COMMON LAW RESTRICTIONS ON COMMERCIAL AND POLITICAL USER OF THE HIGHWAY.

The purpose of this article is to examine the uses which the citizen is entitled to make of the public highway. This is an issue of constitutional and cultural significance in a system in which all land is privately owned,[1] for public space becomes the arena in which much social, political and commercial activity takes place. Highways are an important public resource offering opportunities not only for travel, but also social interaction, recreation, commerce, and, of course, protest. A walk though a small English town on a summer's afternoon revealed that, in addition to uses connected with the right of free passage, highways in the town were used for the stationing of boards advertising menus at pubs and restaurants; the distribution of leaflets; and the collection funds for charity. A trader operated a burger stand; conversations took place between passers-by; rubbish bins and skips were placed on the highway; cars and heavy goods vehicles were parked on the road-side; and there were buskers, and stalls for street sellers; some shops even displayed goods on the pavement. The law has struggled to accommodate these and many other familiar uses of the highway within the legal principles governing their use.

This indeterminacy has partly been attributable to a failure to identify an appropriate theoretical model. The law has shifted between two alternative approaches. According to the first "private law" approach the user of the highway has to demonstrate that he or she is in some private law sense a member of a class of persons which is the beneficiary of a legal right to use the highway. The intention, or presumed intention of the landowner, who first dedicated to way to public use is relevant here.

A different model, which is the antithesis of the private law model, is founded upon communitarian principles. This prefers to ask whether the use in question is reasonable regardless of the intention of the private landowner who first dedicated the highway to public use. This model is, in one sense, a means of facilitating individual freedom, although it also overrides it since the interest of the landowner is subordinate. This latter approach is ultimately concerned with whether there is a need to regulate the activity rather than with the private law origin of the public's right of access. This failure to resolve the fundamental questions of principle has produced divergences within even the most recent decisions, as will be shown in relation to *Secretary of State for Defence v. Percy*,[2] and the House of Lords' decision in *DPP v. Jones*.[3] This

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1 The problems of the reconciling the interests of the community with the interests of private landowners is raised in the proposed introduction of a "right to roam" announced in *The Times*, March 9th 1999. Legislation is not expected before 2001.

2 [1999] 1 All ER 732, Carnwath J.

article will evaluate these models in order to identify the extent to which the common law accommodates economic and political activity in respect of the highway.

WHAT CONSTITUTES A HIGHWAY?

At common law, a highway is a way over which there exists a public right of passage. This right is one which allows "all of Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance".[4] The highway may be dedicated subject to conditions, for example, as to the class of traffic which may use it.

The definition is wide enough to include *inter alia* footpaths,[5] lay-bys,[6] "service roads",[7] a pedestrian precinct,[8] bridleways [9] and grass verges,[10] depending on the facts.

For the purposes of the Highways Act 1980, s.328 extends the meaning of "highway" to the whole or part of a highway other than a ferry or waterway. Where a highway passes over a bridge or through a tunnel these are also taken, for the purposes of the Act, to be a part of the highway.

THE RIGHT OF THE PUBLIC IN RELATION TO THE HIGHWAY

The Private Law Model

The private law asks whether the user in question falls within those classes of user which the landowner contemplated, or can be presumed to have contemplated, when the highway was first dedicated to the public. It purports to respect individual preferences by identifying the scope of the grant of property

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3 [1999] 2 WLR 625.

4 Ex p. Lewis (1888) 21 QBD 191,197, Wills J .

5 *Wolverton UDC v. Willis* [1962] 1 All ER 243

6 *Nagy v. Weston* [1965] 1 WLR 280.

7 *Redbridge London Borough Council v. Jaques* [1970] 1 WLR 1604.

8 *Hirst and Agu v. Chief Constable of West Yorkshire* (1986) 85 Cr App Rep 143; *Waite v. Taylor* (1985) 149 JP 551.

9 Highways Act 1980, s. 329

10 *DPP v. Jones* [1999] 2 WLR 625.

rights. This approach essentially examines the scope of the "easement" [11] which the public has acquired over the highway.

The fundamental premise of the private law model reminds us that the ownership of the highway is not vested in the public. It emphasises that the surface of the highway belongs *prima facie* to the owner of the land adjoining it. If the land on either side of the highway is vested in different owners, each is the owner of the surface as far as the centre of the highway[12]. If the highway is maintained at the public expense, the surface is vested in the highway authority. The fundamental premise remains, however, that it is still "private" land.

Private law reasoning is paramount in the classical decision of the majority of the Court in *Harrison v. Duke of Rutland.* [13] Here a highway ran across a grousemoor owned by the defendant. The plaintiff had gone onto the highway to disrupt the grouse shoot, but was removed from the area by the defendant's men. He brought an action for damages for false imprisonment and assault; the defendant counter-claimed that the plaintiff was a trespasser on the highway.

It was held that the ownership of the sub-soil remained with the defendant even though a public highway ran over the land. The public highway was merely an "easement" or a permission for the public to pass over the land. Since the plaintiff had not intended to pass and repass along the highway, his purpose fell outside that for which the highway was dedicated. It was thus unlawful and constituted a trespass. The issue of motive in establishing lawful user, which was paramount in *Harrison*, is capable of being highly restrictive of potential lawful user, and is considered further below.

The private law model allowed the courts to control highway user at two levels. First the court might have decided that the activity was not of a permissible kind.[14] Second it examined the purpose or motive with which a *prima facie* lawful activity was undertaken. The result, when these two levels of control, were applied, furnished the courts with a weapon to strike down many common place activities. For instance, the "purpose" rule ostensibly outlawed any kind of commercial use of the highway, even if it did not involve a right to remain (as in static trading from a stall). Decisions seemed to be tinctured with value judgments rather than transparent principles.

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[11] A public right of way is not synonymous with an easement of way because the public right of free passage may be exercised by anyone, whether he owns land or not. An easement is a right exercisable over servient land by the dominant proprietor by virtue of his estate in the land. There may, however, be similarities in the manner of their creation.

[12] Surface includes sub-soil for these purposes.

[13] [1893] 1 QB 142.

[14] E.g., trading from a stationary van: *Pitcher v. Lockett* [1966] Crim L.R. 283.

The Kinds of Lawful User

In *Harrison* there was an absence of agreement concerning what activities were permissible on the highway. Lord Esher MR was careful to stress that the public's 'easement' over the highway was not limited to passing and repassing:

> "Highways are, no doubt, dedicated *prima facie* for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and so constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."[15]

Lord Esher MR's approach was subtly but fundamentally different from the orthodox private law view. This, as it will be recalled, would have focused upon the limited easement which the public acquires over the highway. His approach was to abandon private law ideas of limited access and to pursue instead a communitarian model which was more concerned with whether the mode of user was a reasonable one. This was examined according to the public interest in general and not the exclusive interest of the owner of the sub-soil of the highway. This is a fundamentally different approach from the orthodox analysis. But the majority was more conventional.

Kay L.J. stated: [16]

> ". . . the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass."

Lopes L.J., also stated the law in narrow private law terms:[17]

> ". . . if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil . . . "

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15 *Harrison v. The Duke of Rutland,* supra n. 12 at p. 146-7.

16 at p. 158.

17 at p. 154.

The majority therefore decided that the public's only legal right was the right of passage. Any other use would be a trespass against the owner of the sub-soil.[18] Nevertheless, Kay L.J., recognised that the highway is regularly used for other purposes,[19] but he insisted that such uses would be a trespass against the owner of the sub-soil. Most instances, would, in his opinion, be too trivial to justify legal proceedings.[20] This appears to acknowledge the social utility of many activities which do take place upon the highway, but relies on a restrained invocation of legal redress to shield those activities from incurring a penalty. Common activities not connected with the right of free passage are therefore an indulgence of the state, not a fundamental right. This formulation, which denies use as of right, therefore accommodates the interest of the zealous landowner or prosecutor rather than the public. Those activities which were socially useful were always vulnerable to removal from the highway by the landowner or by public officials. Community interests in wider recognition of highway use were accorded no priority under the private law model.

There was also arbitrariness in isolating those uses which were identified as "trivial" and so deserving of indulgence. Kay L.J. offered as an the example an artist who sets up an easel on the highway. In contrast, stallholders or other traders who occupy a pitch without a licence or consent are often prosecuted.[21] Imposed preferences rather than principle appear to distinguish the artist from the trader. Even if the latter's activities might cause a larger obstruction it is not self-evident why each static use should *necessarily* be treated differently. Indeterminacy is the inevitable outcome as prosecutors floundered to identify uses which, by the operation of some compelling but inadequately described, public policy on the operation of the private law model, should be indulged rather than punished.

But this does not conclude the matter, because even if the nature of the activity fell within the scope of the dedication, that is, it was undertaken in pursuit of free passage or a right incidental thereto,[22] the court would apply a further layer

[18] E.g., Lopes LJ at p. 154 and Kay LJ at p. 158.

[19] At. p 152.

[20] The need to indulge trivial uses was re-iterated in *A-G v. Wilcox* (1938) 36 LGR 593. Farwell J. emphasised that anything which obstructs the right of the public to use the whole of the highway even to the smallest possible degree is unlawful but the court will not intervene in trivial cases, such as would occur if a car let out passengers. It is noteworthy that setting passengers down is thus *of itself* unlawful and does not depend on the reasonableness of the circumstances in which that act takes place.

[21] Street trading outside Greater London is often regulated by the so called "street trading code." This is an adoptive code enacted in the Local Government (Miscellaneous Provisions) Act 1982, s.3 and Shed. 4 according to which it is an offence *inter alia* to trade in streets in which a licence/consent is required but where such has not been obtained. Outside those streets and "prohibited" streets (in which most forms of street trading are permitted) the common law governing highways, usually applies. Bye-laws sometimes regulate street trading in areas in which the code has not been adopted.

[22] Exceptionally, a highway may be dedicated- or may be presumed to have been dedicated- subject to the rights of street traders. See further below.

of control capable of restricting the right still further. This additional level examined the purposes for which free passage was undertaken.

Controls on the Purpose of Passage.

The restriction as to purpose is capable of having far-reaching effects for both political and commercial use of the highway. For example, even if a person passes up and down upon the highway - an activity which may appear to be within the dedication- it does not necessarily follow that his actions are lawful. It depends upon the purposes for which that person is on the highway. This is most clearly seen in *Secretary of State for Defence v. Percy*.[23] In this case bye-laws affecting an RAF station had been declared *ultra vires*, but pending an appeal the Ministry of Defence and local officials declined to remove bye-law signs from the land. The defendant removed the signs having gained access to them by means of a public footpath. One question was whether she had strayed beyond the limits of the path when she removed the signs. Carnwath J. held, however, that this was unimportant. This was so because this question only became relevant if she was using the footpath lawfully. He decided that her actions did not fall within the permitted user because she was not using the footpath for passing and repassing. Her illegitimate purpose (i.e. her intention to remove the signs) took her outside the scope of the permitted user of a public footpath.

This principle has long been recognised. In *R v. Pratt*,[24] the defendant trespassed on a public highway when he walked along it armed with a gun and accompanied by a dog. The dog was sent onto private land to send up pheasants which Pratt then shot. Similarly, in the well known case of *Hickman v. Maisey*[25] the defendant, a "racing tout", walked up and down a 15 yard stretch of the public highway watching horses in training upon the plaintiff's land. It was held that he was a trespasser since his purpose was not to exercise his right of passage but to act in connection with his business.[26]

The limitation that the individual using the highway must have done so intending to exercise the right of free passage is open to criticism. First, it is uncertain what the inquiry into purpose was designed to test. Few ever use the

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[23] [1999] 1 All ER 732. Limitations as to purpose can also be seen in *Waite v. Taylor* (1985) 149 JP 551 in which a juggler performing with lighted fire sticks in a precinct was held to be obstructing the highway since he was not using the highway for a purpose which was ancillary to his right of free passage along it. Even selling refreshments to tired motorists has been held to be an unreasonable use of the highway: *Waltham Forest LBC v. Mills* [1980] Crim LR 243.

[24] (1855) 4 E & B 860.

[25] [1900] 1 QB 752.

[26] See also *Harrison v. Duke of Rutland*, above, where it will be recalled that the protester had only used the highway to disrupt the grouse shoot.

highway with passing and re-passing as their ultimate purpose. They have other goals in view because highways provide a means to an end. This suggests that the focus on purpose or motive seems to test the end results of the user. This merely invites value judgments about which goals were socially acceptable. For example, the racing tout's purpose was held to make his passing and repassing unlawful. Had he been, for example, a person pacing up and down whilst waiting for a bus, the activity would have been lawful.[27]

The limitation as to purpose purports to distinguish those who use the highway in precisely the same manner, but whose goals are different. This seems arbitrary. Could there ever be a consensus about which goals were socially acceptable? And why did the law seek to exclude commercial purposes? If it was unacceptable for the racing tout to engage in his business on the highway, could we distinguish the haulage company, or the commercial traveller, the commuter or indeed anyone who used the highway as a means to an end connected with profit rather than highway use for its own sake?

The Private Law Model-Concluding Remarks

The first conclusion which may be drawn from the rule that the highway was dedicated solely for free passage and activities incidental thereto is that stationary forms of highway use, such as the holding of a meeting or an assembly[28] or stationary forms of street trading *prima facie* fall outside the uses for which highways are presumed to be dedicated.[29] This means that any encroachment onto the highway for an illegitimate purpose is an obstruction even though members of the public may pass without being impeded.[30] This has the consequence that those without access to private premises must either curtail their trading or political activities, or in respect of the former of these, have them licensed by the state.[31] There is no liberty to trade on the highway, just as there is no right to hold a political meeting on the highway.[32] An exception for traders benefits lawful markets where trading activity can be organised and governed either by the state, or by an beneficiary of a royal

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[27] Presumably incidental to the right of passage, albeit by bus. A similar conclusion seems possible in the case of the stationary pedestrian waiting for a bus.

[28] But a more liberal approach to peaceful non-obstructive street protest was taken by the Divisional Court in *Hirst and Agu v. Chief Constable of West Yorkshire* (1986) 85 Cr App Rep 143. The issue was central to *Jones v. DPP* (above n. 10) which is considered below.

[29] *Wolverton UDC v. Willis* [1962] 1 All ER 243; *Pitcher v. Lockett* [1966] Crim L.R. 283; *Waltham Forest v. Mills* [1980] Crim LR 243.

[30] E.g. *Homer v. Cadman* (1886) 16 Cox CC 51; *Redbridge LBC v. Jaques* [1970] 1 WLR 1604; *Cambridgeshire & Isle of Ely CC v. Rust* [1972] 2 QB 426.

[31] See above n. 20.

[32] *Nagy v. Weston* (below) purports to make the lawfulness of trading a question of fact which would permit trading which was reasonable in all the circumstances. But a close examination of the facts reveals that the courts have not substantially departed from their stance in *Harrison*. The decision is discussed further below. See also *Cooper v. Metropolitan Police Commissioner* (1986) 82 Crim App Rep 238.

franchise of the Crown acting essentially on the state's behalf.[33] But this only re-inforces the principle that the it is state or some nominated and powerful dignitary or authority which is vested with power either to regulate or to curtail the trading activity.[34]

The private law model is open to further objection because its principles were founded upon a legal fiction. This emphasised property rights as a mechanism to allow the individual (in this context the landowner) to maximise their own preferences. As we have seen the law decided that when the highway was first laid out the landowner dedicated it for public use for limited purposes. Any use outside those purposes would be a trespass. This fiction can be exposed for three reasons. First, it is almost certainly inaccurate to assume that most highways were established by grant. It is possible that some of oldest highways originated as hunter's tracks in times of prehistory. Others of great antiquity may have arisen as convenient trade routes.[35] Neither type were "dedicated" to the public use in the manner and for the purposes for so long presumed by the common law. Secondly, in the case of highways which were established by grant it is unrealistic to presume that each landowner who made a grant shared with all others an identical intention to limit public use. If each grant was actually made subject to its own conditions it seems that the lawful use of any highway could differ from that permitted on other highways. Each might be distinguished according to the terms of the dedication[36]. Finally, even if lawful use can be identified by reference to the actual or presumed intention of the original landowner could it be said that this permission, often granted so many centuries ago, encompassed technological changes in the modes of transport - from foot and horse to fast moving vehicular traffic? [37] These considerations expose the private law model as the imposed preferences of the common law disguised as the subjective intention of each grantor.

The Communitarian Approach

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[33] Local authorities have a statutory power under the Food Act 1984, s.50 to establish a market in their area. Historically markets were most often created by grant under the prerogative to a powerful local dignitary whose function was essentially to operate the market as a means of preserving public order. The potentially lucrative right to make charges in respect of goods sold in the market (toll) and to rent space for stalls (stallage) ensured that the market owner would benefit from fulfilling what was regarded as a public function. See Hough, *The Law of Street Trading,* (Earlsgate Press: 1994).

[34] Subject to the rule that every member of the public has the right to come into a lawful market to buy and to sell: e.g., *Scott v. Glasgow Corpn* [1988] AC 470.

[35] See generally Prof. R. Moore-Colyer, *Roads and Trackways of Wales,* (Moorland: 1984). Under the Highways Act 1980, s.31 a way is presumed to have been dedicated as a highway if it has actually been enjoyed by the public as of right and without interruption for at least twenty years.

[36] If successive strips of highway were once vested in different owners and dedicated subject to different restrictions passage along the entire length of the highway might theoretically involve both lawful and unlawful acts.

[37] see Lord Irvine of Lairg LC at p. 632.

The communitarian approach is the antithesis of the private law model. It emphasises interdependence and co-operation between individuals and groups. It resists the traditional priority of private law rights, and permits any use which is reasonable, the latter limitation being required to achieve a pragmatic accommodation of competing interests and uses.

The infiltration of communitarian values in this context is not innovative. In *Lowdens v. Keaveney*[38] the court decided that the public's right to use the highway was not limited to free passage lest anyone who joined a crowd which stopped to listen to a military band marching along a street, or the to watch the funeral of statesman, should be held to have committed an unlawful act. It resolved the question of lawful user by adopting a communitarian perspective according to which only "unreasonable or excessive" use of the highway was prohibited.[39]

The essence of a permitted use was that it should merely be reasonable, and this issue was to be resolved as a question of fact.[40] The weakness of the court's reasoning was that it was still value-laden. The deliberate choice of the military and civic examples (the military band and the statesman's funeral) is revealing because they are self-consciously laden with a judgment about the perceived value or importance of the activity. In an age of Empire the judge must have chosen these as exemplars of the kind of use it was desirable to protect rather than merely to indulge. It can only be speculated whether street protesters would have received the same indulgence. This is considered further below.

The alternative doctrinal foundation from that adopted in *Harrison* does not attempt to restrict the *type* of highway use; many kinds of activity could be lawful. The essence of the communitarian approach is thus to examine the legality of highway use by reference to the *consequences* of the use *vis a vis* the primary right of free passage. It precludes the unreasonable domination or appropriation of a public space by one group to the exclusion of others. Thus, for example, it permits the activities of protesters who do not entirely obstruct the highway because this is consistent with the free passage of others.[41] Nevertheless, the alternative model, whilst apparently more permissive, still resounds to policy considerations.

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[38] [1903] 2 IR 142, esp. 146-7. *Lowdens v. Keaveney* was followed and applied in *R v. Clark (No 2)* [1964] 2 QB 315 where it was held that the jury ought to have been directed to ask whether the CND demonstration was a reasonable use of the highway.

[39] per Gibson J. at 89.

[40] The occasion duration, place of user and time must be considered along with any *wrongful intent.* per Gibson J at p. 90. (Emphasis added).

[41] E.g., *Hirst and Agu v. Chief Constable of West Yorkshire* (1986) 85 Cr App Rep 143

Nagy v. Weston[42] is most revealing in this regard. As in *Lowdens* it was decided that the legality of highway use had to be considered as a question of fact and in particular whether it was reasonable in the circumstances. Relevant would be the length of time the obstruction continued, the place where it occurred, *the purpose for which it was done*, and whether an actual obstruction to free passage resulted. The reasoning appears to be coloured by communitarian concerns emphasising co-operation and balance between competing interests. However, the italicised words, although ambiguous, suggest that even the new model could be interpreted so as to control use by reference to motive.

It is interesting that in *Nagy* the court upheld the conviction of a hot dog seller for obstruction since the trading, albeit somewhat brief, took place beside a busy highway late at night in a lay-by used by 'buses. This was found to be unreasonable in all the circumstances. However, it might be argued that no user of the carriageway was likely to be substantially impeded by the trading (which was off the carriageway in a lay-by) the circumstances in which street trading could be lawful seem somewhat limited. If this trading was unreasonable, the same could be said of most forms of street trading. One reading of this decisions suggests that the court regarded unlicensed street trading as an activity undertaken for an impermissible purpose.

Communitarian reasoning also prevaled in *Pugh v. Pigden & Powley*[43] which concerned trading from a stall at which a queue formed. The stall which was largely but not entirely situated on private land resulted in persons standing on the highway. No obstruction contrary to the Highways Act 1980 s.137 occurred since there was always room to pass.[44] Moreover, the traders were held to have a reasonable excuse for inviting the queue to form at their stall. The court declined to regulate the activity because the inconvenience caused by the trading was *de minimis* and clearly did not demand regulation. The consequences of the activity rather than its relationship with the presumed origins of the public's right over the highway was accorded priority.

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42 [1965] 1 WLR 280.

43 (1987) 151 JP 664. There is little consistency in the authorities on whether a trader can be made liable for a queue which forms at his shop door or stall. Liability was imposed in *Barber v. Penley* [1893] 2 Ch 447 and *Lyons, Sons & Co v. Gulliver* [1914] 1 Ch 631; but there was no liability for a queue caused by wartime rationing in *Dwyer v. Mansfield* [1946] KB 437 because the trader had done nothing "unnecessary" in the manner of conducting the business which caused the crowd to gather.

44 The Highways Act 1980, s.137 (as amended) states: "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and is liable to a fine not exceeding level 3 on the standard scale".

An important decision in which a more liberal approach found favour was *Hirst and Agu v. Chief Constable of West Yorkshire*. [45] Here the Divisional Court accepted that the highways serve a multiplicity of purposes going beyond simply providing the means of passing to and fro. They are part of a social fabric and due recognition must be given to this.

Thus the court adopted a communitarian stance in its recognition that all manner of encroachments on the highway may have a social benefit. The court emphasised that a balancing exercise is necessary in which the social utility of the defendant's action (in this case the upholding of the right of free speech) is weighed against harm caused (encroachment on the highway).[46] The need to safeguard the right of free passage is but one factor in this exercise which of itself permits all kinds of activities to take place on the highway, if reasonable. Thus the court resisted *inter alia* any suggestion that distribution of advertising material to commuters arriving at stations, or two friends conversing in the street should be criminal activities. Accordingly, no offence was committed by peaceful non-obstructive animal rights protesters who stood outside a shop which sold furs and offered leaflets to passers-by.

The Private Law Model and Markets on the Highway

The example of market trading on the highway places in a different and interesting context the arbitrary consequences of the failure to sustain a clear and satisfactory theoretical foundation for highway use. The private law model, entailing a retrospective search for the intention of the grantor, has been highly influential, but decisions based upon it lie uncomfortably with others which accord a higher priority to the contemporary context and the general social utility of the street market's function. These latter decisions are, in essence, founded upon the communitarian model. The result is an unconvincing and unappetising bifurcation between types of market each of which may have similar benefits, similar environmental impact or impact on traffic, and share the similar antiquity. It may well be asked why the law, through its inability to determine the purpose of highways, has haphazardly resolved to treat them differently. Before this issue is further examined it is necessary to distinguish between lawful and informal markets.

Trading in lawful markets does not require the traders therein to obtain a street trading licence or consent from the local authority.[47] It also seems that trading

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[45] (1987) 85 Cr App R. 143.

[46] A further difference between the private law and communitarian approaches is that under the former the social utility of the activity is no defence in an action in private nuisance: *Adams v. Ursell* [1913] 1 Ch 269.

[47] Local Government (Miscellaneous Provisions) Act 1982, schedule 4, para 1 (2) (b).

on the highway is not an obstruction of the highway contrary to the Highways Act 1980, s.137 because the lawfulness of the market constitutes lawful authority or excuse for the encroachment on the highway.[48] However, a lawful market is one which is created under statute or charter.[49] It is a franchise of market. This means that those market operators who merely organise a market (i.e. an informal market) without a "legal pedigree" may be liable for illegal street trading unless a statutory licence/consent is obtained.[50]

The absence of market rights, which distinguishes an informal market from a lawful one, suggests a clear practical distinction between legitimate and illegitimate markets. In practice, the issue is far from clear because market rights (and so lawful markets) can be created by prescription or under the doctrine of presumed lost grant. According to these principles the courts can legitimate a long established and customary market even though there was no evidence that the market was actually created by lawful means. This demonstrates that some, but not all, informal markets will acquire the clothes of legality. In practice it means that markets sharing similar, informal, origins can be treated differently. The cause of this dichotomy is a doctrinal confusion similar to that which mystifies and obscures the purposes of highways.

An example of the arbitrary consequences of the law concerns the so called "hiring," "mop" or "statute" fairs which grew up around the occasions when magistrates met to fix annual wage rates under the Statute of Labourers 1351. A large number of these customary fairs survive as amusement fairs, their original purpose now having been forgotten. They may, of course, be of extremely great age, but because they are known not to have been created by charter they do not acquire market rights. They are not lawful markets;[51] trading therein can be restrained as an obstruction of the highway. These markets of great antiquity, which are enjoyed by the public and form part of the cultural fabric of a locality can enjoy a precarious legal existence, often merely tolerated by authority.

However, other market activity which has been continued in a locality for many years has often won the sympathy of the courts, in part because there may be a public interest in resisting the withdrawal of the facility it provides.[52] There are various techniques upon which the courts may draw should they choose to do so. Each betrays the absence of an established theoretical approach. The first

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[48] See *GER v. Goldsmid* (1884) 9 App Cas 927 esp. at p. 942 per Ld Selborne LC; *A-G v. Horner* (1886) 11 App Cas 66.

[49] *Manchester City Council v. Walsh* (1986) 84 LGR 1.

[50] Para. 1 of the street trading code defines street so as to include any place to which the public has access without payment. This means that the operation of a market on private land is nonetheless street trading for which consent must be obtained, unless a charge is made for access to the land in question.

[51] *Simpson v. Wells* (1872) LR 7 QB 214.

[52] See *Elwood v. Bullock* (1844) 6 QB 383.

concerns prescription and the second employs the familiar doctrine of limited dedication of the highway.

(i) Immemorial User - Actual and Presumed

A grant of franchise of market will be presumed where user has continued since time immemorial. The limit of legal memory has been established as 1189, which means that any use which can be established as having continued since before that date cannot now be challenged. However, the burden of proving that a use has continued since before 1189 is a heavy one, so the courts have allowed a presumption of immemorial user to arise if there has been uninterrupted modern usage.[53] Twenty or more years will suffice to raise this presumption provided the use is not otherwise explained or contradicted.[54] This means that if it is shown that the use originated within legal memory the presumption cannot be made.

The doctrine betrays communitarian influences, for it allows the courts to legitimate trading which by virtue of its duration could be presumed to serve the interests of the community. The operator's lack of strict legal right to operate the market (i.e. a charter or a statute) is ignored for the sake of the benefit derived from the market. The effect of this principle is that a market which has been operated for not less than twenty years will be lawful provided that no evidence can be adduced that at some time after 1189 the market did not exist. This is an onerous burden. The doctrine could not, for example, legitimate the many former hiring fairs because they are known to have originated after the Statute of Labourers of 1351.

(ii) Lost Modern Grant

This is an alternative and more beneficial means of legitimating a customary market. This is available where the presumption of immemorial user cannot be made because there is evidence that the market did not or could not exist after at some date after 1189.[55] According to this principle the court will presume that a grant was made to support the use claimed, but that the grant is now lost. The doctrine is an "indulgence" which assumes use as of right if twenty years

[53] *Jenkins v. Harvey* (1835) 1 C M & R 877,894 *per* Parke B.

[54] *R v. Joliffe* (1823) 2 B & C 54; *Darling v. Clue* (1864) 4 F & F 329. Market rights are not within the Prescription Act 1832. The claim based on prescription failed in *Hulbert v. Dale* [1909] 2 Ch 570 because the court had evidence that the use was of comparatively recent origin, although it extended back more than 20 years. The claim succeeded on the basis of a lost modern grant.

[55] E.g. *Hulbert v. Dale* [1909] 2 Ch 570.

uninterrupted usage can be established.[56] It appears to promote the private law technique by presuming that an appropriate legal pedigree had been conferred notwithstanding the absence of evidence to establish this. Accordingly, the court may conclude that the inability of the market operator to establish the lawful creation of the market is not fatal because (it will be presumed) that the evidence of the grant has merely been lost or destroyed. The most important dimension of this technique is that the court will presume a lost grant *even if it is satisfied no grant was ever made.* [57]

The case-law reveals how the court disguises communitarian preferences behind private law rhetoric. This is so because the court ostensibly remains loyal to the retrospective approach, insisting that there must have been a grant which once created private rights. The willingness to sustain this conclusion in the absence of all positive evidence, and possibly in the full knowledge that no such right had ever actually existed, illustrates the judicial response to perceived contemporary need regardless of the absence of historical foundations. It is an approach which is ready to accommodate the public facility provided by the market which is accorded a priority over the other right of the public to travel along the highway. The technique is a legal fiction justifying the continued operation of markets of great age for which the long history of uninterrupted operation itself supplies strong evidence of societal need.

(iii) Conditional Dedication of the Highway

The third and final technique is also framed within the private law model. This does not invariably result in the preservation of long standing and beneficial markets or other customary street trading. The court will ask whether the highway can be presumed to have been dedicated subject to the rights of traders to operate on it. By this means the trading can be permitted where the traders are presumed to be the beneficiaries of a legal right to trade. This technique was used in *Spice v. Peacock*[58] where the court searched for a dedication of the highway which would encompass the right to trade on it. The difficulty was that the highway was an immemorial one, but the trading had first occurred within living memory. This was fatal to the traders because it could not be said that the presumed intention of the landowner who dedicated the highway embraced the right to trade upon it.

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[56] *Penwarden v. Ching* (1829) Moo & M 400 at p. 400 Tindall J. Stronger evidence may be required to allow the court to arrive at this presumption than is necessary for a claim of prescription at common law: *Tilbury v. Silva* (1890) 45 Ch D 98.

[57] The issue is not without controversy: see *Angus v. Dalton* (1877) 3 QBD 85; (1878) 4 QBD 162; (1881) 6 App Case 740, but does seem now to be settled: *Tehidy Minerals Ltd v. Norman* [1971] 2 QB 528, 552 where Buckley J. treated the House of Lords in *Dalton* as having confirmed the decision of the Court of Appeal on this point.

[58] (1875) 39 JP 581.

The opposite result obtained in *Jones v. Matthews*[59] where a highway had been laid out in the previous thirty years. There was no direct evidence as to the scope of the dedication, but the court held that it could be presumed that it was intended to preserve trading on the highway that had been conducted during at least the previous forty years. The prior right to trade thus entitled the traders to continue their activities on the highway.[60] The decision is interesting because there was actually no evidence that the highway was actually laid out with express reservations for the rights of traders. The only evidence was that trading on the site pre-existed the modern highway, and that was held to be sufficient. Similarly in *A-G v. Horner*[61] the expansion of a market into neighbouring streets was not unlawful because it was found that the streets were laid out after the market had been established and so the court was prepared to presume that the highway had been dedicated subject to the right of the market operator to allow stallholders to trade upon the highway.

In two further examples the court's decision is not explained by the private law reasoning upon which the court claimed to draw. These represent a more or less open acknowledgement of a communitarian model. One such decision was *Le Neve v. The Vestry of Mile End Old Town*[62] where for many years the occupiers of certain properties, in connection with their trades, had placed obstructions-such as horse troughs or carriages for repair - on land between the footway and the carriageway to which the public had access as of right The tradesman paid rent to the lord of the manor for the use of this strip of land. A statutory authority, in purported exercise of statutory powers, removed the obstructions , but was held to have acted *ultra vires* in doing so. The court held that the traders occupied the land with the permission of the lord of the manor and that, when the public acquired the right to pass over the strip their right must be presumed to have been subject to the rights of the traders.

The important feature of this reasoning was that there was no positive evidence of a conditional dedication of the highway. Notwithstanding the ostensible acceptance of the private law framework the court was transparently unconcerned with the true origins of the public's right over the land in question. The essential issue must have been the court's *sub silentio* recognition that the trading was beneficial and reasonable. There was no public interest in regulating the trader's activities because the public suffered almost no inconvenience since it had unimpeded use of the footway and carriageway and only used the strip of and to pass between the two. This must have entailed some implicit balancing exercise in which the court found that the trading did not unreasonably interfere with the public's right of free passage.

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59 (1885) 1 TLR 482.

60 See also *A-G v. Horner* (1886) 11 App Cas 66 discussed below.

61 *Id.*

62 (1858) 8 E & B 1054.

Elwood v. Bullock[63] is to similar effect. Here, in accordance with an ancient custom, licensed victuallers placed "booths" on a highway during a fair. Although there was absolutely no evidence that the highway had been laid out after the creation of the fair, the court was willing to presume a conditional dedication of the highway so that the right of public passage was subject to the rights of the licensed victuallers.

These latter decisions illustrate how the courts will stretch established principle in order to achieve results which accommodate the needs of the contemporary community rather than the presumed preferences of a private landowner. Lord Denman CJ in *Elwood* admitted that the decision in *Elwood* was founded on issues of public policy when he stated that the public's right of passage was not more important nor beneficial than the right of the licensed victuallers (from which the public also derived a benefit). In other words, the decision was essentially founded on the balancing exercise in which the court favoured the use which it perceived as of equivalent social benefit to the *prima facie* right of the public to be able to pass and repass over the entirety of the highway.

The reality is that this approach actually ignores both the history of the site and the origin of the market (hence the willingness of the court to presume an origin in the absence of any evidence whatsoever) and instead focuses on the question of the importance of the market judged against competing contemporary uses. This is essentially an application of communitarianism since the court is examining whether the benefit of the market to the public can be reconciled with the public's right of free passage. Since no individual can show a positive right to conduct the market, the issue is essentially whether its continued operation is in the public interest.

The Private Law Model and Markets on the Highway: Concluding Remarks.

In conclusion, the doctrinal confusion produces somewhat arbitrary results. The private law model precludes hiring fairs from acquiring prescriptive, customary rights. This is not so with other long standing customary markets and fairs. It is also evident that the courts policy of attempting to preserve customary highway uses is not convincingly undertaken within the private law model. The fictions of the doctrine of lost modern grant, as well as those concerned in presuming a conditional dedication of the highway demonstrate how the courts are uninhibited in pursuing a communitarian approach which brings within focus all relevant circumstances (the benefit of the market, the environmental impact, consequence for highway users etc.) rather than a monocentric examination simply of the presumed choices of a private landowner made long ago.

63 (1844) 6 QB 383.

This leads us to the practical objection to the private law approach is that its focus is historical. If a private right to trade can be identified or presumed, the trading takes place as of right, regardless of whether it is appropriate to modern conditions. There is no concern with contemporary circumstances which might require a different regulatory approach to be applied. The highway may have become incorporated into a busy commercial district causing much inconvenience to traffic. But the private law approach treats the continued trading as a vested private legal right which prevails over the public right of free passage. This creates an ideological tension, with more modern and utilitarian regimes, such as planning law, for controlling the use of land.[64] This would be less likely occur under the communitarian model, since as a balancing exercise the needs of the travelling public could be accorded weight appropriate to the altered environment.

***DPP* v *Jones* : A Revised Theoretical Model?**

In *DPP v. Jones* the House of Lords had to determine whether a demonstration of about twenty individuals on a roadside verge in the vicinity of Stonehenge constituted a trespassory assembly.[65] This issue itself posed the very question with which we are presently concerned: what is the right of the public in respect of the highway? This could not be satisfactorily resolved without determining the appropriate theoretical model governing highway use.

By a majority of 3-2 their lordships decided that, depending on the facts, a peaceful and non-obstructive public assembly on a highway can constitute a reasonable user of the highway such that it is not a trespass. However, their lordships reasoning betrayed considerable divergence indicating a continued and regrettable absence of agreement about the principles governing highway use.

Private Law v. Communitarianism in *DPP v. Jones*

Of their lordships only Lord Irvine was prepared to reject unequivocally the private law model. He reasoned that restricting the use of the highway to the use actually contemplated by the landowner would be a legal fiction, since the

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64 S*pook Erection* v *Secretary of State* [1988] 2 All ER 667; see also s.31 of the Highways Act 1980 which removes a private legal right to trade on the highway under certain circumstances: see *Gloucestershire CC* v *Farrow* [1985] 1 WLR 741.

65 An order under s 14A (1) of the Public Order Act 1986 was in force prohibiting trespassory assemblies.

public's right of access would necessarily differ from highway to highway. Since the court was never asked to enforce the actual intention of the landowner the rationale of adhering to this legal fiction was lost. He thus concluded with a resounding rejection of private law principles:

> "the public highway is a public place which the public may enjoy for any reasonable purpose, provided that the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass: within these qualifications there is a public right of peaceful assembly on the highway." [66]

It followed that there was no longer a need merely to indulge the many common place activities which highways are properly used. Their exercise should be a matter of right not toleration. If it were otherwise, and a peaceful assembly on the highway were necessarily a trespass, the right under Article 11 of the European Convention of Human Rights would be denied. However, he acknowledged that this right was not absolute. English statutory restrictions to prevent wilful obstruction of the highway were held to be consistent with Article 11. However, his lordship found that the common law recognised the right of peaceful non-obstructive assembly without recourse to the European Convention.

Lord Clyde's, who also referred *en passant* to Article 11, pursued reasoning which sought to obscure the contradiction between the communitarian and private law models in order to mediate between them. He adopted the private law premise that the highway is dedicated for limited purposes, but then construed the presumed dedication in liberal terms. In citing *Hickman v. Maisey* his starting point was that the primary right of the public is the right of free passage, but subsidiary rights can be framed in wide terms. He considered that :

> If a group of people stand in the street to sing hymns or Christmas carols they are in my view using the street within the legitimate scope of the public right of access to it, provided of course that they do so for a reasonable period and without any unreasonable obstruction to traffic. If there are shops in the street and people gather to stand and view a shop window, or form a queue to enter the shop, that is within the normal and reasonable use which is matter of public right.....*All such activities seem to me to be subsidiary to the use for passage*. So I have no difficulty in holding that in principle a gathering of people at the side of a

[66] *per* Lord Irvine of Lairg LC at pp. 632-633.

> highway within the limits of the restraints which I have noted may be within the scope of the public's right of access to the highway. [67] (Emphasis supplied)

This reasoning seems to be an intuitive attempt to sustain desired *ad hoc* social arrangements. However, the activities described as ancillary to the right of passage (e.g. singing carols) do not convince. The reasoning barely disguises an unacknowledged reliance on communitarian principles to save activities identified as deserving the protection of the law. His lordship, however, shrank from pursuing this reasoning as far as Lord Irvine because he ultimately rejected the latter's conclusion that any reasonable, peaceful and non-obstructive use of the highway would be non-trespassory. He thought this would permit an "ill-defined" area of uses capable of eroding the pre-eminence of the right of free passage.[68]

The lack of resolve in identifying a clear theoretical foundation leaves the citizen somewhat confused. For example, reconciling his lordship's unwillingness to legitimate *any* reasonable use with the acceptance of not only of hymn singing but also the type of non-obstructive assembly at issue in this appeal, is not straightforward.[69] His lordship escaped this dilemma by determining that this is merely a question of fact and degree for the trial court. This is of no assistance to those who wish to know the law before undertaking a particular static use of the highway. Would a commonplace activity such as street trading, if undertaken reasonably, be lawful? Lord Clyde's resort to the discredited limitation as to purpose further compounds the problem of indeterminacy:

> If the purpose of the activity becomes the predominant purpose of the occupation of the highway, or if the occupation becomes more than reasonably transitional in terms of either time or space, then it may come to exceed the right to use the highway. [70]

Lord Hutton considered that the principles governing the public's right of access to the highway should be extended. It should include the right to conduct a peaceful non-obstructive assembly in a reasonable manner. Predominantly his reasoning is framed so as to legitimate uses connected with freedom of expression. However, there are indications that, like Lord Irvine, he may have been prepared to go further, for he indicated that precedent is "open to a broader construction and that (the authorities) do not exclude *a reasonable use of the highway beyond passing and repassing*, provided always that the use

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[67] at pp. 654-655.

[68] at p. 655.

[69] Lord Hutton at p. 664 expressly rejected the suggestion that an assembly could be an activity incidental to free passage.

[70] at p. 655.

is not inconsistent with the paramount purpose of a highway, which is for the use of the public to pass and repass." [71] (emphasis supplied). A reasonable activity might become unreasonable by reason of the space occupied or the duration of time for which it goes on. [72] On balance this appears to locate his reasoning with the communitarian tradition, albeit in a rather circumscribed version.

The dissenting judges were not prepared to dismantle the private law model to vindicate communitarian concerns with reasonable access to the highway. They were concerned that any extension of the public's right of access beyond the primary right of free passage and the limited range of ancillary uses would embrace a right to remain on land to the detriment of private landowners. Lord Slynn's views were typical[73]

> The appellants' argument in effect involves giving to members of the public the right to wander over or to stay on land for such a period and in such numbers as they choose so long as they are peaceable, not obstructive, and not committing a nuisance. It is a contention which goes far beyond anything which can be described as incidental or ancillary to the use of a highway as such for the purposes of passage; nor does such an extensive use in my view constitute a reasonable, normal or usual use of the highway as a highway. If the appellants' claim is right, it seems to me to follow that other uses of the highway than assembly would be permitted - squatting, putting up a tent, selling and buying food or drinks - so long as they did not amount to an obstruction or a nuisance.

Lords Slynn and Hope were not satisfied that the European Convention on Human rights required any change to this statement of the law since the it permitted exceptions to the right of assembly which were necessary for the protection of the rights and freedoms of others consistent with those imposed under English law. Lord Hope was also influenced by Article 1 of the First Protocol which guarantees that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law. He concluded that landowners might be deprived of this right if trespassers were permitted by law to remain on land.

The dissentients thus concluded that the public's right was limited to passing and repassing along the highway and activities incidental thereto. In substance

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[71] at p. 665.
[72] at p. 666.
[73] at p. 639.

this amounts to a continued vindication of the private law model of highway use.

Conclusion

The law governing highway use has long been obfuscated by the court's resistance to principles which could recognise as lawful many valued and important social, political and economic activities that take place *de facto* on public highways. The law has declined to acknowledge that highways are a public resource even though most are maintained at public expense. The dominance of the private law model means that much activity is tolerated rather than permitted as of right. But the interpretation and application of this model has neither been satisfactory nor clear; neither has it been consistently followed. The result has been an unsatisfactory indeterminacy of principle and of outcome.

It is clear that the courts have ventured further with the communitarian model in the market context than in the context of free speech and other political activity on the highway. This has permitted the court to balance the interests of the public in continuing a market against the claim of the right of free passage to be the exclusive legitimate use of the highway. This polycentric exercise seems capable of producing outcomes which are more satisfactory since it does not fossilise modern highway uses according to the contemporary preferences of a private landowner. The court may, for example, take into account the importance of the use, the nature and importance of the highway and other competing uses.

Although the communitarian model has not been consistently applied in relation to markets, it does seem more deeply embedded in the market as opposed to the political context. Similarly decisions on unorganised street trading (i.e. that outside markets) seem predominantly rooted in private law influences despite lip-service to communitarian model in cases such as *Nagy v. Weston*. In practice there seems little commitment to legitimating street selling where a trader lacks a licence or consent.[74] This suggests that the adoption of a communitarian model, which is dominant in the market context, is not the radical departure that the minority speeches in *DPP v. Jones* might have suggested. It is, however, selectively applied.

The inability to resolve fundamental questions of principle has meant that even the basic right of peaceful non-obstructive protest has been greeted in the House of Lords with judicial uncertainty and dissent. Even the majority

[74] The argument may be advanced that this is to compel traders to submit to the regulation (and costs) of the licensing system. However, it must not be forgotten that not all street are "designated" under the 1982 Act. This means the licensing scheme was not intended by Parliament to apply to *all* public highways even in areas in which it was adopted.

judgements in *Jones* are tentative in their recognition of this right and appear only extend to a principle that a static demonstration might not be trespassory, depending on the facts. Of the three judges who concur in the result in *Jones* only Lord Irvine seems unequivocally to embrace communitarian principles, although it is arguably possible to identify communitarian tendencies in the treatment of the private law model by Lords Clyde and Hutton. The real significance of the decision may, however, be that in the context of political uses of the highway the long shadow of the private law model will continue to furnish the courts with the potential means to curb all manner of peaceful protest on the familiar grounds that its presence on the highway may have impeded free passage.

In conclusion, *DPP v. Jones* may have decided that a non-obstructive peaceful assembly is not necessarily trespassory (although it may be) but it has conspicuously failed to resolve the issue of principle as to what activities are permitted on the highway. This failure stems from the resistance to embracing a communitarian model, because fundamentally, highways remain private property on which the public have but a conditional and circumscribed freedom.