order is protected: at [90].

[71] As noted by Arnold J at [25], Tipping J, like Blanchard J, considered a balancing approach was necessary where the Bill of Rights was engaged. Tipping J

said that, where the behaviour involves a genuine exercise of the right to freedom of expression a reasonable member of the public may be expected to bear a somewhat higher level of anxiety or disturbance than would otherwise be the case. In his view, the decision is a matter of judgment according to all the relevant circumstances of the individual case: at [92].

[72] As Arnold J notes at [22], it is likely that Tipping J's approach to offensive behaviour was broadly consistent with that of Blanchard J. Tipping J's comment, outlined above at [22], was, however, very brief so this cannot be other than a tentative conclusion.

McGrath J's judgment

[73] McGrath J dissented on the result but his test was similar to the balancing test formulated by Blanchard and Tipping JJ. In his view, the first societal interest in conflict with freedom of speech is protection of public order. He said that the heading to ss 3 to 8 of the SOA indicated that "the disorderly behaviour offences" relate to public order: at [118]. By using the plural term "offences," McGrath J appeared to be including all of the s 3 to s 8 offences (including offensive behaviour) in this comment, suggesting that he would, like the Chief Justice but unlike Blanchard and Tipping JJ, see offensive behaviour as concerned with public order, although I note that the rest of his judgment concentrated on disorderly behaviour alone.

[74] In McGrath J's view, infringement of public order necessarily involves a serious interference with community standards of behaviour, in the sense that the behaviour goes beyond what a society respectful of democratic values can be expected to tolerate. He saw the right to express dissenting opinions concerning official action or policy as central to democratic values and considered that it would be rare that expressions of opinion which have no tendency seriously to upset their audience will be categorised as sufficiently intruding on public order: at [120].

[75] McGrath J stressed, however, that it was not necessary that the conduct be likely to produce a physical response or other reaction resulting in a breach of the

peace before the behaviour would properly be found to be disorderly. McGrath J was of the opinion that in any particular situation affronted persons, through the means of self-discipline, apprehension or good judgment, may control their overt response to a manner of behaviour which, objectively, they should not have to tolerate: at [120].

[76] McGrath J pointed out that, in terms of s 5 of the Bill of Rights, any limit on a protester's right of free expression must be demonstrably justified in a free and democratic society. The offence of disorderly behaviour must therefore be restricted to conduct that amounts to a "sufficiently serious and reprehensible interference with the rights of others to warrant the intervention of the criminal law". At that point he saw the protester's legitimate exercise of freedom of expression as ending: at [130].

Thomas J's judgment

[77] Thomas J, also in dissent, said that s 4(1)(a) encompasses, and is intended by Parliament to encompass, a range of conduct that may contravene public order. In his view, however, the public order aspect of the offences would be satisfied if the offences took place in or within view of a public place: at [190].

[78] Thomas J expressed the test in the following manner: a person behaves in a disorderly manner if he or she "causes a disturbance or annoyance to any person or persons or interferes with the rights or interests of another person or persons to such a degree that a reasonable person would regard the behaviour as disorderly". Thomas J reasoned that in determining this question, regard should be had to the time, place and circumstances of the behaviour, the rights and interests of the alleged offender, the rights and interests of the person or persons affected by the behaviour, and the interest of the public in protecting the rights and interests in issue: at [199]. He stressed that the assessment is a question of fact and not law: at [202].

[79] In Thomas J's view, the evaluation set out above must be made against the contemporary attitudes, practices and values of the community and the reasonable person in this context can be presumed to be neither insensitive nor oversensitive to the preservation of public order. He noted that courts in Australia have defined the

reasonable man as one who is mature enough to tolerate expression of views violently at odds with his own, and who is reasonably understanding and contemporary in his or her reactions: at [201].

[80] Thomas J expressly rejected the approach of the Chief Justice with regard to intent and also the approach of Blanchard and Tipping JJ that had regard to the level of seriousness of the conduct: at [193] and [203] respectively. Thomas J considered that his hypothetical reasonable person test was a more principled approach: at [201] – [207].

Result in Brooker

[81] The majority of the Supreme Court in *Brooker* were of the view that Mr Brooker's conviction should be set aside on the basis that his right to freedom of expression was paramount. They reached the decision they did despite:

(a) The fact that freedom of expression also encompasses the right to decide not to receive information and opinions of any kind in any form. For example, in *Rowan v United States Post Office Department* 397 US 728 at 738 (1970) the United States Supreme Court noted that "no one has a right to press even 'good' ideas on an unwilling recipient". See also, Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* (2005) at 321; and

(b) The long common law tradition of a person's home being his or her castle. As noted by this Court in *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460 at [57]:

> The right to shelter is bound up with those of autonomy and dignity expressed in the adage "an Englishman's home is his castle", echoing Sir Edward Coke's dictum in Semayne's Case (1604) 5 Co Rep 91a, 77 ER 194: "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose".

(c) The right to freedom from arbitrary or unlawful interference with an individual's privacy and family contained in art 17 of the ICCPR;

(d) The recognition of a privacy value in *Hosking v Runting* [2005] 1 NZLR 1 at [117] per Gault P and Blanchard J, and [249] per Tipping J (CA);

(e) The United States jurisprudence on captive audiences which has also been applied in Canada: see for example the comments made in *Committee for the Commonwealth of Canada v Canada* [1991] 77 DLR (4th) 385 at 430-431 per L'Hereux-Dubé J (SCC). As outlined by McGrath J at [126] – [127] of *Brooker*, the Supreme Court of the United States has given strong recognition to the importance of what Brennan J has described as "the right of an individual 'to be let alone' in the privacy of the home": *Carey v Brown* 447 US 455 at 471 (1980). In *Frisby v Schulz* 487 US 474 at 484-485 (1988), O'Connor J, delivering the majority judgment of the Court, outlined that an important aspect of residential privacy was protection of the unwilling listener in her home:

> Although in many locations, we expect individuals simply to avoid speech they do not want to hear . . . the home is different. 'That we are often "captives" outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.' . . . Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

(f) The fact situation at issue in *Brooker* where the policewoman could be seen as having been particularly captive in that she had come home from a night shift to sleep, a fact of which Mr Brooker was aware: *Brooker* at [67] per Blanchard J, at [94] per Tipping J, at [140] per McGrath J and at [281] per Thomas J. (Elias CJ was not prepared to infer from the evidence that Mr Brooker had deliberately woken up the policewoman: at [50). The policewoman also (understandably) felt intimidated by Mr Brooker's presence outside her house: *Brooker* at [50] per Elias CJ, at [66] and [68] per Blanchard J, at [73] per Tipping J, at [140] per McGrath J and at [266] and [279] per Thomas J. Further,

the policewoman in her own home was clearly no longer acting in any way in her official capacity. She was a private individual in her own home.

(g) The fact that the policewoman's neighbours were also captive (and of course had had no involvement at all with the search warrant), although there was no evidence of any concerns by the neighbours. However, this could possibly have been because of the time of day, because Mr Brooker was alone and the limited nature of the protest (lasting about 15 minutes and consisting of playing the guitar and singing in a relatively loud voice).

(h) The fact that, while it is true that Mr Brooker was wishing to express his concern at perceived official injustice, the District Court Judge rejected the contention that the policewoman had acted unlawfully: see *R v Brooker* [2004] NZAR 680 at [7]. In these circumstances this Court's view in *R v Brooker* [2004] NZAR 680 at [31] was that Mr Brooker's actions could be seen not so much as a protest but as more aligned with a:

> different course of conduct, regrettably all too common, in which disaffected individuals set out to harass individuals in ways which are sometimes explicitly or implicitly threatening. In reaching this conclusion we note that … [Mr Brooker's] purpose was to harass and annoy her.

(i) The fact that the policewoman was just doing her job with regard to the search warrant (effectively performing an important public function of the police). The harassing and annoying of an individual policewoman in such a manner could be viewed as being designed to try to interfere with a police officer's fearless adherence to his or her duty. The risk in allowing such behaviour is that it may have the desired effect in effecting such interference or at least may be perceived to have done so. Such a consequence risks lowering the public's perception of and confidence in the police.

[82] That *Brooker* was decided the way it was in light of the countervailing values set out above suggests that it can only be in exceptional and extreme cases that the right of freedom of expression (and particularly the right to protest) can legitimately be curtailed through the medium of the offence of disorderly behaviour, at least when it is exercised in a reasonable manner.

Principles from other cases

Previous authority on offensive behaviour

[83] Prior to *Brooker*, the most recent decision of this Court that explored the meaning of offensive behaviour was *R v Rowe* [2005] 2 NZLR 833. In *Rowe*, Panckhurst J, for the Court, reasoned that "threatening, injurious and hurtful may frequently be apt synonyms" for the term offensive: at [22].

[84] This Court noted that the offence is one against public order which must occur in, or within view of, a public place. It said that, because the offence is one against public order and must occur in, or within view of, a public place, the right that must be seen to be infringed is the freedom to use and enjoy the public place in question: at [22].

[85] This Court saw the significant test as being whether the behaviour was "such as (to be) calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person": at [23]. Significantly, this Court in *Rowe* reasoned that, when considering whether or not offensive behaviour has occurred, it is the tendency of the conduct and its likely impact upon hypothetical reasonable members of the community which must be assessed: at [24]. Such reasoning reflected that of Tompkins J in *Ceramalus v Police* at 682 where it was noted it was not necessary to prove that persons present found the behaviour offensive. Rather it would be sufficient if the court considered that it would be so regarded by persons whose views were representative of the community.

Flag burning as expressive conduct

[86] The right to freedom of expression is a longstanding and fundamental right which is essential to the effective functioning of democracy. As acknowledged by Lord Steyn in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 126 (HL), the right to freedom of expression serves a number of broad objectives:

> First, it promotes the self-fulfillment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill) "the best test of truth is the power of the thought to get itself accepted in the competition of the market"...Thirdly, freedom of speech is the lifeblood of democracy."

[87] This Court in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 has recognised that the right to freedom of expression is "as wide as human thought and imagination." Unsurprisingly, it has therefore been recognised in New Zealand that conduct as well as speech will fall within the scope of s 14. For example, the importance of flag burning as a form of expressive conduct was recognised by Ellen France J in *Hopkinson v Police* [2004] 3 NZLR 704 (HC). In *Hopkinson* the constitutionality of s 11(b) of the Flags Emblems and Names Protections Act 1981, which provides that it is an offence for any person to destroy or damage a New Zealand flag in or within view of any public place with the intention of dishonouring it, was explored. Significantly, France J held that prohibition of flag burning under the Act was a breach of the right to freedom of expression, and such a limitation was not justified under s 5 of the Bill of Rights. France J stated at [76]:

> Obviously, the flag is important. However, even in the United States where the flag is such a dominant symbol, [it has been] concluded [that] its protection did not warrant the interference of the criminal law. Freedom of expression comes at a cost in the sense that one must accept the ability to say and act in a way that annoys or upsets. Further, as Jackson J stated in *Board of Education v Barnette* 319 US 624 (1943) at p 642:
>
> > . . . freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

[88] France J's recognition that the expressive conduct of flag burning was protected by s 14 of the Bill of Rights reflects the jurisprudence that has emerged in the United States, holding that legislative provisions prohibiting the desecration of flags infringe the First Amendment right to freedom of speech. In *Texas v Johnson*, the United States Supreme Court quashed a conviction for flag desecration (burning), on the grounds that prohibition of such conduct was inconsistent with the First Amendment. Acknowledging that flag burning fell within the scope of expressive conduct, Brennan J, delivering the majority judgment, emphasised that the "bedrock principle" underlying the First Amendment was that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable": at 414.

[89] Indeed, relying on previous precedent, the Court stated that the function of free speech was to invite dispute and "[i]t may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger": at 408 – 409. Brennan J emphasised that the Court's recognition of the unconstitutionality of the legislative provision prohibiting the destruction of flags was a "reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that [the Court's] toleration of criticism... is a sign and source of... strength": at 419.

[90] This reasoning was later upheld by a majority of the Supreme Court in *United States v Eichman* 496 US 310 (1990) where it was said that punishing desecration of the flag would dilute the very freedom that makes the flag as an emblem so revered and worth revering: at 319.

Freedom of expression in public fora

[91] With regard to the restriction of First Amendment rights in public fora, the United States Supreme Court has established that, because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.

[92] The Court recently outlined the relevant principles in *Pleasant Grove City, Utah v Summum* 129 S.Ct 1125 at 1132 (2009):

> While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property. This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, "which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) *(*quoting *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939*)* (opinion of Roberts, J.)). In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such "traditional public fora." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985*)*. Reasonable time, place, and manner restrictions are allowed, *see Perry Ed. Assn., supra*, at 45, 103 S.Ct. 948, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, *see Cornelius, supra*, at 800, 105 S.Ct. 3439, and restrictions based on viewpoint are prohibited, *see Carey v. Brown*, 447 U.S. 455, 463, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).

[93] A reluctance to restrict freedom of expression in a public forum has also emerged in Canadian jurisprudence. The Supreme Court of Canada explored the value that must be granted to freedom of expression, contained within s 2(b) of the Canadian Charter of Rights and Freedoms, occurring in public property in *Montreal (Ville) v 2925-1366 Quebec Inc* [2005] 258 DLR (4^{th}) 595.

[94] The Court in *Montreal* noted that the basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression. Such an expectation would arise on the basis that expression in that place does not conflict with the purposes underlying s 2(b) which are: democratic discourse; truth finding; and self-fulfilment: at [74].

[95] The Court held that to answer this question the historical or actual function of the place should be considered and also whether other aspects of the place would suggest that expression within it would undermine the values underlying free expression. Thus, both the historical function of a place for public discourse and whether an open right to intrude and present one's message by word or action would

be consistent with what is done in that space must be explored in determining whether the right to freedom of expression must prevail: at [75] – [76].

Captive audience jurisprudence

[96] While the right to freedom of expression is fundamental to a functioning democracy, it is also apparent that justified limits must be placed on this right. As noted above, it has been established in United States jurisprudence that the state is entitled to protect individuals from unwanted communication that implicates certain privacy interests when the listener is somehow captive to the message. Thus, the Supreme Court in *Cohen v California* 403 US 15 at 21 (1970) noted that the ability of government to shut off discourse to protect others from hearing it is dependent upon showing privacy interests are invaded in an essentially intolerable manner. Accordingly, the interests of unwilling listeners in situations will prevail in situations where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure": *Erznoznik v City of Jacksonville* 422 US 204 at 205 (1975).

[97] The recognisable privacy interest in avoiding unwanted communication varies widely in different settings: *Hill v Colorado* 530 US 703 at 716 (2000). Thus, the Supreme Court has found that the privacy interests of individuals in their home (*Frisby v Schulz*) and the privacy interests of individuals entering an abortion clinic (*Hill v Colorado*) prevail over the right to freedom of speech. Moreover, as noted by Arnold J at [35] the captive audience jurisprudence was applied by the Sixth Circuit Court in *Phelps-Roper v Strickland* 539 F 3d 356 (2008) to find that the state could place limits on the rights of free speech on the private occasion of a funeral. Significantly, however, the majority judges in *Brooker* did not grant precedence to the captive audience principles when undertaking the balancing exercise, thus indicating a judicial reluctance to consider such privacy interests as outweighing the right to freedom of expression under s 14 even in the circumstances in that case: see at [81](f) above.

Summary of principles to be applied

Disorderly behaviour

[98] By taking an amalgam of the very similar tests set out by Blanchard, Tipping and McGrath JJ, the test for disorderly behaviour as outlined by the Supreme Court in *Brooker* can be discerned. Following the approach of the three judges it is clear that the conduct has to be sufficiently seriously disruptive of public order to warrant the intervention of the criminal law. Where the rights in the Bill of Rights are engaged, a balancing of those rights against other relevant rights and values is required. Limits can be placed on the right to freedom of expression (and in particular the right to protest) only if justifiable in a free and democratic society, assuming a proper tolerance of minority unpopular views. Time, place and circumstance remain important considerations but the result in *Brooker* would suggest that very strong countervailing factors would need to exist before the right to express genuine political views might be counter-balanced.

[99] Thomas J's balancing approach in *Brooker* was, however, similar to that of Blanchard, Tipping and McGrath JJ. However, rather than concentrating on the seriousness of the behaviour, Thomas J assessed the behaviour from the viewpoint of a reasonable, properly tolerant member of the public, taking into account the right at issue, the rights of other individuals and the interests of society as a whole. Thomas J's reasonable person test for disorderly behaviour appears to equate to the test advanced by Blanchard J with regard to offensive behaviour.

[100] As noted above at [62] the Chief Justice rejected the balancing approach used by the other judges.

Offensive behaviour

[101] In the case of offensive behaviour, Blanchard J's test set out in his judgment in *Brooker* (necessarily obiter) was whether the behaviour was such as to cause substantial offence to reasonable persons in the particular circumstances. The behaviour is judged by reference to the reactions of the person actually subjected to

it and can relate to the content and not just the manner of expression. I agree with Arnold J's comments at [24] that the balancing test set out at [59] of Blanchard J's judgment would also apply to offensive behaviour where the Bill of Rights was engaged. For present purposes I adopt Blanchard J's test with two caveats.

[102] The first caveat relates to the lack of any public order aspect to the test. In Blanchard J's view, an added element of a risk to public order is not required with regard to offensive behaviour. It is unclear whether Tipping J agreed with this comment of Blanchard J's. It is, however, likely that the other judges would have held that offensive behaviour was also a public order offence (see above at [62] and [73]), although for Thomas J this means simply that it is in, or within view of, a public place: see above at [77].

[103] As it is not decisive in this case, I would leave the point open. It may be, as noted by Arnold J at [27], that the objective element (the hypothetical reasonable person) provides the appropriate limiting mechanism. It may be too that, where conduct is so offensive that it is more than a reasonable person in a free and democratic society should have to bear, then this is in itself a threat to public order (noting McGrath J's comments in this regard summarised at [75] above).

[104] On the other hand, it might be thought odd that there is an added public order limitation for one part of s 4(1)(a) but not for the other, particularly given the generic heading to ss 3 – 8 of the SOA as offences against public order: see discussion above at [73]. I note that this Court in *Rowe* seemed to be of the view that the offence was one against public order: see the summary above at [84]. However it could be argued that the Court's emphasis on the fact it was in a public place means that an approach similar to that taken by Thomas J was envisaged.

[105] The second caveat relates to a potential problem with postulating a reasonable person as being the same type of person as the people who are actually subjected to the conduct: see at [21](b) of Arnold J's judgment. First, in *Rowe*, the test that was favoured did not include the fact the reasonable person had to be "of the kind actually subjected to it". Secondly, as noted by Arnold J at [27], there are risks in assessing the conduct and speech by the effect on the particular audience. To take

an historical hypothetical example from outside New Zealand, if a civil rights activist in the United States had chosen to address a gathering of the Ku Klux Klan on racial tolerance, there would likely have been outrage from the audience and a threat to public order. In this hypothetical example, it is hard to postulate a reasonable Ku Klux Klan member properly tolerant of views that were not his or her own and legitimate questions could be raised as to whether the threat to public order would have been the fault of the civil rights activist or his or her reluctant audience.

[106] I would therefore modify Blanchard J's test to encompass a more general community values test: see the discussion of Thomas J's judgment at [28] above and the discussion of *Rowe* at [85]. This assumes in the audience a proper tolerance of minority viewpoints and fully recognises the right to freedom of expression, including the right to express and hold unpopular views and to choose the manner and form in which they are expressed. A person is also entitled to express views that are wrong or misguided (remembering of course that whether something is wrong or misguided is often a matter of perspective). Time, place and circumstance remain relevant considerations, as well as the demographic and other characteristics of the audience (such as, for example, whether children were present). Any views held by the particular audience that were not properly tolerant of the right to freedom of expression in a free and democratic society would not, however, be taken into account.

Countervailing considerations

[107] In this case the most important countervailing right is that of freedom of expression and in particular the right to protest. It has been recognised that political expression is central to a democratic system which requires that even ideas that "offend shock and disturb" be published: *Handyside v United Kingdom* (1976) 1 EHRR 737 at [49] (see generally, Clayton and Tomlinson *The Law of Human Rights* (2ed 2009) at 1455). Protest fulfils a very important function in a free and democratic society, as noted in the course of his judgment in *Brooker* by McGrath J:

> [116] Protest in general involves the physical presence of the protester or protesters where the protest takes place, the conveying of information, attempts at persuasion and pressure on the subject of the protest. To these

> ends protesters will seek to draw the attention of their immediate or wider audience to perceived public mischiefs in ways that will bring home to those at whom the protest is directed the force of their criticisms. Protesting actively in or within view of a public place will normally be thought to have a greater impact on public opinion than a more passive approach, especially if it generates media attention. In assessing the particular weight to be given to freedom of speech in a protest context, respecting the freedom to choose the means of protesting which are seen to be most effective is important. Respect for protest as a means of pressing for change in official policy or conduct is very much part of New Zealand's culture and societal values. A protest concerning perceived overbearing police conduct is well within the spirit of the right to freedom of expression. As Andrew Geddis has put it:
>
> > [T]he overall health of our body politic may be judged by how far our legal ordering provides [the individual dissenter] with the space to make her opinions known to the public.

[108] The principles from the flag burning cases discussed above are also of particular relevance. The flag is an emblem of nationhood, democracy and freedom. It is vital to ensure that this symbolism is not destroyed by using that very emblem as a justification for curtailing legitimate political protest. It is at the heart of democracy that people must be free to differ on even core values.

[109] I now turn to the application of the principles to this case but first it is necessary to examine whether the application of the balancing test is a question of law.

Question of law?

[110] Both parties submitted that Blanchard J's balancing test required an analysis under s 5 of the Bill of Rights in each case as a matter of law. This meant that this Court would perform the s 5 analysis afresh on appeal.

[111] In my view, this was not the approach advocated by Blanchard J in *Brooker*. After all Blanchard J recognised that different judges could come to different conclusions, as noted above at [67]. I do not think that any of the other judges in *Brooker* considered that the application of the balancing test was a question of law either. Thomas J specifically observed at [186] that whether behaviour is disorderly "will essentially be a question of fact and degree"; see also the comments at [48] and [49] per Elias CJ, at [64] per Blanchard J, at [92] per Tipping J and at [133] per

McGrath J. In my view the application of the balancing test is either a question of fact or possibly a mixed question of fact and law.

[112] As acknowledged by William Young P at [46] above the appeal to this Court is confined to questions of law and is not the equivalent of an appeal under s 385(1)(a) of the Crimes Act 1961. However, in my view, the same test must apply for this appeal. Thus, drawing guidance from the approach taken under s 385(1)(a) it can be argued that the decision of the District Court could only be overturned if it used the wrong test or on the basis that, having regard to all the evidence, the Judge could not reasonably have been satisfied to the required standard that the appellant was guilty: see generally *R v Owen* [2008] 2 NZLR 37 at [5] (SC) and *R v Munro* [2008] 2 NZLR 87 at [86] (CA).

[113] It appears to be accepted that both Judges below properly identified the test to be applied (and I agree that they did). The issue then is whether the principles, properly applied to the facts as found, could legitimately have led to the conviction.

Application of the principles to this case

[114] It is clear from the portion of the judgment of Judge Blaikie quoted at [9] of Arnold J's judgment that Judge Blaikie would have held that the burning of the flag alone was offensive behaviour not protected by the Bill of Rights (even without the added dimension of the horn). From the portion of Miller J's judgment quoted at [11] above, it is possible that Miller J may have upheld Judge Blaikie's decision on this point alone, although Miller J did put emphasis on the fact that the burning of the flag was part of a strategy to disrupt the service, including by blowing the horn.

[115] Arnold J in his reasons emphasises the concerted nature of the protest and the deliberate disruption of the service and, in particular, Mr Fortune's speech, which the majority see as interfering with Mr Fortune's right to freedom of expression and the right of his audience to receive information and opinions from others: at [34]. Arnold J also takes account of the captive nature of the audience: at [35].

[116] In my view, the burning of the flag by itself on University grounds as a genuine exercise of the right to express political opinions could not be seen as offensive. Following the test outlined at [101] –[106] above, behaviour is offensive in terms of s 4(1)(a) only if it is sufficiently serious to offend appropriately tolerant reasonable members of the public, taking account of the time, place and circumstances, the "demographics" of the public involved and any competing values and rights (such as freedom of expression, the importance of the right to protest and those considerations identified in the flag burning jurisprudence discussed above at [86] – [90] and [107] - [108]).

[117] There is no doubt that Ms Morse's conduct could well be seen by those present at such an occasion as highly disrespectful to those who had fallen in the service of their country and to their friends and loved ones. It could also be seen as unwise in that it could tend to alienate the very audience she wished to reach. For example, one witness noted that he did not "particularly disagree" with an anti-war message, but that a "solemn celebration" should not have been disrupted in such a manner. The burning of the flag at an occasion such as this and on a day that has been associated with national identity (as well as respect for the fallen) could be seen as particularly insensitive.

[118] However, as noted above at [55], not all witnesses found the act of burning the flag in itself particularly offensive. Those that did were free to avert their eyes (particularly given that Ms Morse was on university grounds some distance from the bulk of the crowd). Moreover, Ms Morse's intention was to make a political statement of views genuinely held, at a time Ms Morse considered was relevant for making the points she wished to make (during a speech by an official representative as against during prayers or during the other aspects of the ceremony more related to individual sacrifice). Indeed, a commemoration service for servicemen and women of past wars might be seen as a particularly apt time to protest against current and future involvement in wars. The content of Ms Morse's message was clear from the surrounding circumstances as an anti-war message which could not in any way legitimately be seen as offensive.

[119] The general appropriateness of the occasion for an anti-war message is particularly the case given that, as pointed out by Arnold J at [30], Anzac Day has come to have wider significance than merely commemorating individual sacrifices. Anzac Day celebrations are now quintessentially public rather than private occasions, and (as noted below at [131]) the privacy right that is important to mourners at a private funeral will usually not extend to individuals attending a public event. A properly tolerant reasonable member of the public would, in my view, understand this.

[120] It can only have been the manner in which that legitimate message was conveyed that could be offensive. In that regard I endorse the comment of the Supreme Court of Canada in *Irwin Toy Ltd v Attorney-General (Quebec)* [1989] 1 SCR 927 at 970 where it was stated "[t]he content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts". It is not for the Courts to prescribe the acceptable means of conveying a message. In this regard, the principles outlined in the flag burning cases become of particular importance. The very importance of the flag as a symbol of freedom means that a political statement relating to that emblem cannot lightly be condemned. To do so risks compromising the very values the flag protects. Further, as noted above at [89], a significant factor for the majority in *Texas v Johnson* in its recognition of the importance of flag burning as expressive conduct was that freedom of speech may indeed best serve its high purpose when it stirs people to anger.

[121] For the above reasons, and for those discussed below at [127] – [134] I do not consider Ms Morse's conduct in burning the flag (if that stood alone) could, on any proper application of the balancing test, have reached the stage where it fell outside the *Brooker* principles.

[122] The next question is whether the added dimension of the horn changes this analysis. I agree with the majority that the use of the horn, co-ordinated with the flag burning, means that there is an issue of a clash of rights in this case, being Mr Fortune's right to freedom of expression (and the right of his audience to choose to listen to him) as against Ms Morse's right to freedom of expression. It is the

antithesis of freedom of expression to attempt to drown out the views of others totally. As noted by the United States Supreme Court in *Red Lion Broadcasting Co. v FCC* 395 US 367 at 387 (1969), "the right of free speech does not embrace a right to snuff out the free speech of others".

[123] On the other hand, a certain amount of disruption and interruption is the very nature of protest. It could not seriously be suggested that heckling at a political rally is an illegitimate form of protest. Interrupting is sometimes the only way minority views can be heard by those a protest is aimed at. Ms Morse's behaviour (and the accompanying horn) can be seen in somewhat the same light as political heckling, which took place on a public occasion which, while not a political occasion, was an occasion relevant to her message. In this regard I refer to Blanchard J's comments in *Brooker* that "the purpose of protest is to make someone listen to something they do not want to hear" (at [62]) and to McGrath J's comments on the importance of protest in New Zealand society: outlined above at [107].

[124] Even with the added dimension of the horn blowing, I do not consider any legitimate application of the balancing test could have resulted in a conviction for Ms Morse (see also discussion of the duration of the protest at [133] below).

[125] Time, place and circumstance are of course important. The following factors were put forward on behalf of Ms Morse as militating against her conduct being offensive in the particular circumstances of this case:

(a) The lighting of the flag was fleeting and lasted only seconds before Ms Morse was stopped;

(b) The protest was distant from the speaker's podium, across a road and behind a hedge;

(c) Only a small number of the attendees were in the Law School grounds with the protesters;

(d) The vast bulk of the attendees were in front of Ms Morse and looking the other way and so would not even have seen her brief lighting of the flag;

(e) The attendees were not forced to watch the flag burning;

(f) There was no evidence of any danger to anyone nearby;

(g) There was no evidence that the official party was disturbed;

(h) There was no evidence that the crowd was actively disturbed (as opposed to some sentiment being aroused);

(i) Those in attendance could be expected to understand that it was done in the course of a genuine protest and therefore to exercise more tolerance even if they were annoyed by it;

(j) There was no conduct that might be characterised as lewd or indecent or threatening to public morals;

(k) Ms Morse was doing nothing more than the second flag burner who was not prosecuted; and

(l) Ms Morse's activities were less disruptive of proceedings than a horn blower, who was not prosecuted for blowing a horn.

[126] Taking these factors in reverse order, that others involved in the protest were not prosecuted for the same offence or at all is irrelevant. Absent bad faith or some improper motive for initiating the prosecution, the courts must deal with those in front of them in accordance with the law: *Fox v Attorney-General* [2002] 3 NZLR 72 at [37] (CA). The decision to bring a prosecution is the prerogative of the Crown, and the even-handedness or fairness of a decision to prosecute certain individuals and not others, despite being involved in the same events, is not ordinarily a matter for the courts: *R v Forsyth* [1997] 2 Cr App R 299 at 310 (CA). There is no

suggestion that there was an improper purpose in prosecuting Ms Morse rather than the others who were involved.

[127] I do consider it significant that there was no lewd or indecent behaviour involved. While offensive behaviour would not be limited to such behaviour, this is likely to form the bulk of cases of offensive behaviour. I accept that other types of behaviour could, however, legitimately be characterised as behaviour that has a tendency seriously to wound the feelings and sensitivities of a reasonable person in accordance with Blanchard J's test outlined above at [101]. For example, there is little doubt that it would be offensive behaviour justifying the intervention of the criminal law if a person, at a private memorial service for holocaust victims, paraded a swastika among the crowd, whatever the political message it was intended to convey.

[128] I accept that the factors identified at [125](b) to (i) are relevant, pointing towards the result of the balancing exercise being in Ms Morse's favour. The distance from the Cenotaph and the podium is of particular significance. Indeed, the distance between a protester and the person subjected to the protest has been recognised by the United States Supreme Court to be a significant factor in determining whether the First Amendment right to free speech has been infringed: see the discussion in *Hill v Colorado* of the differing judicial treatment of an 8 foot compared to a 15 foot protest restriction: at 726.

[129] I would add that the fact the protest took place in University grounds is also important. Section 161(1) Education Act 1989 provides that the intention of that Act is to ensure that academic freedom and the autonomy of academic institutions are to be preserved and enhanced. As recognised by s 161(1), a University should be seen as an autonomous institution, which implicitly functions to facilitate public discourse. Thus an open right to intrude and present one's message by word or action would be consistent with the nature of a university. Further, if regard is had to the Canadian jurisprudence discussed above at [93] – [95] (and I consider it is applicable in New Zealand), both the actual and historical function of the particular public space would support Ms Morse's right to express her anti-war message freely.

[130] Moreover, I consider Arnold J's reliance on the captive audience jurisprudence to be misplaced. As recognised by the United States Supreme Court in *Erznoznik*, absent the situation where the degree of captivity makes it impractical for the unwilling viewer to avoid exposure, the burden falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes": at 211. As it has been recognised that the recognisable privacy interest in avoiding unwanted communication varies widely in different settings (see above at [97]), and that persons on public streets have limited privacy interests (*Erznoznik* at 212), to apply the privacy interest in avoiding unwanted communication at a public event, such an Anzac Day Dawn Service, would appear to be a significant extension of the captive audience jurisprudence. This is especially the case as it was not seen as conclusive by the majority in *Brooker* in a situation where it might have been thought the policewoman was particularly captive: see above at [97].

[131] Further, Anzac Day has become a symbol of national identity, as recognised by Miller J at [36] and Judge Blaikie at [26]. It is thus a conceptually different occasion to the setting of a funeral in *Phelps-Roper*, relied upon by Arnold J at [35]. In *Phelps-Roper*, emphasis was placed on the privacy rights of family and friends when mourning their loved ones. Following the jurisprudence on captive audiences, the Court reasoned that a funeral or burial service is a moment of collective, shared grief when many family and friends come to pay their final respects to the deceased and to offer comfort to one another: at 366. It was acknowledged that any unwanted intrusion during the last moments the mourners share with the deceased during a sacred ritual would surely infringe upon the recognised right of survivors to mourn the deceased: at 366.

[132] While I accept that the reasoning in *Phelps-Roper* is sound, it cannot be easily applied to the situation that occurred in this case. If Ms Morse had burnt the flag during a more personalised aspect of the ceremony (eg the laying of wreaths by those who had lost family or friends in armed conflict) and this had occurred by the Cenotaph or by the speaker's podium, particularly if accompanied by the horn, the situation may have been different.

[133] The fact the protest was fleeting is also of major significance. In the event the flag burning protest and the accompanying horn were stopped by the police almost immediately. The short duration of the protest was a major factor in *Brooker*, despite the fact that in that case too the protest was stopped by the police. Arnold J at [39] appears to consider that the Supreme Court's reliance on the short duration of the protest was because the police were not entitled to arrest Mr Brooker for disorderly behaviour. However, regardless of whether or not the reason for the short duration of the protest in *Brooker* was in fact a wrongful act by the police, it is quite clear that the majority judges in *Brooker* viewed the short length of the protest as an important consideration in determining whether an offence has been committed under s 4(1)(a).

[134] In this case, even if Ms Morse's actions had not been frustrated by the police, her intent to disrupt Mr Fortune's speech was presumably only for the duration of the flag burning, which would not, one assumes, be long in itself. There was no finding that the intention was to disrupt the event for longer than that. Thus any interference with Mr Fortune's rights and those of his audience were of limited duration. Although Arnold J at [43] states that the length of the flag burning holds no relevance to the determination as to whether Ms Morse's behaviour was offensive, this does not appear to accord with the approach taken towards protest action by the Supreme Court in *Brooker*.

Conclusion

[135] For the above reasons, I do not consider that the Judges below could legitimately have come to the conclusion that Ms Morse's behaviour was offensive. I would have allowed the appeal and quashed Ms Morse's conviction.

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