LIMITING LAW SO AS TO RESPECT THE LAW: AN APPLICATION OF LIMITING PRINCIPLES TO GANG LEGISLATION

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I. INTRODUCTION

Gangs pose a serious problem for communities worldwide. In 2008 members of the New Zealand police association estimated that 75% of the 1.5 billion dollar methamphetamine trade is controlled by gangs. Over the years there have been a number of legal responses to the 'gang problem' in different jurisdictions. Some recent responses in New Zealand and Australia have seen the enactment of legislation that seeks to punish gang related activities rather than gang related offending. South Australian legislation[1] implemented the ability to punish non-gang members for communicating with a member of a gang that is a 'declared organisation', even if the communication is not intended to pursue criminal offending. In Whanganui, New Zealand, there is now the ability to prevent the wearing of gang insignia in specified locations, regardless of whether the wearing of the insignia was for a criminal purpose.

Whilst it is not denied that gang offending poses an unacceptable harm to the community and is deserving of criminal sanctions, it is suggested that legislation which focuses on gang activities may cause greater harm to the community by eroding the core principles of criminal law. Criminal law protects the interests of society by demanding compliance through the use of penalties that deter and punish 'undesirable' behaviour. However, when 'undesirable' behaviour is criminalised this represents a limitation on the liberty of a person to behave in a particular manner. The principles of criminal law recognise that if members of society are subject to numerous and excessive limits on liberty this can 'enhance contempt for the law in general' and lead to non-compliance. In effect, legislation which seeks to resolve issues such as the 'gang problem' through excessive use of criminal law may create a less law-abiding society.

As such, the use of criminal law should be restricted in its use so as to preserve its ability to control behaviour in society. Legal literature identifies several principles that identify ways in which the use of criminal law can be limited so as to preserve respect and compliance with the law. These principles include; respect for personal autonomy, the presence of harm, morality, and the need for culpability.[2] This paper focuses on the principle of respect for autonomy and relates this to the *Wanganui District Council (Prohibition of Gang Insignia) Act 2009* (NZ) ('Gang Insignia Act') so as to demonstrate the potential problems that arise when limiting principles are given insufficient consideration.

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1 *Serious and Organised Crime (Control) Act 2008* (SA).

2 Roger Bowles, Michael Faure and Nuno Garoupa, 'Scope of Criminal Law and Criminal Sanctions' (2008) 35 *Journal of Law and Society* 389–416.

II. Wanganui District Council (Prohibition of Gang Insignia) Act 2009 (NZ)

The Gang Insignia Act 2009 (NZ) came into force in 2009 and s 6 prohibits the 'display' of 'gang insignia' within 'specified areas' of the Whanganui District.[3] A person who, without reasonable excuse, is in breach of this prohibition will be convicted and fined up to $2000.00. Police have the power to arrest without warrant any person suspected of displaying gang insignia and may seize the gang insignia (with force if necessary) that has been or is being displayed.[4] Any gang insignia that has been seized is forfeited to the Crown.[5] There is also the power to stop a vehicle without warrant if there is reasonable suspicion that a person who has displayed gang insignia is in the vehicle.[6] If a vehicle had been stopped for this reason, the police may search the vehicle and request any person in the vehicle to provide their name, date of birth, address, or any other detail requested by the police.[7] A failure, without reasonable excuse, to comply with this or the request to stop will result in a conviction and a fine of up to $1000.00.[8]

Gang insignia is defined as being any sign, symbol, representation that shows affiliation or support for a 'gang'.[9] The Law and Order Committee[10] had initially recommended that tattoos be included so as to prevent 'an increase in the use of tattoos by gang members to intimidate the public'[11] but the *Wanganui District Council (Prohibition of Gang Insignia) Bill 2008* (NZ) was later amended so that any 'gang insignia' will not include tattoos. Section 4 of the *Gang Insignia Act* defines a gang as being the seven listed gangs and any organisation, association of group identified in a bylaw made in accordance with s 5 of the *Gang Insignia Act*. In order to identify such a group as a gang, the Council must be satisfied that the group has a common name, signs and symbols and its members, associates, supporters promote, either individually or collectively encourage or engage in a pattern of criminal activity.[12] Section 5 of the *Gang Insignia Act 2009 (NZ)* also allows for the Council to make bylaws to designate areas of the Wanganui District as 'specified places'.

These powers are in theory restrained by the requirement that the Council use special consultative procedures prior to making the bylaw(s)[13] and that the bylaw can only be made if it is necessary to prevent public intimidation or gang confrontations.[14] In relation to designating specified places, any bylaw cannot be made if the effect would be to have all public places in the District as 'specified places'.[15] The bylaw passed by the Whanganui District Council in 2009[16] included more 'gangs' and made the entire urban area a specified area. Although geographically this area does not comprise the entire District, it is where 90% of the population lives.

3 There was a recent call to have the District revert to its correct Maori term of Whanganui. The District Council has not yet fully implemented this and the legislation was made under the old name, hence the use of different spellings for Whanganui in this paper.
4 *Gang Insignia Act (NZ)* s 7(1).
5 *Gang Insignia Act (NZ)* s 7(2).
6 *Gang Insignia Act (NZ)* s 8(1).
7 *Gang Insignia Act (NZ)* s 8(4).
8 *Gang Insignia Act (NZ)* s 8(5).
9 *Gang Insignia Act (NZ)* s 4.
10 This is the select committee that reviews reports and submissions made in relation to bills that impact on law and order. The Law and Order committee provides recommendations to Parliament as to whether the *Wanganui District Council (Prohibition of Gang Insignia) Bill 2008* (NZ) should be enacted and any amendments that should be made to it.
11 New Zealand Government, Law and Order Committee, *Wanganui District Council (Prohibition of Gang Insignia) Bill: As Reported from the Law and Order Committee* (2008) 3.
12 *Gang Insignia Act (NZ)* s 5(3).
13 *Gang Insignia Act (NZ)* s 5(2).
14 *Gang Insignia Act (NZ)* s 5(4).
15 *Gang Insignia Act (NZ)* s 5(5).
16 *Wanganui District Council (Prohibition of Gang Insignia) Bylaw 2009* (NZ).

III. Protecting Autonomy

Personal autonomy is the ability to exercise free will in regard to life choices. The concept of autonomy and its relationship to criminal law is twofold. First, acceptance of the autonomous individual means limiting the law so that the ability to self-regulate is maintained.[17] Second, the recognition that individuals are capable of self-regulation imports the concept of responsibility for their choices and lays the foundation for culpability in relation to criminal acts.[18] If the criminal law seeks to limit the autonomy of the individual then there must be a compelling reason to do so. Often this reason will occur where the exercise of one person's free choice will restrict the exercise of other people's equally valid choices. Considering this, the principle of respect for personal autonomy is often modified as being: criminal law should not restrict the liberty of one person to engage in certain conduct unless it unduly restricts other people's exercise of free choice. This principle is strongest when the exercise of free choice is in relation to a right as opposed to a privilege.

Actions pursued by the individual may be 'rights' or they may be 'privileges'. A right is a valid claim against others to exercise a freedom.[19] A freedom is the ability to pursue a certain action without being subject to interference or requiring the permission of another.[20] So exercising a right is validly claiming the ability to pursue a course of action without interference. This claim is valid when the action can be justified by the value or benefits produced by the action. These benefits may be to either the individual or society as a whole. If the benefit is to the individual, it must be compatible with the 'good' of society as a whole. If the action cannot be justified in this way, the ability to pursue it cannot be validly claimed.[21] For example, it would be difficult to justify the ability to kill people with red hair, even if it gave personal benefit to the killer. This means there would be no valid claim to kill redheads, so therefore there is no 'right' to kill redheads. In essence the exercise of any right 'is only as powerful as its justification can make it'.[22]

Whilst a valid right is subject to justifications, a privilege in contrast requires more than justification — it also requires permission in order that the actor may pursue the particular action. As an example, the choice to walk on your own land is a freedom whilst the choice to walk on the land of another person is a privilege.[23] Since a privilege requires permission it is easier to understand how the exercise of choice to engage in the privilege can be limited by the criminal law — essentially the criminal law removes the permission granted when certain

17 For a discussion on the principle of personal autonomy and its relationship to criminal law see Andrew Ashworth, *Principles of Criminal Law* (6th ed, 2009) 23–6.

18 C A Cambell, *In Defence of Free Will* (1967) argues that 'free-will is the pre-condition of moral responsibility' — that is, that without the freedom to do otherwise a person is not capable of gaining the ability to be morally responsible. Blame or praise that comes from labelling the person responsible for their acts can only occur if (a) the person is sole cause of the act; and (b) has the ability to act in alternative ways — that is, they have the freedom to choose their actions. The degree to which a person has the ability to act in alternative ways can be dependant on social and economic factors. This does not mean, however, that a lack of alternatives reduces the ability to be responsible, as pointed out in J Fischer, 'Responsibility and Control' (1982) 79 *Journal of Philosophy* 24, where it is argued that, even in situations where the result is inevitable (meaning there is no real alternatives or freedom to do otherwise), responsibility can still be attributed to 'free, uncompelled' actions (p37). In this respect, Fischer states at p38:

> Thus the reason why lack of control normally rules out responsibility is that it normally points to actual-sequence compulsion. But when lack of control is not accompanied by actual-sequence compulsion, we need not rule out responsibility.

This view is also taken in J Gardner, 'On the General Part of Criminal Law' in A Duff (ed), *Philosophy and the Criminal Law* (1998), which explains the differences between moral autonomy and personal autonomy and concludes that moral responsibility or culpability arises through moral autonomy which is neither 'necessary or sufficient' for personal autonomy, hence a person may be held responsible even where there is a lack of personal autonomy (or availability of choices).

19 J Griffin, 'First Steps in an Account of Human Rights' (2001) 9(3) *European Journal of Philosophy* 306–27, 308.

20 W L Miller (ed), *Alternatives to Freedom: Arguments and Opinions* (1995) 3.

21 This requirement leads to the view that freedoms are essentially 'good', or the ability to do 'good', as opposed to the ability to do any action.

22 J Gardner, 'Freedom of Expression' in Christopher McCrudden and Gerald Chambers (eds), *Individual Rights and the Law in Britain* (1995).

23 Michael Badnarik, *Good to Be King: The Foundation of Our Constitutional Freedom* (2004).

circumstances are present. Driving can be classed as a privilege as it requires the permission of others (through the licensing systems) so there are limits as to how this privilege may be exercised, for example by imposing speed limits, or restricting driving after drinking.

In New Zealand, rights that are recognised as having justification and fundamental importance to its citizens are contained within the *New Zealand Bill of Rights Act 1990* (NZ) ('NZBOR'). When the *NZBOR* was first introduced as a bill it was intended to have a substantial impact on civil rights and to act as a safeguard against the excesses of government:

> A Bill of Rights for New Zealand is based on the idea that New Zealand's system of government is in need of improvement. We have no second House of Parliament. And we have a small Parliament. We are lacking in most of the safeguards which many other countries take for granted. A Bill of Rights will provide greater protection for the fundamental rights and freedoms vital to the survival of New Zealand's democratic and multicultural society. The adoption of a Bill of Rights in New Zealand will place new limits on the powers of Government. It will guarantee the protection of fundamental values and freedoms. It will restrain the abuse of power by the Executive branch of Government and Parliament itself. It will provide a source of education and inspiration about the importance of fundamental freedoms in a democratic society. It will provide a remedy to those individuals who have suffered under a law or conduct which breaches the standards laid down in the Bill of Rights. It will provide a set of minimum standards to which public decision making must conform.[24]

Whilst originally intended to be entrenched and gain priority status the *NZBOR* obtained assent on the condition it remained subordinate to all other legislation. This means that although the *NZBOR* places duties on each branch of Government and other public actors to observe the statutory rights, it does not provide a mechanism to fully 'restrain the abuse of power'.

The *NZBOR* allows for rights to be limited by such reasonable limits prescribed by law 'as can be demonstrably justified in a free and democratic society'.[25] This section has the twofold purpose of defining the extent to which a limit may be imposed and also providing acknowledgment that rights can be limited in certain circumstances — essentially rights are not absolute. The extent to which legislation *does* limit a particular right needs to be considered in terms of s 6 of the *NZBOR* which provides for ability of the Court to prefer meanings (to the extent that the legislation is open to such interpretation) which would uphold rights in the *NZBOR*. This section has been described as creating an added dimension to statutory interpretation,[26] but even with broader power, the Court must still ensure that it is interpreting rather than legislating.[27] This means that although a *NZBOR* consistent meaning 'can' be given by the Courts, it 'must be a meaning that is tenable on the text and in the light of the purpose of the enactment'.[28] If legislation is still inconsistent after a consideration of the extent to which the right may be properly limited, this does not mean that the inconsistent provision may be struck down as s 4 of the *NZBOR* creates an ability to legislate contrary to the rights in the *NZBOR* by providing that any legislation cannot be invalidated by the courts due to reasons of inconsistency with the *NZBOR*. There is some debate as to the interrelationship between ss 4, 5 and 6 of the *NZBOR*, as to whether the enactment should first be justified in terms of s 5 of the *NZBOR* and then (if the limitation is unreasonable) interpreted in a consistent manner in accordance with s 6 of the *NZBOR* with the result that if any inconsistency still exists it will still be preserved due to s 4 of the *NZBOR*; or if a s 6 based interpretation should first be applied and then this interpretation should be the focus of the section 5 assessment if the consistent interpretation still contains limitations.[29] For the purposes of this paper, a section 5 *NZBOR*

24 New Zealand Department of Justice, *A Bill of Rights for New Zealand — A White Paper* (1985) 5.

25 *NZBOR* s 5.

26 *Herewini v Ministry of Transport* [1990–92] NZBORR 113, 139 (HC); see also the comments in Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005).

27 *Quilter v Attorney-General* [1998] 1 NZLR 523, 576 (CA).

28 *R v Hansen* [2007] 3 NZLR 1, [25].

29 Cf *R v Hansen* [2007] 3 NZLR 1 to the approach in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) (*'Moonen'*).

assessment of the *Wanganui District Council (Prohibition of Gang Insignia) Bill 2008* (NZ) in its original form will be discussed and then the revised Act will be considered in terms s 6 of the *NZBOR* as to the extent that the provisions may accommodate relevant *NZBOR* rights.

A preliminary safeguard against unwarranted limitations on rights is the requirement in s 7 of the *NZBOR* that the Attorney-General report to the House of Representatives as to any potential inconsistencies with the *NZBOR* contained within newly introduced bills. However, there is no obligation on the part of Parliament to comply with the report; instead the report merely acts as guidance. In compiling such a report the Attorney-General will first ascertain if the legislation will have the effect of limiting a right. If there is a potential for one of the statutory rights to be limited, the Attorney-General will then consider if the limitation is justified in terms of s 5 of the *NZBOR*.

To determine if a limitation on a right is justified, a balancing of the right to be limited against the right that will be protected through the limitation is often required. There are two ways in which this balancing may be achieved — either by 'definitional balancing' or by '*ad hoc* balancing'.[30] Definitional balancing perceives freedoms as having inherent limitations, which automatically attach to them. In the situation of freedom of speech, this would mean speech is automatically limited when it contains, for example, obscenities, regardless of the exact situation in which the obscene speech has occurred. The danger in using this approach was recognised by Tipping J in *Quilter v Attorney-General*:

> if restrictions which may be legitimate or justified in some circumstances are built into the right itself the risk is that they will apply in other circumstances when they are not legitimised or justified.[31]

Due to the restrictions that this form of balancing has, the approach of the New Zealand Courts has been to adopt *ad hoc* balancing which 'starts with a more widely-defined right and then legitimises or justifies a restriction if appropriate'.[32] This approach was used and further developed in the case of *Moonen v Film and Literature Board of Review*,[33] where the Court considered that after establishing that the legislation had the capability of breaching a provision of the *NZBOR* the correct test to ascertain whether the limitation was justified was to:

> [First] ... identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective.... The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective.[34]

The *Moonen* 'justifiable limitation test' is essentially a three part test[35] that first identifies the 'rights' (valid claims to freedoms) that the legislation seeks to protect. The second part of the test, 'the rational connection' determines whether the exercise of the right to be limited does infringe the other right that the legislation seeks to protect. If the exercise of the right does not infringe upon the other right, there can be no justification in limiting the right. The third part of the test introduces the actual balancing exercise — whether the limitation on the right is accurately balanced against the strength of the right that is being protected.

30 A Butler, 'Limiting Rights' (2002) 33 *Victoria University of Wellington Law Review* 113.

31 [1998] 1 NZLR 523, 576 (CA).

32 Ibid.

33 *Moonen* [2000] 2 NZLR 9 (CA).

34 Ibid [18].

35 The full test set out by *Moonen* [2000] 2 NZLR 9 (CA) involves five steps for interpreting legislation that may breach a right within the NZBOR. The first step ascertains if the legislation is open to an interpretation consistent with the NZBOR, the second step identifies a meaning that imposes the least limitation on the right, and the third step is to determine the extent of the limitation. The fourth step is the 'justifiable limitation test' where it is considered whether the limitation is justified. The fifth step is for the court to indicate its finding of whether the justification is limited.

IV. APPLICATION TO THE WANGANUI DISTRICT COUNCIL (PROHIBITION OF GANG INSIGNIA) ACT 2009

The Moonen 'justifiable limitation test' can be seen in the report issued by the Attorney-General for the Wanganui District Council (Prohibition of Gang Insignia) Bill 2008 (NZ).[36] In the report the Attorney-General first established that the Bill in its current form raised issues of consistency with s14 of the NZBOR, which is the right to free expression. As there was an issue of consistency, the Attorney-General then proceeded to the three step Moonen test and first identified and assessed the objectives of the legislation. The objective was stated as being to reduce the likelihood of gang confrontations and intimidation of members of the public. As these objectives had the aim of protecting public order and preserving the rights of others they were considered to be 'significant' enough (they are a valid right) to warrant limiting the right to free expression in some circumstances.[37]

The next step was to assess whether there was a rational and proportionate connection between the objectives and the limitation on free expression. In doing this the Attorney-General could have referred to a range of evidence and research to establish and support the link between the prohibition on gang insignia and intimidation/gang warfare.[38] The report does not refer to any such evidence. Instead, in relation to gang warfare, it was merely stated that removing one of the means by which gangs identify each other should logically reduce the likelihood of gang warfare.[39] This 'rational connection' suggests that gang insignia not only identifies but also 'marks' a person as a target for confrontation.

There are some difficulties with this suggestion. As this observation notes, gang insignia is just *one* method of identifying gang membership. There are many other means of gangs identifying each other. Often gang membership will be created due to family or neighbourhood associations within a particular community so there is a community awareness of who is in a certain gang.[40] Several gang related attacks have been on houses of gang members, so this would support that it is community knowledge rather than the wearing of insignia that leads to the identification of gang members.[41] There have been some incidents where members of the public who are not gang members have been subject to abuse due to the wearing of gang colours, which on face value gives credence to the concept that insignia is a source of gang confrontations. However, in the situation of a young child who was harassed for the colour

36 New Zealand Government, Attorney-General Office, *Report of the Attorney-General under the New Zealand Bill of Rights 1990 on the Wanganui District Council (Prohibition of Gang Insignia) Bill 2008 (NZ)* (2008).

37 Ibid 3. In particular, article 19(3) of the *International Covenant on Civil and Political Rights1966* and the ability to limit freedom of expression to protect public order was referred to.

38 *Moonen* [2000] 2 NZLR 9 (CA), [18] — the Court indicated that the use of a wide range of factors should be considered by stating: 'whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.'

39 New Zealand Government, Attorney-General Office, above n 36, 4.

40 There are a variety of reasons for joining gangs, see: s Decker and B Van Winkle, *Life in the Gang: Family, Friends, and Violence* (1996); Alexandra Green, *Public Perceptions, Gang "Reality" and the Influence of the Media: A Thesis Presented in Partial Fulfilment of the Requirements for the Degree of Master of Science in Psychology at Massey University* (1997). However Alison J McIntosh and Anne Zahra, 'A Cultural Encounter through Volunteer Tourism: Towards the Ideals of Sustainable Tourism?' (2007) 15 *Journal of Sustainable Tourism* 541–56 at 548 provide a poignant link between family and the gang involvement in an extract written by an observer overseeing the experiences of members of a volunteer tourist group who were interacting with local Maori, including young Maori children:

> The volunteers are commenting a lot and very fascinated bout the gangs and culture associated with gangs. This is an aspect of the culture they did not expect to encounter. The volunteers discuss how the kids talk about how their parents are in gangs and how they will join the gangs when they get older. The kids are recruited for the gangs at a young age.

41 For example ,with the death of Wanganui toddler Jhia Te Tua, this arose after members of the mongrel mob were 'searching for a Black Power house in Wanganui. The People who occupied a Puriri Street house were members and associates of those who lived at 173 Puriri Street where the young child died.' Taken from *R v Church* (Unreported, Young J, 23 May 2008) (HC).

of his shirt, the condemning comments in the media by gang members as to this behaviour suggests that this form of victimisation is not common or sanctioned gang conduct.[42]

Given this, it would seem that mere display of insignia that is associated with gangs has a limited effect on confrontational gang behaviour. Gangs are able to distinguish between 'innocent' wearers and those who are likely to be gang members, so the insignia does not appear to be the real cause of confrontations. This indicates there is a much reduced connection between the objective and the provision to prohibit gang insignia. A stronger link between the objective and the prohibition could have been achieved if it was established that the wearing of gang insignia acts as a provocative statement to rival gang members rather than just a mere form of identification. However, in the absence of research to support these links it is difficult to state with any degree of certainty that removing gang insignia will or will not be a logical step in reducing gang warfare.

In regard to intimidation of members of the public it was stated by the Attorney-General that the provision would not reduce intimidation caused by the presence of gang members in a group and their behaviour. It was suggested that the gang insignia may cause intimidation as it 'conveys a message' to the public that the wearers are members of a group known for violence and unlawfulness.[43] Again, a lack of research undermines the strength of this statement that identification of a group association rather than actual conduct is the source of intimidation. What is known is that in a survey of the Whanganui public in 2009,[44] out of the 161 residents (from a total of 409 surveyed) who said they felt unsafe in the city, 27% had said the reason for this was youth /street kids, 27% had said it was undesirable people, and only 16% had said gangs were the reason. The higher polling groups do not wear forms of identification (particularly with the 'undesirable people' group) so this could suggest that it is the actual conduct of the people rather than images of association with a particular group (or gang) that is the main cause of public intimidation.

Even if the survey did reveal that the unsafe feeling was due to the 'message' sent by the gang insignia that the person is a member of a lawless group, this may not be sufficient to justify the prohibition on the gang insignia unless there were other valid reasons to support the fears held by the public. This is because to allow laws that limit liberty based on the concerns of a minority that mere membership to a group poses a threat, without the need to further justify a reason for the concern, could lead to discriminatory practices. To illustrate, Maori males are statistically more likely to be convicted compared to non-Maori,[45] so it could be said that being a Maori male sends a message that the person is a member of a (racial) group that is prone to criminal activity. This could lead some members of the public to feel fearful or intimidated by the presence of Maori males — regardless of whether those actual Maori men are exhibiting any aggressive behaviour. If the view of the Attorney-General was accepted then this unsupported fear held by members of the public due to the 'message' sent could justify limiting the liberties of Maori men. It is suggested that when considering whether there is a rational connection, the infringing conduct should only be 'connected' to legitimate instances of the harm which are the object of the legislation.

Although the Attorney-General considered that there was a 'tenuous' connection between the objective and the relevant provision, when it came to proportionality it was considered that there would be a disproportionate impact on freedom of expression. In order to understand this

42 See Tanya Katterns and Mike Watson, 'Gang Vows to Punish Young Boy's Attacker', *Dominion Post* (New Zealand), 13 May 2010 <http://www.stuff.co.nz/national/crime/3689417/Gang-vows-to-punish-young-boys-attacker> at 24 November 2010. Also, in the case of Paul Shane Kumeroa who was attacked when he walked down the street wearing a red 'hoodie' there was a family connection to the mongrel mob (which associates with the colour red). So it is possible that it was this family link rather than the mere display of colour that produced the attack. See 'Wanganui Killing may be Related to Jhia Te Tua Drive-by Shooting', *TV3 News* (New Zealand), 25 September 2008 <http://www.3news.co.nz/Wanganui-killing-may-be-related-to-Jhia-Te-Tua-drive-by-shooting/tabid/423/articleID/73191/Default.aspx> at 24 November 2010.

43 New Zealand Government, Attorney-General Office, above n 36, 4.

44 Whanganui District Council, *Wanganui District Council Community View Survey April 2009* (2009).

45 For further information refer to: Department of Corrections Policy, Strategy and Research Group, *Over-Representation of Māori in the Criminal Justice System — An Exploratory Report* (September 2007).

conclusion, further clarification on the right to freedom of expression and the way in which it may be balanced against other rights is needed.

Expression is not limited to words. It can also take the form of symbols and signs designed to impart a particular meaning. The test devised in *Spence v Washington*[46] as to whether symbols are 'expression' requires an intent to convey a particular message and likelihood that the message will be understood by those who view it.[47] The context in which the symbol or conduct occurs will also be important as this may help to provide the intended meaning.[48] In New Zealand Courts, the idea of what constitutes expression has been defined broadly as being: 'as wide as human thought and imagination'[49] so it appears there is a vast array of conduct and symbolism which may be regarded as expression.

Free expression has an ancient tradition within society and is often associated with the notion of democracy, although its application and worth is further reaching than just political comment. As Emerson commented, free speech is valued for several reasons:

> The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfilment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.[50]

Not all of these justifications may be present in a particular exercise of speech. For example in *Brooker v Police* (*'Brooker'*),[51] a man (Brooker) positioned himself outside of the house of a policewoman who has issued a search warrant for his house. Brooker then proceeded to sing a 'protest' song about the warrant. This exercise of free speech may have satisfied (1) and (4) by allowing him to express his anger against the warrant in a non-violent way, but was highly unlikely to have satisfied (3).

The case of *Brooker* also highlights a common theme in New Zealand and overseas jurisdictions — that expression which is a form of protest should be afforded a high level of protection, this is represented by the following observation in *Brooker*:

> 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.[52]

Since each exercise of free speech is capable of providing different justifications and core values, it is impossible to have a 'blanket rule' as to what is a reasonable limit. Instead each situation must be assessed separately to decide which value is present, and whether that particular value should be subject to any limits. For example, if the expression only serves the value of self-fulfilment it may have a weaker argument against other broader rights that impact on the community as a whole but could have equal status with other 'individual' rights. This means legislation that is incapable of differentiating between the values provided by the

46 41 L Ed 2d 842 (1974).

47 The ability to have the message understood appears to be at the heart of the cases where 'individual' symbolic expression has not gained protection. Although the author of the symbol may have intended a particular message, due to the personalised meaning of the expression, it is not a message where there is a likelihood of it being understood by others. See *Villegas v Gilroy Garlic Festival* No 05–15725 (9th Cir, 3 September 2008) and also *Bivens v Albuquerque Public Schools* 899 F Supp 556 (D New Mexico, 1995) where in both cases it was stated that the subjective message would not be apparent to those who viewed it.

48 For example, in *R v Morse* [2009] NZCA 623 in relation to a protest that involved a flag being burnt it was stated at [34] that: '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'.

49 *Moonen* [2000] 2 NZLR 9 (CA).

50 Thomas I Emerson, 'Toward a General Theory of the First Amendment' (1963) 72 *Yale Law Journal* 877, 881.

51 *Brooker* [2007] 3 NZLR 91.

52 Ibid [16].

expression cannot be accurately balanced against the competing rights — since all core values of free expression are potentially limited all of these values must be weighted against the other right. It would only be in exceptional circumstances that all values of free expression would be denied.

This sentiment of the need for exceptional circumstances was expressed in *Brooker* by using the following quote from *Terminiello v City of Chicago*,[53] where it was stated in regard to free speech that:

> It 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. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute… is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest.

In the situation of gang insignia, this is capable of conveying a variety of meanings. One meaning is that the wearer is intending to send a message that they support (through membership or association) their 'organisation' and its beliefs. According to the promoters of the legislation[54] this message of support is a threat to public order as the organisation is one that stands for crime and violence. By expressing support for a gang, the wearer also expresses support for crime and violence. However this is not the only message that the support demonstrates. Gangs and their insignia can also be a form of rebellion and protest. For example, the 'Black Power' insignia portrays the clenched fist that is associated with civil rights protests against the oppression of African people.[55] The Mongrel Mob name and insignia represents anger against colonial oppression and the British systems in place — including the justice system.[56] So a blanket prohibition on the wearing of insignia also suppresses expressions of protest.

This was noted by the Attorney-General who stated that the prohibition would cover a large range of expressions and would not differentiate between the display of insignia that intended to be confrontational or intimidating and displays that were not intended to have this effect.[57] The tentative connection to the objectives of reducing intimidation and gang confrontations means the conduct did not provide a 'clear and present danger'. As such, the omission of a *mens rea* requirement[58] that would have separated expression with little social value (eg the intimidation 'statements') from those with greater social value and deserving of protection meant the legislation cast a net over the right to free expression wider than what the objectives of the legislation justified. Hence the Attorney-General concluded that the *Wanganui District Council (Prohibition of Gang Insignia) Bill 2008* (NZ) presented an inconsistency with s 14 of the *NZBOR* that could not be justified.

As commented previously, even when there is a report from the Attorney-General highlighting inconsistency with the *NZBOR* there is no obligation on the part of Parliament to comply with this report and abandon the inconsistent legislation. The Law and Order Committee considered the report but made only minor alterations to the *Wanganui District Council (Prohibition of Gang Insignia) Bill 2008* (NZ) as a result. It is argued that these amendments, even with a *NZBOR* consistent interpretation, may not adequately address the concerns raised by the report from the Attorney-General, and that the legislation still creates an unwarranted intrusion on personal autonomy.

First the defence of 'without reasonable excuse' was inserted into the provision for displaying gang insignia and a failure to stop or provide information. While this inclusion may appear to

53 *Terminiello v City of Chicago* 337 US 1, 4 (1949).

54 Refer to the comments (particularly those of Chester Borrows) in New Zealand, *Parliamentary Debates*, Wanganui District Council (Prohibition of Gang Insignia) Bill — Second Reading, Volume 652, 1642.

55 New Zealand Government, Department of Internal Affairs, *Report of the Department of Internal Affairs to the Law and Order Committee August 2008, Wanganui District Council (Prohibition of Gang Insignia) Bill* (2008) 7.

56 Tuhoe 'Bruno' Isaac and Bradford Haami, *TrueRed — The Life of an Ex-Mongrel Mob Gang Leader* (2007).

57 New Zealand Government, Attorney-General Office, above n 36, 4.

58 For example, by requiring that the display be done with the intent or knowledge that the display will intimidate or provoke confrontation.

resolve the issue of 'valuable' expression being protected, in reality it could prove ineffectual. The reasoning for this is as follows. The defence of reasonable excuse allows a defendant to escape conviction if it is shown their behaviour will not create or increase the type of risk that the legislation seeks to prevent.[59] In this situation, the legislation prohibits displaying gang insignia (which includes gang colours) on the premise that this display identifies the person as a member or supporter of a particular gang. The risk of harm this behaviour poses is that a person displaying the insignia may intimidate others, or may identify themselves as a target for confrontations from rival gang members. Whilst it may be possible to distinguish displays that increase the risk of intimidation from those that do not, the legislation does not isolate offences where the displays intimidate from those that increase confrontations. This means that if it is shown the display will increase the risk of confrontations then it will not matter that the person displaying the insignia would have a valid excuse in relation to intimidation. The legislation has been justified due to the idea that gangs use insignia to establish targets for confrontations. Therefore all displays not just those done by gang members/supporters must create the risk of gang confrontations since it is the display rather than any associations which are considered to be the provocation. The result is that either the defence of reasonable excuse will not be available to a large number of 'innocent' people displaying colours associated with gangs, or, if the defence does extend to these people, then the legislation has been incorrectly justified as it would mean it is not the mere display of insignia that creates the risk to public order.

This reasoning may also impact on a *NZBOR* consistent interpretation as to the second amendment that was made. The word 'wear' was removed so that it is only the 'display' of gang insignia that is prohibited. According to the Law and Order Committee, this was done to 'be more consistent' with the *NZBOR* so that 'the wearing of an item that cannot be seen would not be inadvertently captured'.[60] With respect, this reasoning misses the point of freedom of expression. The key element of this right is that an idea, comment, or statement is expressed — it is put into the public sphere. The right is different to a right to freedom of thought, where the belief may be held but not acknowledged to the public. If the gang insignia is not seen there is no 'expression'. Protecting the wearing of items that cannot be seen is not protecting the right to express views in public.

Although the reasoning given as to the alteration appears misguided, the use of the word display in association with other defined terms in the legislation may create an avenue for an interpretation which lessens the impact on freedom of expression. To display means to 'expose to view, exhibit or show'.[61] Each of these terms can be taken to indicate that the person must do the act intentionally,[62] that is a person must intentionally exhibit gang insignia. A *NZBOR* consistent interpretation of 'gang insignia', using the reasoning in *Moonen*,[63] would mean that only signs or symbols that have the *effect* of encouraging or advocating a particular gang would be regarded as 'gang insignia'.[64] So for a person to breach Section 12 of the *Gang Insignia*

59 The idea that the objective of the legislation must be considered can be seen in *Lister v Lees* 1994 SCCR 548, 553:

> Although 'good reason' is a different expression from ' reasonable excuse ', in our opinion the same approach falls to be adopted when the court is considering whether what has been put forward on behalf of an accused amounts to 'good reason'. Each case must depend on its own facts and circumstances and, in determining the issue, the court should have regard to the general purpose of the legislation, and where the legislation contains a general prohibition, the court must determine whether the reason advanced appears to constitute a justifiable exception to the general prohibition contained in the legislation.

60 New Zealand Government, Law and Order Committee, above n 11, 2.

61 Concise Oxford Dictionary definition as stated in: Wanganui District Council, *Submission on Amendments Made to the Law and Order Committee September 2008, Wanganui District Council (Prohibition of Gang Insignia) Bill* (2008) 1.

62 Refer to the comments in *Police v Starkey* [1989] 2 NZLR 373 in regard to how the term 'publish' was treated similarly to 'display'.

63 [2000] 2 NZLR 9 (CA).

64 In regard to whether conduct 'supported' exploitation it was stated in *Moonen* [2000] 2 NZLR 9 (CA) (at para 29) that:

> The concepts of promotion and support are concerned with the effect of the publication, not with the purpose or the intent of the person who creates or possesses it. The concepts denote an effect which advocates or encourages the prohibited activity, to borrow the words of Rowles J of the British Columbia Court of Appeal in an allied context in R v Sharpe (1999) 136 CCC 3d 97 judgment given on 30 June1999 at para 184. Description and depiction (being the words used in s 3(3)(a) of the Act) of a prohibited activity do not of themselves

Act,[65] there must be an intentional exhibition of a sign or symbol that has effect of encouraging or advocating a particular gang. This, in combination with the defence of reasonable excuse, would eliminate the possibility of displays such an elderly woman or very young child wearing blue being in breach of the legislation.

However, as the intent aspect would only go to the showing of the sign or symbol (meaning that a person would not come within the provision if the insignia became visible accidentally or unintentionally) rather than an intent that the display have the effect of advocating a particular gang[66] this would mean, as with the defence of reasonable excuse, that young men who are not gang members or supporters (but who could be mistaken for gang supporters) who deliberately wear colours associated with gang identity would be in breach of the legislation. It also does not remove the problem that even if the display is done by a gang member/supporter, it may still be done as part of, for example, legitimate protest rather than an act of intimidation/confrontation so there is still suppression of harmless expression — unless a *NZBOR* consistent interpretation could be taken one step further.

A further progression of an interpretation that is consistent with the *NZBOR* would be to consider that the legislation is only intended to penalise displays that have the effect of advocating or encouraging gang intimidation and warfare not just the effect of advocating a particular gang. This interpretation would place the least limitation on freedom of speech as it would only capture expressions that are intended to have a harmful effect. Support for this could come from s 5(5) of the *NZBOR* which requires that any bylaw can only be made if it is reasonable necessary to prevent or reduce the likelihood of intimidation or confrontation. Since the legislation envisions that the powers of the Whanganui District Council will only be implemented where there is the risk of intimidation/confrontation, it is arguable that enforcement of the legislation is only intended where these risks are present.

There are some difficulties with accepting this interpretation of the legislation. First, when the legislation was debated supporters of the bill maintained that the ban on gang insignia was justified as gang insignia itself was intimidating rather than the conduct of the wearer or the situation when it was worn.[67] This view of the supporters should be taken as a clear intention on the part of Parliament that all displays regardless of the intention of the displayer or the effect of the display were to be prohibited. The second problem is that allowing an interpretation where only displays that have the effect of intimidation/confrontation are prohibited could create uncertainty in the law and possible discrimination.[68] Each situation would be assessed by the Police to see if the risk factors were present, this assessment may not coincide with the understanding or assessment of the person displaying the insignia and in some situations may be based on facts that are unknown to the person so the exact circumstances that would give rise to the offence would be unknown or uncertain.[69] This may lead to a perception on the part of

necessarily amount to promotion of or support for that activity. There must be something about the way the prohibited activity is described, depicted or otherwise dealt with, which can fairly be said to have the effect of promoting or supporting that activity.

65 *Wanganui District Council (Prohibition of Gang insignia) Act 2009* (NZ).

66 Refer to passage from *Moonen* [2000] 2 NZLR 9 (CA) [at para 29] extracted above at n 62.

67 Refer to the comments of Chester Borrows in New Zealand, *Parliamentary Debates*, Wanganui District Council (Prohibition of Gang Insignia) Bill — Third Reading, 6 May 2009, [Volume:654;Page:2944].

68 If the law was selectively enforced this would most likely target gang members. Since the legislation does not state that only gang members are subject to the restriction this would mean less protection of NZBOR rights for gang members, a situation that has been expressly condemned in *R v Wharewaka* (2005) 21 CRNZ 1008 where it was stated at [30]:

> The law protects the rights of all persons; gang members are no exception. Gang membership or association is not of itself prohibited by law; on the contrary ss 16–17 of the Bill of Rights provide: 16. Freedom of peaceful assembly, everyone has the right to freedom of peaceful assembly. 17. Freedom of association, everyone has the right to freedom of association.

See also Tamara Walsh and Monica Taylor, '"You're Not Welcome Here": Police Move-On Powers' (2007) 30(1) *UNSW Law Journal Volume* 151, as to possible discrimination where police are given broad discretion as to whether the circumstances of the offending is present.

69 For a discussion as to how uncertainty or vagueness of the law can impact on anti-gang legislation see: Kim Strosnider, 'Anti-Gang Ordinances after *City of Chicago v Morales*: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law' (2002) 39(1) *American Criminal Law Review* 101.

'offenders' that they are being targeted by Police, which in turn may increase attitudes against the Police and law enforcement.[70]

This does not mean that the current bylaw is not open to challenges that would limit or restrict the impact on free expression. One challenge would be as to the extent of the area that has been made a 'specified place'. The Law and Order Committee had seen the need to limit the imposition of the ban by specifically including a clause that any bylaw should not have the effect that all public places are specified places.[71] Also, as commented above, there is the requirement that the council must be 'reasonably satisfied' that the bylaw is necessary to prevent or reduce intimidation/confrontations.[72] This would indicate that any bylaw should only be imposed within an area where it is considered that the public would most be at risk of intimidation or the fallout from gang warfare. The current bylaw covers the entire urban area so appears to cover areas that were not intended to be subject to the prohibition. If using the reasoning in *Drew v Attorney General*[73] then it could be argued, using a *NZBOR* consistent interpretation of the empowering legislation, that the bylaw is *ultra vires* as the power to create the bylaw was only to the extent of prohibiting insignia in 'risk' areas so as to reduce the limitations placed on expression.

The potential for the bylaw to be limited means that there is a practical need for the legislation to be subject to judicial assessment,[74] however, protection for fundamental rights should come from Parliament demonstrating a better understanding of the principles for limiting the use of criminal law so as to avoid the need for prolonged and costly litigation to ensure rights are upheld.

V. CONCLUSION

The principles associated with limiting criminal law are intended to preserve respect for the law. Following these rules require Parliament to understand and evaluate the law, the liberties that it seeks to protect, and the limitations that can be rightly placed on either. More than that, these limiting rules are also designed to ensure that laws enacted by Parliament are made because they represent the most effective means of dealing with disorder rather than being a convenient short cut. The criminal law should not be used as a quick measure; it should be enforced when it is the most effective measure.[75]

If these rules are misunderstood or ignored there is a risk that the law can antagonise the situation that the law sought to correct. For example it was noted by Greene and Pranis that:

> Heavy handed suppression efforts can increase gang cohesion and police community tensions, and they have a poor track record when it comes to reducing crime and violence. This is problematic in that 'the more cohesive gang usually is the more criminally involved.[76]

70 Beth Bjerregaard, 'Antigang Legislation and Its Potential Impact: The Promises and the Pitfalls' (2003) 14 *Criminal Justice Policy Review* 171, 176 states that 'suppression techniques targeted at specific communities can lead to a highly adversarial climate in which communities and police view each other suspiciously.'

71 *Gang Insignia Act (NZ)* s 5(6).

72 *Gang Insignia Act (NZ)* s 5(5).

73 [2002] 1 NZLR 58 (CA).

74 Even where there is no possibility of striking out a bylaw the process can still be of value as commented on in *Moonen* [2000] 2 NZLR 9 (CA), [19], by stating that even if the court indicates that there is an unjustified limitation the court may 'declare this to be so, albeit bound to give effect to the limitation in terms of s 4 [New Zealand Bill of Rights Act 1990].' The Court in *Moonen* [2000] 2 NZLR 9 (CA), [20] did go on to comment that the exercise may not be entirely futile as:

> Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum. In the light of the presence of s 5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified there under.

75 Douglas N Husak, 'The Criminal Law as Last Resort' (2004) 24 *Oxford Journal of Legal Studies* 207–35.

76 J Greene, and K Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Strategies*, (2007) Justice Policy Institute at pg 5. See also Australian Government, Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice* (2004).

Also, when using the law as a short cut the legislators miss the opportunity to address the real causes of the social problems and therefore do not resolve the main concerns. Baker[77]demonstrates this problem in the context of begging laws by referring to observations in a Sampson and Rudenbush study which found that:

> The active stimulus for criminality was structural disadvantage and attenuated collective efficacy more so than disorder. They held that attacking public disorder through strong-handed policing may be a politically popular approach to reducing criminality, but is an analytically weak strategy as 'it leaves the common origins of both, but especially the last, untouched.'[78]

In the situation of trying to resolve the 'gang problem', the use of an injunction that has limited ability to resolve issues of intimidation and gang confrontation and which may increase tensions between the law and gang members does not seem to be the most effective means of dealing with the problem. Removing the identifying symbols of gangs may drive gangs further underground so will increase the difficulty of monitoring gang activity and offending, and could cause gangs to migrate to less policed areas which might antagonise the 'gang problem'.[79] Also, it may serve to foster alienation of gangs from the rest of the community so that gang membership and unity will become even more important than community values and co-operation.[80] Due to the extent of the prohibition there is also the risk that non-gang members/supporters will be innocently convicted, thereby increasing the effects of reduced respect for the law.

This paper has intended to demonstrate the need to understand and comply with principles for limiting criminal law. These principles may be criticised as being unworkable ideals that do not bear out when meeting the practical needs of society.[81] However, when ideals are lost the essence of what the law represents is also eroded. Ideals, and the principles that seek to uphold them, give faith to society as to why law is needed. If the New Zealand Parliament had adhered to the limiting principles of criminalising behaviour when enacting the *Wanganui District Council (Prohibition of Gang Insignia) Act 2009* (NZ) they may have been able to better identify the issues that are required in order to successfully resolve the 'gang problem' in a way that does not jeopardise respect for criminal law.

77 Dennis J Baker 'The Moral Limits of Criminalizing Remote Harms' (2007) 10 *New Criminal Law Review* 370–91.

78 Ibid 380.

79 For example in a US study it was found that the implementing of a gang injunction into less disordered communities had a negative effect. Several causes were nominated by the researchers, which included migration and also less police enforcement of the injunction in this area. See pp44-46; Cheryl L Maxson et al, 'Can Civil Gang Injunctions Change Communities? A Community Assessment of the Impact of Civil Gang Injunctions'(2004) *National Institute of Justice, U.S. Department of Justice*.

80 Bjerregaard, above n 68, 176.

81 Lucia Zedner, *Criminal Justice* (2005) 58–63.