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Comment

***212 THE CONSTITUTIONALITY OF ENJOINING CRIMINAL STREET GANGS AS PUBLIC
NUISANCES**

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***213 I. Introduction**

Cities throughout the nation are plagued by the growth of criminal street gangs. [FN1] To combat this growth, state and local governments have enacted a wide variety of legislation increasing criminal sanctions for gang

behavior. [FN2] In addition, state and local governments have *214 turned with increasing frequency to civil remedies to augment their criminal law enforcement efforts. [FN3]

Gangs pose a particularly acute problem in California. [FN4] Reports of gang violence are increasing, and gang-related homicides are at an all-time high in the Los Angeles area. [FN5] Despite the enactment of new criminal sanctions to combat gangs [FN6] and the use of existing law enforcement techniques at their constitutional limits, [FN7] these efforts have *215 not quelled the increase in gang-related crime. [FN8] Consequently, California has been particularly innovative in using civil remedies to control gang activity. [FN9]

One such innovation is taking place in the cities of Los Angeles, [FN10] Burbank, [FN11] San Jose, [FN12] Westminster, [FN13] Oakland, [FN14] and Norwalk, [FN15] where city attorneys have asked courts to declare certain street gangs or gang members public nuisances and to enter injunctions to abate them. [FN16] City officials and community members report that these injunctions have been extremely effective in reducing gang activity. [FN17] Because of their success and the universal availability of public nuisance *216 doctrine, other municipalities facing burgeoning gang problems are considering pursuing similar injunctions. [FN18]

However, these antigang injunctions raise difficult constitutional questions. [FN19] For instance, since court orders can prohibit otherwise legal conduct, they operate as personal criminal codes that may infringe upon defendants' substantive constitutional rights. [FN20] In addition, employing a civil remedy such as an injunction may deprive defendants of constitutional procedural protections that would have been provided if the jurisdiction had elected to deter the same behavior with available criminal sanctions. [FN21]

Drawing on the California antigang injunctions as examples, this Comment addresses these constitutional questions by considering whether antigang injunctions violate either the substantive or procedural rights guaranteed by the United States Constitution. [FN22] Part II *217 provides the background for the analysis by describing the history of the California injunctions and outlining the types of injunction terms that raise the most salient constitutional concerns. Part III then discusses whether the injunction terms identified in Part II infringe on any substantive constitutional rights. Part IV continues the constitutional analysis with an evaluation of whether certain types of injunction terms are overbroad or void for vagueness. Part V then considers whether the procedures commonly followed in issuing antigang injunctions comply with the requirements of due process and argues for expanded procedural due process protection. Finally, Part VI concludes that for the most part, a properly drafted antigang injunction should be found constitutional. Nevertheless, Part VI reasserts Part V's argument that defendants of these injunctions should be given greater procedural protections than normally associated with civil remedies.

II. Antigang Injunctions in California

The antigang injunction cases in California provide a useful starting point for an analysis of antigang injunctions' constitutionality. This Part describes these injunctions, which taken together illustrate the wide range of views courts have taken of antigang injunctions' constitutionality, the type of terms included in such injunctions, and the type of procedures used to implement them. Section A begins the analysis by tracing the history of the antigang injunctions. Section B then organizes the most constitutionally significant injunction terms into specific categories to structure the subsequent analyses of whether the antigang injunctions violate the alleged gang members' constitutional rights.

A. The Antigang Injunctions: West Los Angeles, Burbank, Blythe Street, San Jose, Westminster, Oakland, and Norwalk

On December 10, 1987, Los Angeles Superior Court Judge Warren Deering issued the first antigang injunction against a gang known as the Playboy Gangster Crips. [FN23] Applying California's general nuisance *218 statutes, [FN24] the court declared the entire three-hundred member gang a public nuisance and issued a six-point preliminary injunction against it throughout a twenty-six block neighborhood. [FN25]

However, Judge Deering did not grant all of the injunction terms requested by the Los Angeles City Attorney. For instance, he refused to impose a curfew or prohibit gang members from dressing in gang fashion or associating with other gang members. [FN26] Calling these provisions "overbroad in content" and "far, far overreaching," Judge Deering said the injunction, if approved as originally requested, would have "violate[d] basic constitutional liberties." [FN27] Consequently, Judge Deering limited the scope of the injunction to acts already illegal under California law. [FN28]

Even in this limited form, the injunction reportedly was effective in curbing gang-related crime. [FN29] In the six months following the imposition of the injunction, the City Attorney noted that major felonies dropped eighteen percent and gang-related crime dropped thirty percent. [FN30] Residents also noted a marked reduction in crime throughout the neighborhood in which the injunction was effective. [FN31] Since the City Attorney felt that the preliminary injunction had solved the *219 problems at which it was aimed, he made no motion to make the injunction permanent, and it lapsed after one year. [FN32]

Despite the success of the Playboy Gangster Crips injunction, no other city attempted to enjoin street gang activity for nearly five years. However, between October 1992 and July 1994, antigang injunctions were sought in seven separate cases: *People ex rel. Fletcher v. Acosta*, [FN33] *People v. Blythe Street Gang*, [FN34] *People ex rel. City Attorney v. Acuna*, [FN35] *People ex rel. Jones v. Amaya*, [FN36] *People ex rel. City Attorney v. Avalos*, [FN37] *People v. "B" Street Boys*, [FN38] and *City of Norwalk v. Orange Street Locos*. [FN39]

Courts granted the requested injunctions in *Acosta*, [FN40] *Blythe Street*, [FN41] *Acuna*, [FN42] *Avalos*, [FN43] and *Orange Street Locos*. [FN44] Only in *Blythe *220 Street* did the court accompany its order granting the antigang injunction with an opinion analyzing the legal issues. [FN45] In that opinion, the court upheld the injunction against challenges based on the freedom of association, the right to travel, freedom of speech, overbreadth, vagueness, and the right to privacy. [FN46] At least two people have been convicted and another two arrested for violating the *Blythe Street* injunction, [FN47] and at least one person has been convicted and two others arrested under the *Acuna* injunction. [FN48] Significantly, in all of these cases the court expanded the permissible scope of antigang injunctions beyond the limits established in *Playboy Gangster Crips* and included provisions specifically rejected by Judge Deering. [FN49]

*221 In contrast, the *Amaya* and "*B*" *Street Boys* courts declined to issue preliminary injunctions against the alleged gang members. [FN50] Although the courts relied in part on equitable considerations, they both also cited constitutional grounds. Specifically, the *Amaya* court based its rejection on the First and Fourteenth Amendments to the United States Constitution as well as the California constitutional right to privacy, [FN51] while the "*B*" *Street Boys* court called the proposed injunction "overbroad" and "vague" and found the evidence relied upon as the basis for the injunction "constitutionally insufficient." [FN52] Notably, the rejected injunction terms were almost identical to those granted in other cases. [FN53]

B. Summary of Key Injunction Terms

This section provides the framework for the constitutional analysis of the antigang injunctions by identifying five types of injunction *222 terms found in California antigang injunctions that raise particular constitutional problems. [FN54]

1. Restrictions on Associating with Other Gang Members. -- The antigang injunctions have all included a provision restricting the defendant gang members' associational activities. For example, the *Avalos*, *Acuna*, and *Acosta* injunctions prohibited gang members from "standing, sitting, walking, driving, gathering or appearing anywhere in public view" with any other defendant or gang member. [FN55] The *Blythe Street* injunction prohibited defendants from "congregat[ing] with any other member or affiliate of the *Blythe Street Gang* for the purpose of threatening or intimidating others in any public place,"

[FN56] and the Orange Street Locos injunction employed similar language. [FN57] *223 A clause banning all association with any other gang member was rejected in Playboy Gangster Crips. [FN58]

2. Prohibitions Against Demanding Entry. -- The Avalos and Blythe Street injunctions included provisions to deter the gang's practice of forcing entry into residents' homes to evade arrest by police. The Blythe Street injunction prohibited "demand[ing], or by threat of force, enter[ing] into another's residence," [FN59] while the Avalos injunction enjoined defendants from "[d]emanding entry into another person's residence at any time of the day or night." [FN60]

3. Restrictions on Gang Clothing and Hand Signs. -- Although several cities requested a ban on gang attire and hand signs in their initial complaints, [FN61] only the Avalos and Acuna injunctions in San Jose ultimately included this type of provision. [FN62] However, those provisions were constructed more narrowly than the generalized bans on gang fashion, regalia, or colors that have raised constitutional concerns in other contexts. [FN63] Specifically, the Avalos and Acuna injunctions prohibited gang members from "[w]earing clothing which bears the name or letters" of the specified gangs as well as using the hand signs of the specified gangs. [FN64]

*224 4. Restrictions on Local Movement. -- The antigang injunctions imposed two different kinds of restrictions on the movements of gang members. The first kind of restriction prohibited certain types of movements designed to spot or flee from approaching law enforcement officers. These movements included being on rooftops in nonemergency situations; climbing trees, walls, or fences; and passing through tunnels or holes in walls and fences. [FN65]

The second type of restriction on movement was curfews. Both the Orange Street Locos and Blythe Street injunctions prohibited defendants under the age of eighteen from being in a public place within the affected neighborhood during the evening. [FN66] Furthermore, the Orange Street Locos and Blythe Street injunctions instituted curfews that applied to adults as well. [FN67] The City of Los Angeles also requested a similar curfew in Playboy Gangster Crips, but Judge Deering denied the request. [FN68]

*225 5. Prohibitions Against Annoying or Harassing Residents. -- All of the injunctions included a clause prohibiting gang members from harassing neighborhood residents. The Playboy Gangster Crips injunction ordered gang members not to "annoy, harass, intimidate, threaten or molest" residents, [FN69] and the Avalos, Acuna, and Acosta injunctions banned gang members from "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering" residents. [FN70] The Orange Street Locos injunction restrained defendants and gang members from "harassing, intimidating, . . . or otherwise threatening the peace or safety of any person." [FN71] Similarly, the Blythe Street injunction ordered gang members not to "annoy, harass, intimidate, threaten, [or] challenge . . . any person." [FN72]

In summary, this Comment will consider the constitutionality of five types of injunction provisions: restrictions on associating with other gang members, prohibitions against demanding entry, restrictions on clothing bearing gang insignia, restrictions on local movement, and prohibitions against annoying or harassing residents.

III. The Abridgment of Substantive Constitutional Rights

Opponents of the California antigang injunctions have challenged their constitutionality on the grounds that they infringe on the gang members' substantive constitutional rights. [FN73] This Part considers the most significant of these claims. Section A evaluates whether the injunctions infringe upon the defendants' right to freedom of association, concluding that street gangs are neither expressive nor intimate enough to fall within this constitutional protection. Nevertheless, section *226 A finds that law enforcement authorities must be careful to ensure that the injunctions are not applied in such a way that they constitute guilt by association. Section B then considers gang members' right to freedom of expression, determining that while the prohibitions of demanding entry are permissible, the restrictions against the wearing of gang clothing probably violate the alleged gang members' First Amendment rights. Lastly, section C demonstrates that the constitutional right to travel may not be implicated, and even if it is implicated, the injunction terms restricting that right will likely be found to be reasonable restrictions of that right.

A. Freedom of Association

Even though the Constitution does not explicitly enumerate a right to freedom of association, the Supreme Court has repeatedly recognized such a right. [FN74] The Court has referred to freedom of association in two distinct senses: expressive association and intimate association. [FN75] This section begins by evaluating each of these forms of freedom of association and concludes that street gangs are not sufficiently expressive or intimate to warrant such protection. The Court has also protected associational rights by prohibiting any finding of guilt based on purely associational activity. [FN76] This section ends by concluding that antigang injunctions can easily constitute impermissible guilt by association and that the authorities seeking the injunction must be careful to avoid this infirmity.

1. Freedom of Expressive Association. -- One aspect of the freedom of association, referred to by the Court as the freedom of expressive association, protects people's right to act collectively in exercising their First Amendment rights. [FN77] In the seminal case of *NAACP v. Alabama ex rel. Patterson*, [FN78] the Court for the first time protected the "freedom to engage in association for the advancement of beliefs." [FN79] The freedom of expressive association was reiterated in *Griswold v. Connecticut*, [FN80] which noted that "freedom of association [is] a peripheral *227 First Amendment right." [FN81] The *Griswold* Court went on to define this right in broad language, stating that "[i]n like context, we have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members." [FN82] Consequently, courts in the past have interpreted the freedom of expressive association expansively, including a wide variety of organizations within its boundaries, [FN83] including prison gangs. [FN84]

More recently, the Court has taken a more restrictive view of the kind of associative activity that can be considered expressive. [FN85] As the Court stated in *New York State Club Ass'n v. City of New York*, [FN86] " '[t]he close nexus between the freedoms of speech and assembly' " does not indicate "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." [FN87] More pointedly, in *City of Dallas v. Stanglin*, [FN88] the Court rejected respondents' claims that an ordinance prohibiting teenagers from being in dance halls violated the teenagers' freedom of expressive association, in part because "[t]here is no suggestion that these patrons 'take positions on public questions' or perform any of the other similar activities" normally associated with expressive association. [FN89] In so holding, the Court limited the breadth of expressive association rights, refusing to recognize a generalized right of "social association." [FN90] The Court recognized that other courts had often found a right to social association *228 because of the expansive language in *Griswold*, [FN91] but it explained

that such a broad reading was unwarranted because "the quoted language from *Griswold* recognizes nothing more than that the right of expressive association extends to groups organized to engage in speech that does not pertain directly to politics." [FN92] Other courts have applied this more limited reasoning to hold inapplicable the right to freedom of expressive association in cases where the association in question did not take positions on political, social, or religious questions or other activities associated with the First Amendment. [FN93]

These decisions indicate that the gang activity restricted by these injunctions is not protected by the freedom of expressive association. Like the social organization in *Stanglin*, street gangs typically do not take positions on public issues. [FN94] Therefore, as in *Stanglin*, absent indications that gangs undertake First Amendment activities, courts are unlikely to find gangs to be expressive associations. [FN95]

Even if gangs attempt to gain First Amendment protection by taking positions on public issues, they still may be subject to regulations limiting their nonexpressive activities. The Court has made it clear that no group of persons has the right to associate for wholly *229 illegal aims, and associations engaging in both legal and illegal activities may still be regulated to the extent that they engage in illegal activities. [FN96] The mere existence of some First Amendment activity within an association is insufficient to bring all of its activities within the First Amendment. [FN97] Thus, nonexpressive gang activities such as those giving rise to the nuisance would still be regulable.

Lastly, even if an association is found to be expressive, some infringement on its associational rights may be justified. [FN98] In *Roberts v. United States Jaycees*, [FN99] the Court held that enforcing a state law against sex discrimination did not unconstitutionally violate the club members' right to freedom of association. [FN100] Conceding that the club does participate in expressive activity, [FN101] the Court nonetheless held that the law under review was constitutional because it was not aimed at the suppression of speech, and it was the least restrictive means of achieving compelling state interests. [FN102] The Court further reasoned that "[t]here is . . . no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." [FN103]

Similarly, in *Madsen v. Women's Health Center, Inc.*, [FN104] the Court held that First Amendment activity may be enjoined so long as the injunction "burden[s] no more speech than necessary to serve a significant government interest." [FN105] The Court noted that numerous significant government interests were protected by the injunction in that case. The Court then upheld some provisions of the injunction as being sufficiently narrowly tailored to meet the aforementioned standard, but rejected others as unduly burdensome to speech. [FN106] The Court reasoned that the injunction was not an impermissible limit on the First Amendment freedom of association because "petitioners are not enjoined from associating with others or from joining with them to express a particular viewpoint. The freedom of association protected *230 by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights." [FN107]

Thus, even if gangs constitute expressive associations, courts may find that antigang injunctions are justifiable infringements of gangs' freedom of expressive association. Like the statute in *Roberts* and some of the injunction provisions in *Madsen*, antigang injunctions serve significant, if not compelling, government interests by abating the threat to public health and safety caused by public nuisances. [FN108] Moreover, as in *Roberts* and *Madsen*, the regulation, being limited in geographic scope, does not "impede the organization's ability to engage in . . . protected activities or to disseminate its preferred views" because gang members can still conduct their expressive activities elsewhere. [FN109] Therefore, even if courts find that gangs are expressive associations, courts may still issue injunctions if they are sufficiently tailored.

2. Freedom of Intimate Association. -- It is also unlikely that gangs will be protected by the freedom of intimate association, [FN110] which protects those "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." [FN111]

Determining whether a given association falls within these parameters has proven to be a difficult task. As the Supreme Court noted in *Board of Directors of Rotary International v. Rotary Club of Duarte*:

We have not attempted to mark the precise boundaries of this type of constitutional protection But . . . we observed that "[d]etermining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum *231 from the most intimate to the most attenuated of personal attachments." [FN112]

The Court has considered several factors in evaluating whether a relationship falls within the right of intimate association. Specifically, the Court has looked at "size, purpose, selectivity [in beginning and maintaining the relationship], and whether others are excluded from critical aspects of the relationship." [FN113] Applying this analysis, the Court in *Rotary* concluded that since the clubs numbered in size from twenty to nine hundred, recruiting and turnover were constant, and club activities were open to nonmembers, the clubs "[did] not suggest the kind of private or personal relationship to which we have accorded protection under the First Amendment." [FN114]

Viewing antigang injunctions with those considerations in mind, criminal street gangs, like the clubs in *Rotary*, clearly do not constitute intimate associations. [FN115] Like *Rotary Clubs*, the gangs involved in these particular cases are relatively large, ranging in size from thirty-eight to four hundred fifty members. [FN116] Moreover, as in *Rotary*, the fact that gangs engage in constant recruitment activity [FN117] and open their activities to nonmembers [FN118] belies any claim that street gangs *232 constitute an intimate association. Nor is the existence of intimate relationships between certain gang members sufficient to render the entire gang an intimate association worthy of constitutional protection. [FN119] As the Court held in *New York State Club Ass'n v. City of New York*, [FN120] "[i]t may well be that a considerable amount of private or intimate association occurs in such a setting, . . . but that fact alone does not afford the entity as a whole any constitutional immunity." [FN121] Therefore, courts should reject defendants' argument that an injunction would inhibit intimate associations.

3. Guilt by Association. -- Law enforcement authorities must ensure that antigang injunctions are not implemented in a way that constitutes guilt by association. Although people do not have the right to associate for the purpose of pursuing wholly unlawful aims, [FN122] associations with both legal and illegal goals present a different case. [FN123] The Supreme Court has made it clear that members of an association with both legal and illegal goals cannot be held liable for the association's illegal activities unless they actively participated in those illegal actions with the specific intent of furthering the association's illegal aims. [FN124]

NAACP v. Claiborne Hardware Co. [FN125] is illustrative. In *Claiborne Hardware*, black citizens were boycotting white merchants to *233 protest perceived racial injustice. [FN126] The merchants sought and were granted an injunction against 146 individuals to prevent them from continuing their boycott. [FN127] Seventy-nine of these individuals were enjoined because they regularly attended NAACP meetings, and twenty-two others were enjoined because the black hats they wore identified them as protesters. [FN128]

The Court dissolved this injunction because it constituted civil liability on the basis of associational activity. [FN129] The Court reasoned that "[t]he First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another." [FN130] The Court continued:

Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal

aims. In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. [FN131] The Court proceeded to quote *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*: [FN132] " 'Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality.' " [FN133] The Court then concluded that attendance at NAACP meetings and the wearing of black hats were insufficient to prove the specific intent to further an unlawful aim embraced by the group and thus were an insufficient factual predicate for the injunction. [FN134]

Therefore, a person may be subject to an antigang injunction without constituting guilt by association only if the facts sufficiently establish that that person actively participated in the gang's illegal activities and had the specific intent to do so. Accordingly, cities should be careful to enjoin only those persons whose level of participation and specific intent justify their being subjected to the injunction. In addition, courts should carefully scrutinize the methods used to determine who is subjected to the injunctions to ensure that the facts establish these elements.

***234** The record of *People ex rel. City Attorney v. Acuna* [FN135] demonstrates the risk of impermissible guilt by association involved in determining against whom an antigang injunction should be imposed. In *Acuna*, the San Jose City Attorney looked to several factors in deciding whether a person was a gang member and should be subjected to the antigang injunction: (1) whether the person had admitted to membership in a specific gang; (2) whether the person bore a tattoo, wore gang clothing, or was observed using gang hand signs; (3) whether the person was named as a gang member by two or more other members of the gang; (4) whether the person was an active participant in a criminal street gang crime; (5) whether the person was identified as a gang member by a reliable informant; or (6) whether the person had been observed associating with identified gang members two or more times. [FN136]

The factors used in *Acuna* offer little protection against unconstitutional guilt by association. For example, subjecting a person to an injunction based on that person's being identified as a gang member by himself or by another gang member is suspect. [FN137] As one expert noted, "Be skeptical about what you hear, even if you get it directly from gang members. (Gang members have lots of games to play -- with themselves, with each other, with police or anybody else in authority, and with anybody who can possibly be 'impressed.')" [FN138]

Moreover, the mere fact that a person identifies himself or herself as a gang member does little to establish that his or her level of participation is active enough to support legal liability. [FN139] Gang experts agree that there are different levels of participation in gangs, [FN140] and a ***235** person may identify himself or herself with a gang solely for recognition, protection, or social purposes and never actively participate in the gang's illegal activities. [FN141] Given that the Constitution requires a person's active participation with the specific intent of furthering an organization's illegal aims before that person can be enjoined because of his or her membership in that organization, [FN142] a person's self-identification as a gang member without more is insufficient to subject that person to an antigang injunction.

A person's wearing of gang clothing or a gang-related tattoo is also insufficient to justify subjecting that person to an antigang injunction. [FN143] The fact that nonmembers often experiment with gang clothing [FN144] and inactive gang members still bear gang tattoos [FN145] makes basing an injunction on such indicia problematic. Furthermore, the Supreme Court held in *Claiborne Hardware* [FN146] that an individual's wearing of apparel associated with an organization was constitutionally insufficient to establish the level of participation in that organization's illegal aims necessary for an injunction. [FN147] Given that holding, courts should not find that having a gang tattoo or wearing gang clothing is sufficient to subject a person to an antigang injunction.

Nor should a person's association with known gang members conclusively indicate that that person is an active participant in the gang's criminal activities sufficient to justify subjecting that person to an antigang injunction. [FN148] Just as attending NAACP meetings was held insufficient to justify the injunction in *Claiborne Hardware*, lawfully associating with identified gang members should be held insufficient to form the basis for an antigang injunction. [FN149]

***236** The risk of guilt by association is particularly acute in those cases where gangs are enjoined as unincorporated associations. [FN150] In cases where named defendants have been enjoined, a judge in theory has reviewed the factual sufficiency of the case against each defendant. However, in unincorporated-association cases, judges decide only whether the entire gang should be enjoined, while the decision whether a particular person should be subjected to the injunction lies entirely with experts in local police departments without any further judicial review. [FN151] Thus in unincorporated-association cases, a person may face contempt-of-court charges without ever having his or her case subjected to an independent, judicial determination of whether the police's determination of gang membership was correct. [FN152]

This is not to say that gang members can never be subjected to antigang injunctions without violating the Constitution's prohibition of guilt by association. The problem is ensuring that such injunctions are only applied to persons who meet the active participation and specific intent requirements mandated by the Constitution. Law enforcement authorities should take two steps to ensure that antigang injunctions are applied to alleged gang members in a constitutional manner. First, in deciding who should be subjected to such an injunction, authorities should employ a definition of gang membership that includes active participation and specific intent requirements. Although defining gang membership has proven to be a difficult task, [FN153] many states have already developed such definitions in their antigang statutes that have passed constitutional muster. For example, California's Street Terrorism Enforcement and Prevention (STEP) Act [FN154] contains a definition of gang membership that includes both active participation and intent requirements [FN155] which, as courts ***237** have held, avoids guilt-by-association problems. [FN156] Cities pursuing antigang injunctions can similarly avoid guilt-by-association concerns by incorporating these standards and only enjoining persons whose conduct satisfies these definitions. [FN157]

The second step law enforcement should take to avoid guilt-by-association problems is to eschew enjoining gangs as unincorporated associations and allow courts to review the factual sufficiency of the claim against each defendant. [FN158] Moreover, to make these protections effective, courts should scrutinize the factual sufficiency of the case against each individual defendant to make sure that the defendant's conduct satisfied the requirements imposed by the definition of gang membership. [FN159]

B. Freedom of Expression

The First Amendment of the Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." [FN160] The Supreme Court has encapsulated the freedoms of speech and the press into the term "freedom of expression." [FN161] This section analyzes whether antigang injunctions violate gang members' freedom of expression, focusing on the prohibitions against demanding entry and restrictions on wearing gang insignia and using hand signs. [FN162] This analysis reveals that since demanding entry constitutes speech representing a clear and present ***238** danger, it is not protected by the First Amendment. However, this analysis also indicates that the wearing of gang clothing is protected by the First Amendment and that the injunction terms restricting gang attire will be found to violate the gang members' freedom of expression.

1. Prohibitions Against Demanding Entry. -- The injunction provisions that prohibit gang members from demanding entry into residents' homes constitute restrictions on the alleged gang members' pure speech and thus are subject to the most exacting scrutiny. [FN163] The standard of review for restrictions of pure speech turns on whether the restriction is content-based or content-neutral. [FN164] Content-based restrictions must be "narrowly drawn to serve a compelling state interest" in order to be found constitutional. [FN165] Content-neutral restrictions are subjected to less rigorous standards. [FN166] To determine whether a regulation is content-based or content-neutral, courts look first to whether the government has adopted the restriction without reference to the content of the regulated speech. [FN167]

***239** However, the Court has defined certain categories of speech to be unprotected by the First Amendment and has permitted governments to regulate those categories in a content-based manner. [FN168] Words that pose a clear and present danger constitute one category of unprotected speech. [FN169] Under the clear and present danger test, speech that advocates the use of force or crime can be regulated if it is directed at inciting imminent lawless action and is likely to produce such action. [FN170] The threat of illegal action must be truly imminent to satisfy the clear and present danger test; advocacy of illegal action at an indefinite time in the future is not sufficient. [FN171]

Since the prohibitions against demanding entry refer on their face to the content of the regulated speech, they are clearly content-based restrictions. However, the injunctions prohibit such demands because gang members often evade arrest by forcing their way into people's homes. [FN172] Such demands are directed at inciting the imminent lawless action of evading arrest and are likely to produce such action. Therefore, the speech these injunction terms restrict does pose a clear and present danger and can be regulated without violating the First Amendment.

2. Restrictions on Gang Clothing and Hand Signs. -- In contrast, the antigang injunction terms prohibiting the wearing of gang clothing and the use of gang hand signs probably violate the gang members' First Amendment rights. As noted earlier, the Supreme Court has held that regulations of pure speech, unless they restrict only categories of unprotected speech, must pass the most exacting scrutiny to be held constitutional. [FN173] However, the Court has generally allowed the government greater latitude in restricting expressive conduct than it has in restricting the written or spoken word. [FN174] As the Court stated ***240** in *United States v. O'Brien*, [FN175] "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." [FN176] Similarly, the Court reasoned in *City of Dallas v. Stanglin*: [FN177]

"[F]reedom of speech" means more than simply the right to talk and to write. It is possible to find some kernel of expression in almost every activity a person undertakes -- for example, walking down the street or meeting one's friends at a shopping mall -- but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. [FN178]

To determine whether conduct is sufficiently expressive to fall within the First Amendment's protection, the Court applies the two-part test first articulated in *Spence v. Washington*. [FN179] Under that test, the Court evaluates whether "an intent to convey a particularized message was present" and whether "the likelihood was great that the message would be understood by those who viewed it." [FN180] If the conduct restricted by the regulation is found to be expressive under *Spence* and the regulation takes the form of an ordinance, the standard of review turns on whether the regulation is related to the suppression of speech. [FN181] If related to the suppression of speech, the regulation will be subjected to the same scrutiny as pure speech. [FN182] If unrelated to the suppression of speech, the less stringent standard announced in *United States v. O'Brien* [FN183] applies. [FN184]

***241** It is unclear whether the wearing of symbolic attire such as gang insignia should be analyzed as pure speech or expressive conduct. [FN185] In the pre- *Spence* case of *Tinker v. Des Moines Independent Community School District*, [FN186] for example, three public school students were suspended for wearing black armbands to protest American involvement in Vietnam. [FN187] Noting that "the wearing of armbands in the circumstances of this case" was "closely akin to 'pure speech,'" [FN188] the Court invalidated the school's policy of banning such armbands as an unjustified infringement upon free speech. [FN189] Consequently, some courts have reasoned that the right to control one's appearance is protected by the First Amendment. [FN190] However, other courts have disagreed, holding that one's personal appearance is not sufficiently expressive to receive First Amendment

protection. [FN191] The Supreme Court has declined to resolve the split in authority, denying certiorari in numerous cases that presented the issue. [FN192]

***242** Regardless of whether one's appearance should be considered pure speech or expressive conduct, the regulation of the wearing of gang insignia and the use of hand signs should be found unconstitutional. If the wearing of gang attire and the use of hand signs are found to be pure speech, it will almost certainly be considered a content-based restriction, since they clearly refer to the content of the speech. [FN193] Moreover, in *Cohen v. California*, [FN194] the Court held that arresting a person for wearing a message on his clothing constituted a content-based restriction and was invalid. [FN195] Since injunction provisions prohibiting gang attire and hand signs similarly penalize the wearing of messages, like the statute in *Cohen*, they should be considered content-based and presumptively invalid. Therefore, unless the speech restricted by the regulation is determined to fall within one of the categories of speech unprotected by the First Amendment, it will be subjected to strict scrutiny and almost certainly be found unconstitutional. [FN196]

It is unlikely that courts will find that gang insignia and hand signs fall into one of the categories of unprotected speech. [FN197] First, gang insignia and hand signs probably do not constitute fighting words. [FN198] Fighting words are words of slight moral value which "by ***243** their very utterance inflict injury or tend to incite an immediate breach of the peace." [FN199] To be fighting words, it is not enough that they make listeners angry; they must actually incite others to violence, [FN200] and unless an onlooker could reasonably interpret the words as a direct personal insult or an invitation to exchange fisticuffs, they cannot be considered fighting words. [FN201] Although gang attire and hand signs do at times provoke violence, [FN202] they do not invariably have this effect, and onlookers appear to understand that their principal purpose is to express affiliation and not to incite violence. [FN203] Therefore, courts will probably conclude that gang clothing and hand signs do not constitute fighting words.

Similarly, courts are unlikely to hold that gang clothing and hand signs constitute speech that represents a clear and present danger. As noted earlier, speech represents a clear and present danger if it is directed at inciting imminent lawless action and is likely to produce such action; [FN204] in addition, the lawless action advocated must be more than a generalized threat of future action. [FN205] Since gang members wear gang clothing and use hand signs primarily to indicate affiliation and not to incite violence, [FN206] and the clothing and hand signs are at worst a generalized threat of action rather than a specific incitement to commit violence, [FN207] they should not be regarded as speech that represents ***244** a clear and present danger. Thus, if the wearing of gang clothing and the use of hand signs are treated as pure speech, they should not be regarded as unprotected speech, and antigang injunction provisions restricting the wearing of gang clothing and the use of hand signs should be regarded as presumptively invalid.

Courts will reach the same conclusion even if the wearing of gang insignia and the use of hand signs are analyzed as expressive conduct rather than pure speech. As an initial matter, courts should hold that the wearing of gang attire and the use of hand signs are sufficiently expressive under the *Spence* test to be protected by the First Amendment, [FN208] because gang clothing and hand signs probably send a particularized message of affiliation likely to be understood by people observing them. [FN209] Thus, the wearing of gang insignia and the use of gang hand signs are likely to be sufficiently expressive to fall within the ambit of the First Amendment.

Furthermore, courts will likely find that the prohibition of gang clothing and hand signs in antigang injunctions are related to the suppression of speech and thus are presumptively invalid. In *Texas v. Johnson*, [FN210] the Court considered whether a statute prohibiting flag burning was related to the suppression of speech. [FN211] The State claimed that one of the purposes of the statute was to prevent breaches of the peace. The Court held that since the flag burning itself was insufficient to constitute a breach of the peace, the only way the State's asserted interest was implicated was by focusing on the impact the flag burning had on the audience. [FN212] However, in focusing on the likely communicative impact of the conduct, the interest became related to the suppression of speech, subjecting the restriction to strict scrutiny. [FN213]

Similarly, antigang injunctions that prohibit the wearing of gang clothing and the use of hand signs should be deemed related to the suppression of speech and subjected to strict scrutiny. Just as the flag burning by itself did not constitute a breach of the peace in *Johnson*, the wearing of gang clothing and the use of hand signs by themselves do not harm anyone directly and do not pose a sufficient threat to the public health, safety, or morals to constitute a public nuisance. As in *245 *Johnson*, this lack of direct impact on the public reveals that the real interest behind the regulation is the impact that the prohibited activity will have on the surrounding community. Therefore, as in *Johnson*, courts are likely to conclude that this interest is related to the suppression of speech. Since gang clothing and hand signs do not fall within a category of unprotected speech, [FN214] injunction provisions restricting the wearing of gang clothing and the use of hand signs should be found to violate the First Amendment. [FN215]

C. Right to Travel

Antigang injunctions should not be found to be unconstitutional restrictions on gang members' right to travel. The existence of a right to travel has been acknowledged at least since *Shapiro v. Thompson*. [FN216] While the Court has held that the right to travel includes both interstate and international travel, [FN217] the Court has declined to determine whether this right extends to intrastate travel, [FN218] and the circuits have split over the issue. [FN219]

Even if the right to travel includes the right to intrastate travel, like most constitutional rights, it is subject to reasonable limitation. [FN220] Accordingly, courts have upheld temporary curfews and other restrictions *246 on movement during times of emergency. [FN221] Conversely, a restriction that, in light of the asserted governmental interests, unreasonably infringes upon an individual's freedom of movement is not justified. [FN222]

In *Lutz v. City of York*, [FN223] the Third Circuit considered the constitutionality of an ordinance outlawing "cruising." [FN224] The court first concluded that the right to travel does encompass the right to travel intrastate, basing the right in substantive due process. [FN225] However, the court then eschewed the strict-scrutiny test traditionally applied to substantive due process cases, fashioning instead a standard of review similar to that employed in reviewing time, place, and manner restrictions of free speech. [FN226] Because the ordinance served a significant governmental interest, was limited in geographic scope, and allowed ample alternative routes to travel about the town, the court upheld the ordinance's constitutionality as a reasonable restriction on that right to travel. [FN227]

If the right to travel is found not to include the right to travel intrastate, then the antigang injunctions' restrictions on local movement pose no constitutional problems. However, even if the right to travel is found to include the right to travel intrastate, the injunctions' restrictions on local movement, like the ordinance in *Lutz*, should be held to constitute a reasonable restriction on that right. As in *Lutz*, the restriction on local travel in question does serve the significant governmental interest of abating public nuisances. [FN228] The injunctions, like the ordinance in *Lutz*, are also limited in geographic scope. And *247 lastly, since the injunctions only impose a limited curfew and prohibit climbing trees, standing on rooftops, passing through walls, and other limited activities, [FN229] the restrictions still allow the enjoined parties myriad routes to travel around the area. Therefore, even if a right to intrastate travel is found, it is likely that the restrictions imposed by the antigang injunctions, like the ordinance in *Lutz*, will be found to be constitutionally permissible restrictions on the right to travel in light of the circumstances. [FN230]

Thus, except for the provisions restricting the wearing of gang insignia and the use of hand signs, antigang injunctions do not appear to violate defendants' substantive constitutional rights. They do not infringe on the defendants' freedom of expressive or intimate association. Furthermore, the prohibitions against demanding entry probably fall within a category held to be unprotected by the freedom of expression. Lastly, gang members' constitutional right to travel might not be implicated, and even if it is, its infringement is justified by the significance of the governmental interests in restricting it and the limited scope of the restriction. However,

courts should scrutinize the evidence about each and every defendant in order to avoid any guilt-by-association problems, being careful to apply a standard that requires that the defendants have the specific intent and the level of participation in the gang's nuisance creating activities required by the Constitution.

IV. Void for Vagueness and Overbreadth

In addition to the possibility that the antigang injunctions violate the alleged gang members' substantive constitutional rights, defendants and their amici have consistently challenged antigang injunctions as void for vagueness and as overbroad infringements on First Amendment rights, and the courts that have reviewed antigang injunctions' constitutionality have taken diametrically opposed positions on overbreadth and vagueness issues. [FN231] This Part will first analyze *248 whether certain categories of antigang injunction terms are void for vagueness and will then discuss whether these types of terms are overbroad and thus infringements of the alleged gang members' constitutional rights. Since the Court and commentators view these doctrines as closely related, [FN232] the vagueness and overbreadth issues will be discussed together.

The provisions that prohibit demanding entry, restrict local movement, and restrict the wearing of gang insignia and the use of hand signs, while raising other constitutional questions, do not suffer from lack of definiteness and satisfy the vagueness requirements of the Due Process Clause. [FN233] The preceding analysis has also already indicated that overbreadth analysis is inappropriate for those provisions since demanding entry is not protected by the First Amendment, the restrictions in gang attire and hand signs are facially invalid under the First Amendment, and the right to travel does not implicate the First Amendment at all. [FN234] Therefore, this section will focus on the provisions limiting defendants' association with other gang members and prohibiting defendants from annoying or harassing residents.

A. Restrictions on Associating with Other Gang Members

The antigang injunctions' restrictions on associating with other gang members pose serious vagueness and overbreadth concerns. Under the void-for-vagueness doctrine, the Due Process Clause of the Fourteenth Amendment requires that statutes and injunctions be sufficiently specific so that people have notice of what conduct is prohibited. [FN235] To survive a vagueness challenge, a restriction must be sufficiently definite that a person of ordinary intelligence can understand *249 what is prohibited. [FN236] The restriction must also provide criteria specific enough to discourage arbitrary enforcement. [FN237] These terms need not be defined with mathematical precision; reasonable certainty is sufficient to satisfy the mandates of due process. [FN238]

Historically, antigang measures have been particularly vulnerable to vagueness attacks on both notice and arbitrary enforcement grounds. In *Lanzetta v. New Jersey*, [FN239] for example, the Court considered a statute stating that "[a]ny person . . . known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime . . . is declared to be a gangster" and was punishable by fine or imprisonment. [FN240] The Court held that the phrase "consisting of two or more persons" was insufficient to define the term "gang." [FN241] Therefore, the Court held that the statute was void for vagueness because it failed to give sufficient notice of what activity was prohibited and reversed the defendant's conviction. [FN242]

The absence of a definition of gang membership also raises problems of arbitrary enforcement. [FN243] As noted earlier, law enforcement officials and scholars have been unable to formulate uniform criteria for determining gang membership. [FN244] In the absence of such clear criteria, judicial officers are not provided with any specific standards for determining when a violation of the injunctions has occurred. [FN245]

Thus, unless the provisions in antigang injunctions prohibiting defendants from associating with other gang members are carefully worded, they may be vulnerable to vagueness challenges. For example, *250 the provision in the Acuna injunction prohibiting defendants from "standing, sitting, walking, driving, gathering or appearing anywhere in public view with . . . any other known [gang] member" [FN246] lacks a clear definition of gang

membership and thus poses the same notice problems as the statute in Lanzetta. Like the statute in Lanzetta, these provisions leave the defendants guessing whether a person with whom they are standing or congregating is a gang member within the meaning of the injunction. [FN247] Moreover, the absence of a specific definition of gang membership makes the provision vulnerable to arbitrary enforcement. Therefore, the provisions banning defendants from associating with other gang members probably are unconstitutionally vague.

Two adjustments would mitigate the vagueness problems posed by the Acuna injunction. [FN248] First, as in Acosta, the Acuna injunction should limit its prohibition of associational activity to other named defendants. [FN249] By limiting this prohibition to a discrete list of names, the provision more clearly notifies defendants with whom they are prohibited from appearing in public and is relatively unsusceptible to arbitrary enforcement.

Alternatively, the injunction should incorporate a pre-existing statutory definition of gang membership either on the face of the injunction itself or by judicial construction. [FN250] As noted earlier, the California *251 Street Terrorism Enforcement and Prevention (STEP) Act includes a definition of gang membership [FN251] that courts have held is not unconstitutionally vague. [FN252] Thus, the provisions limiting defendants' ability to associate with other gang members can probably survive a vagueness challenge if their scope is limited to prohibiting association with other named defendants or if gang membership is defined specifically enough to satisfy the Due Process Clause.

With regard to overbreadth, a regulation is impermissibly overbroad if it deters a substantial amount of constitutionally protected conduct while purporting to restrict or prohibit nonprotected activities. [FN253] If so, the Court must then evaluate whether the injunction is vulnerable to selective enforcement. [FN254] Given that associational activity among gang members is neither sufficiently expressive nor intimate enough to receive constitutional protection, [FN255] it is unlikely that an injunction term restricting gang members' ability to associate with one another will be found to deter a substantial amount of constitutionally protected conduct, particularly where alternate channels of communication are available. [FN256] Moreover, as with void-for-vagueness, any concerns about possible selective enforcement can be dispelled by enjoining gang members by name and by incorporating a more specific definition of gang membership. [FN257] Thus, even if the terms restricting gang members' associational activity do raise some overbreadth issues, as in void-for-vagueness, these issues can be easily settled.

B. Prohibitions Against Annoying or Harassing Residents

The provisions prohibiting defendants from annoying, harassing, intimidating, or threatening residents and citizens are also suspect on *252 both vagueness and overbreadth grounds. [FN258] In Coates v. City of Cincinnati, [FN259] the Court confronted a city ordinance making it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by." [FN260] The Court held that the term "annoy" was neither sufficiently definite that persons of common intelligence could understand what conduct was being prohibited, nor specific enough to offer standards that discourage arbitrary enforcement. [FN261] Therefore, it held that the ordinance was void for vagueness. [FN262] Injunctions that have used terms such as "annoy" without any further explanation raise vagueness problems similar to those raised in Coates. [FN263] Therefore, antigang injunctions that employ such terms without further definition [FN264] run the risk of being found void for vagueness.

However, cities can take steps to avoid vagueness problems. For example, injunctions using terms such as "harass" and "annoy" have survived vagueness challenges when the injunction included a specific intent requirement [FN265] or more specific definitions of "harass" and "annoy." [FN266] If drafters of antigang injunctions include similar language, such injunction provisions will more likely survive vagueness challenge.

Coates also held that terms such as "harass" and "annoy," when used without further definition, raise significant overbreadth concerns. [FN267] *253 The lack of clarifying standards renders these prohibitions quite susceptible to selective enforcement. [FN268] However, the overbreadth concerns can be addressed in much the same way as

the vagueness concerns were addressed [FN269] since courts have tended to uphold regulations using such terms when they included more specific definitions of what constituted harassing or annoying behavior either directly or by reference to other statutory provisions. [FN270]

V. Procedural Due Process

In addition to potentially violating alleged gang members' substantive constitutional rights, the use of antigang injunctions and other civil remedies to control antisocial behavior raises equally serious questions about alleged gang members' procedural constitutional rights. [FN271] Commentators have expressed concern that increased use of civil remedies to control behavior traditionally addressed by the criminal law will effectively circumvent the procedural protections normally accorded criminal defendants by the Constitution. [FN272]

Among civil remedies, injunctions place particularly severe pressure on defendants' procedural rights. [FN273] As the Court noted in *Madsen v. Women's Health Center, Inc.*:

There are obvious differences . . . between an injunction and a generally applicable ordinance. Ordinances represent a legislative choice regarding promotion of particular societal interests. Injunctions, by contrast, *254 are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances. [FN274]

In particular, the wide discretion given judges in fashioning public nuisance remedies suggests that greater procedural protection is appropriate. Public nuisance statutes are stated in extremely broad terms, [FN275] giving judges the freedom to proscribe otherwise legal acts and create personal criminal codes. [FN276] When the breadth of these statutes is combined with the extreme deference accorded by reviewing courts to the issuance of public nuisance injunctions, [FN277] a judge's power to fashion such remedies is immense. [FN278]

At first blush, procedural concerns raised by antigang injunctions appear to be mitigated by the fact that injunctions are enforced by criminal contempt proceedings during which the defendant is entitled to the full range of procedural protections normally associated with criminal law. [FN279] However, on closer inspection, it becomes apparent that these protections are provided only when it is too late to affect the merits of the case. This is because injunctions are subject to the "collateral bar rule," which prevents defendants from challenging the constitutionality of an injunction at a contempt of court hearing, requiring that defendants instead raise these issues in a motion to dissolve the injunction. This rule therefore limits the issues in a contempt of court hearing to whether the court had jurisdiction to issue the injunction and whether the defendant knowingly violated it. [FN280] Given this bar to constitutional challenges at the contempt stage, it is particularly important that those defendants be provided with both the opportunity and the resources to contest the injunction's constitutionality before the action reaches that stage.

The provision of two procedural protections would greatly lower the risk that a person will be subjected to an erroneous or unconstitutional *255 antigang injunction. First, judges should not issue court orders *ex parte*, depriving the subject of the injunction of the chance to be heard on the matter and shifting the burden of proof to the alleged gang member to show that the court order was improperly applied. [FN281] Second, indigent defendants should be provided with appointed counsel so that they can challenge both the scope of the injunction and the factual basis for subjecting them to the injunction. [FN282]

The Supreme Court has developed two separate approaches to determine which procedural protections should apply in specific cases, and this Part will analyze the applicability of each approach to antigang injunctions. First, the Court has developed an expansive, if somewhat incoherent, jurisprudence to determine whether the procedural protections normally associated with the criminal law should apply to civil remedies closely aligned with the criminal law. [FN283] Second, starting with the landmark case of *Mathews v. Eldridge*, [FN284] the Court has held that the Due Process Clauses mandate certain procedures even in civil cases. [FN285] Section A concludes that antigang injunctions probably do not meet the criteria for invoking criminal-type procedural protections.

Section B argues that under two post- Mathews cases, *United States v. James Daniel Good Real Property* [FN286] and *Lassiter v. Department of Social Services*, [FN287] alleged gang members should be provided with a contested hearing and appointed counsel before injunctions are imposed.

A. The Civil/Criminal Distinction and Criminal Procedural Protections

The distinction between the civil and criminal law, while paradigmatic in Anglo-American law, has proven quite elusive. [FN288] The fundamental question becomes what is the proper means for drawing this distinction, [FN289] and the Court has used both formal and functional tests *256 to determine whether a sanction is criminal or civil [FN290] and thus whether a defendant should or should not receive the full range of constitutional criminal procedural protections. [FN291]

At times, the Court has adopted a formal test, deferring to Congress's designation of a remedy as civil and treating the civil/criminal question as one of statutory construction. [FN292] Under one version of this test, the legislature's designation of a sanction as civil or criminal became the key factor in determining whether criminal procedural protections should apply. [FN293] In another version, the Court focused on the presence or absence of certain procedures and remedies to determine whether a sanction was civil or criminal. [FN294] Given nuisance doctrine's historical and statutory basis in civil law [FN295] and the fact that nuisance actions do not involve the procedures or the remedies traditionally associated with the criminal law, [FN296] it is unlikely that a formal test would indicate that defendants of antigang injunctions should be afforded the procedural protections granted criminal defendants.

Commentators have criticized formal tests on a number of grounds. [FN297] The principal criticism was that in focusing on instrumental indicia and ignoring the consequences of the sanction, the formal test often found sanctions to be civil even though they lacked the kind *257 of proportionality to be expected under the compensation-oriented civil paradigm. [FN298] Consequently, the Court has been forced to characterize particularly harsh sanctions as government reimbursements [FN299] or liquidated damages [FN300] to explain the apparent disproportionality and to justify calling them civil. [FN301]

This has led many commentators to prefer a functional test similar to the one advanced in *Boyd v. United States*, [FN302] in which the Court used a functional test to compare the purpose of a civil forfeiture statute and the nature of its remedy, determined the sanction to be "quasi-criminal," and extended to civil defendants of such actions some of the protections normally afforded only to criminal defendants. [FN303] In making such a comparison, a functional test can represent the proportionality demanded by the compensation-oriented civil law paradigm. Therefore, under the functional test, particularly egregious terms in an antigang injunction might be sufficiently disproportionate to render an antigang injunction "quasi-criminal" and allow injunction defendants to receive some of the benefits of criminal procedural protections. [FN304] However, subsequent decisions of the Court have severely *258 limited *Boyd* [FN305] and have used the functional approach very infrequently. [FN306]

Both the critics and the supporters of the Court's tendency toward formalism saw the Court's 1989 decision of *United States v. Halper* [FN307] as a possible return to functional tests. [FN308] In *Halper*, the respondent was convicted of making \$585 in false claims to the federal government and sentenced to two years in prison and a \$5,000 fine. [FN309] The government subsequently instituted a civil action against him in which he was fined more than \$130,000. [FN310] Respondent moved to dismiss on the basis of double jeopardy. [FN311] Focusing on the strand of double jeopardy that prohibits multiple punishments for the same offense, the Court held that the government was entitled to rough remedial justice in a civil action. [FN312] However, the Court held that when the supposedly remedial sanction does not approximate the government's actual damages and costs, rough justice becomes injustice, and the purportedly remedial sanction becomes punishment and is barred by double jeopardy. [FN313] The Court distinguished *Ward* by reasoning that while the civil/criminal distinction may be important for double jeopardy's other aspects, the civil/criminal distinction was unimportant with regard to the multiple punishments aspect. [FN314]

Given the Court's previous deference to Congress's designation of a sanction as civil and its tendency toward formalism and toward finding remedial purposes in similar cases, [FN315] commentators viewed the Court's return to a functional analysis in determining whether a *259 constitutional procedural protection applied in a civil case as a potential jurisprudential breakthrough. [FN316] Although the Court had never formally repudiated the functional approach it followed in *Boyd*, its disuse raised serious questions as to its vitality. [FN317] In *Halper*, commentators saw renewed potential for functional analysis to justify a much broader extension of criminal procedural protections to civil cases, [FN318] although such a consequence was far from mandated. [FN319]

The extent to which *Halper* marked a change in the Court's approach to punitive civil sanctions was partially answered in *Austin v. United States*. [FN320] In *Austin*, the Court addressed whether the Eighth Amendment's Excessive Fines Clause applied to civil forfeiture where the government was the moving party. [FN321] Following *Halper's* focus on the punitive/nonpunitive distinction rather than the civil/criminal distinction, the Court began by observing that the Eighth Amendment was intended to prevent the government from abusing its power to punish and that unlike the Sixth Amendment and the self-incrimination clause of the Fifth Amendment, nothing in the text or the history of the Eighth Amendment limited it to criminal cases. [FN322] The Court concluded that since forfeitures have historically been viewed as punishment and there was nothing in the text or the legislative history of the forfeiture statute in question to indicate that anything but punishment was intended, the forfeiture in question was properly considered punishment and was subject to the Excessive Fines Clause of the Eighth Amendment. [FN323]

Any inference that *Halper* marked a return to the functional approach to the civil/criminal distinction is undercut by *Austin*. *Austin* relied exclusively on formal statutory analysis, [FN324] in stark contrast to the functional reasoning of *Halper*. [FN325] When read together, it becomes rather unlikely that *Halper* represents a widespread return to functional tests. Instead, the common thread in *Austin* and *Halper* is the Court's focus on the punitive/nonpunitive distinction in determining whether greater procedural protection should be extended, not the type of analysis used.

*260 In sum, although *Halper* and *Austin* mark a breakthrough in extending certain procedural protections to civil cases, they probably do not indicate a widespread return to functional analysis. Accordingly, the Court will likely continue to rely on formal analysis in drawing the civil/criminal distinction and will likely not extend the right to a contested hearing and the right to appointed counsel to all antigang injunction cases because they are quasi-criminal.

B. The Mathews Balancing Test and Civil Procedural Due Process Protections

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." [FN326] Under the requirements of due process, the Supreme Court has established that civil defendants are generally entitled to notice, an opportunity to be heard, and such other procedures as will ensure an accurate and rational resolution. [FN327] The three-part balancing test laid out in *Mathews v. Eldridge* [FN328] determines what procedures due process requires in civil actions. *Mathews* requires courts to consider: (1) the private interest affected by the official action, (2) the risk of an erroneous deprivation of that interest through the procedures used, and (3) the government's interests, including the administrative burden that the additional procedural requirements would pose. [FN329]

This section argues that the Court's decisions applying the *Mathews* test in other civil proceedings indicates that these same protections should be extended to defendants of antigang injunctions. Subsection 1 argues that courts should not impose antigang injunctions *ex parte*, and subsection 2 argues that enjoined gang members should be given the right to appointed counsel to enable indigents to defend themselves.

1. *Ex parte* Proceedings as Determined in *James Daniel Good Real Property v. United States*. -- The right to prior notice and a predeprivation hearing is

central to the Constitution's commands of due process. [FN330] Such a hearing helps ensure fairness for the individual *261 and serves to protect citizens from arbitrary government encroachment. [FN331]

The Court has allowed exceptions to the general rule requiring predeprivation notice and hearing only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." [FN332] In *United States v. James Daniel Good Real Property*, [FN333] the federal government seized the respondent's home and the land on which it stood in an ex parte proceeding. [FN334] The Court considered whether due process prohibited the government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard. [FN335]

The Court applied the Mathews test in evaluating the sufficiency of the ex parte proceeding. [FN336] It concluded that the first Mathews factor --the private interest affected by the official action -- favored the respondent. [FN337] In so holding, the Court analogized *Good* to its decision in *Fuentes v. Shevin* [FN338] where it held that the loss of kitchen appliances and household furniture was significant enough to warrant a deprivation hearing. [FN339] The *Good* Court concluded that the respondent's interests in his home far exceeded those in *Fuentes* in mere chattels and that his interests in maintaining control of his home and being free from governmental interference "weigh[ed] heavily in the Mathews balance." [FN340]

The *Good* Court also concluded that the second Mathews factor favored the respondent because the ex parte seizure created an unacceptable risk of error. [FN341] The Court reasoned that "[t]he purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking." [FN342] A postseizure hearing, the Court noted, may be no recompense for losses caused by an erroneous determination given the backlog of civil cases and the fact that the subsequent hearing, even if decided in favor of the respondent, *262 " 'would not cure the temporary deprivation that an earlier hearing might have prevented.' " [FN343]

Furthermore, the Court found that the third Mathews factor favored the respondent. The Court framed the governmental interest as the pressing need for prompt action in the particular case. [FN344] The Court concluded that in this case, unlike in forfeiture cases involving chattels, there was no pressing need to justify ex parte seizure because the property seized was real property that could not abscond and the government's interests could be adequately protected by filing a *lis pendens* against it. [FN345] In so holding, the Court distinguished *Calero-Toledo v. Pearson Yacht Leasing Co.*, [FN346] in which it upheld the ex parte seizure of a yacht. [FN347] Unlike *Calero-Toledo*, in which the movable nature of the property required that the court seize the property to establish jurisdiction over it and prevent it from disappearing, *Good* involved real property, the immobility of which guaranteed jurisdiction and prevented disappearance. [FN348]

The Court's decision in *Good* supports the conclusion that the ex parte issuance of antigang injunctions violates the requirements of due process under Mathews. First, the gang members' private interests in personal liberty should be significant enough to tip the first factor in their favor. Although in weighing the first Mathews factor courts have been disinclined to give significant weight to nonproperty interests, [FN349] courts could just as well follow the Supreme Court's reasoning in *Good* and conclude that gang members' liberty interests in associating with others, moving freely about their neighborhoods, and controlling their own appearance are more constitutionally significant than, for instance, a party's interest in kitchen appliances and household furniture. [FN350] Moreover, the recognition in *Good* that all individuals have a strong interest in remaining free from governmental interests also "weighs heavily in the Mathews balance" against ex parte issuance of antigang injunctions. [FN351]

Second, the risk of error in issuing an injunction against gang members is quite significant. As noted earlier, governmental bodies depend on adversarial hearings to ensure fairness and prevent arbitrary decision making. [FN352] Moreover, as noted earlier, law enforcement's frequent use of legally insufficient evidence in gang cases *263 indicates that injunctions against alleged gang members run particularly high risks of error. [FN353] The

ability of court orders to act as "private penal codes" makes the consequences of erroneous determination particularly onerous. [FN354] And lastly, as in *Good*, the opportunity for a subsequent contested hearing may not be timely and in any event would likely be insufficient to cure the deprivation of liberty suffered by the gang members. [FN355]

Most importantly, the third Mathews factor clearly favors the alleged gang members. As noted in *Good*, the hallmark of an important governmental interest is a pressing need for ex parte proceedings, [FN356] such as the possibility of property disappearing [FN357] or imminent danger. [FN358] No such pressing need is present in the antigang injunction cases. In fact, allowing governments to enjoin gangs ex parte might destroy an opportunity to deter gang activity, since one function of court orders is to give suspected gang members notice that their conduct is in question and that serious consequences will ensue if they persist in their present behavior. [FN359] Were governments required to give defendants notice and a hearing before injunctions were issued, they might find that the notice of hearing alone is enough to induce them to leave, solving the area's gang problem. [FN360] Thus, applying the logic of *Good*, it is unlikely that courts will be able to justify using ex parte proceedings to enjoin criminal street gangs.

***264** 2. The Right to Appointed Counsel in Civil Actions as Determined in *Lassiter v. Department of Social Services*. -- The alleged gang members' right to counsel prior to the contempt of court stage is critical. Without it, they cannot realistically contest the propriety of the injunctions before facing contempt of court charges, and the collateral bar rule reduces any hearing they receive after being charged with contempt to a mere formality instead of the constitutional protection it is intended to be. [FN361]

The key case in determining whether gang members should have a right to counsel in a civil action is *Lassiter v. Department of Social Services*. [FN362] In *Lassiter*, the Court evaluated the petitioner's right to appointed counsel in a hearing to terminate her parental rights. [FN363] The Court began by abstracting from its precedents the presumption against the appointment of counsel in cases where the litigant is not faced with the deprivation of physical liberty. [FN364] The Court acknowledged that other courts had traditionally dealt with the right to appointed counsel on a class-by-class basis, generally requiring appointed counsel in all hearings for termination of parental rights. [FN365] The Court then rejected the class-by-class approach for determining whether counsel should be appointed in a given proceeding in favor of a case-by-case determination by the trial judge. [FN366]

The Court then applied the Mathews factors to determine whether counsel should be appointed in the petitioner's case. [FN367] The Court found the petitioner's interest in her parental relationship with ***265** her child to be "extremely important." [FN368] It also identified two governmental interests: the interest shared with the petitioner in an accurate and just decision that protects the welfare of the child and a weaker interest in administrative economy. [FN369] On the risk of erroneous deprivation of rights, the Court acknowledged that "the ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be." [FN370]

Despite its recognition of the strength of the petitioner's private interest, the equivocal nature of the government's interest, and the risks of erroneous deprivation caused by the complexities of termination hearings, the Court nonetheless concluded that due process did not require the appointment of counsel. [FN371] In so concluding, the Court focused on the risk-of-error factor, finding it in favor of the government. [FN372] The Court reasoned that despite the admission of hearsay evidence and the incompleteness of the petitioner's defense, the presence of counsel would have changed nothing and concluded that the absence of grounds for criminal charges, expert witnesses, and of "troublesome points of law, procedural or substantive," justified the trial court's refusal to appoint counsel. [FN373]

Since *Lassiter*, many courts have been reluctant to require on constitutional grounds the appointment of counsel in civil cases. [FN374] Nevertheless, if *Lassiter*'s case-by-case approach is to be taken seriously, determining

whether appointment of counsel is required with regard to antigang injunctions depends on an analysis of each individual case's facts.

The application of the Mathews factors for appointment of counsel is similar to their application for ex parte proceedings. [FN375] First, as in the case of ex parte proceedings, gang members can assert a colorable *266 private interest in their liberty, [FN376] although this interest is arguably weaker than the private interest in parental rights asserted in Lassiter.

Furthermore, the governmental interests in antigang injunctions may be marginally weaker than the governmental interests in Lassiter, weighing in favor of the appointment of counsel. Although the state's interest in administrative economy is the same as in Lassiter, its interest in an accurate decision is arguably weaker. Unlike in Lassiter, where the state bore a special burden to protect the welfare of the child, [FN377] in the antigang injunctions the state is protecting the public morals and property rights of the community, who lack the vulnerability that merits increased governmental concern for children.

However, the key difference is the second Mathews factor -- the risk of erroneous deprivation faced by alleged gang members. Unlike the parental termination actions in Lassiter, antigang injunctions present difficult problems of proof, the sufficiency of which a gang member is unlikely to be able to challenge without counsel. [FN378] Moreover, unlike in Lassiter, the predicate activities alleged often constitute grounds for criminal charges. [FN379] The risk of erroneous deprivation of liberty is further heightened in injunction cases by the collateral bar rule. [FN380] And finally, the issues raised in this Comment and the different treatment of identical court orders in different cases [FN381] demonstrate that, unlike in Lassiter, antigang injunctions do present "troublesome points of law, procedural or substantive." [FN382]

Therefore, courts will not likely extend criminal-type procedural protections in antigang injunction cases. However, the manner in which the Court applied Mathews in Good will likely require that alleged gang members receive a contested hearing before being subjected to such injunctions. Similarly, the Court's application of Mathews in Lassiter arguably requires that indigent gang members have counsel appointed for them before being subjected to such injunctions.

VI. Conclusion

In the final analysis, the antigang injunctions survive constitutional scrutiny with only minor alterations and will likely represent an important weapon in state and local governments' antigang arsenal. Although the substantive constitutional claims are the most salient and have been the most heavily litigated, on closer inspection, these *267 claims fall away for the simple reason that the gang members' actions that give rise to the nuisance in the first place are not sufficiently intimate or expressive to implicate the gang members' constitutional rights to association and expression. Moreover, the actions that form the basis of the nuisance claim are linked to illegal activity and can properly be restricted whenever significant governmental interests exist, notwithstanding some infringement of gang members' right to travel or other substantive constitutional rights.

What does emerge from the analysis is the real danger of guilt by association and vagueness. To avoid these problems, law enforcement must adhere to constitutionally permissible standards in determining who should be subjected to an antigang injunction, and judges must carefully screen the evidence for each defendant to make sure each case meets those standards. City attorneys should enjoin gang members by name and should refrain from pursuing gangs as unincorporated associations. Drafters of injunctions should also include specific definitions of what constitutes gang membership and what conduct is enjoined. Fortunately, statutes exist that can provide guidance for the drafting of such definitions or that can be incorporated directly by reference.

Lastly, judges evaluating antigang injunctions should be keenly aware that the use of such injunctions may deprive defendants of important procedural protections, such as the right to a contested hearing and the right to appointed counsel. Although the defendants to antigang injunctions are probably not entitled to the full range of

procedural protections provided to criminal defendants, judges can still use the case-by-case approach of the Mathews balancing test to provide the defendant with those procedural protections, such as a contested hearing and appointed counsel, needed to ensure that each alleged gang member gets a fair hearing and that justice is served.

FN1. I am indebted to Fahnda Hashish of the Orange County District Attorney's Office for providing the inspiration for this Comment and to Jerry Baik of the Los Angeles City Attorney's Office for providing much of the unreported documentation contained herein. I would also like to express my appreciation to Sara Campos and Diane Chin of the San Francisco Lawyers' Committee for Civil Rights; Edward Chen of the ACLU Foundation of Northern California; Stuart Kirchick of Siner, Steinbock, Hofmann & Pennypacker; Dora Komura of Browne, Sand & Komura; Daniel Mayfield of the National Lawyers Guild, Santa Clara Valley Chapter; Mark Silverstein of the ACLU Foundation of Southern California; Carol Weinstein of the San Jose City Attorney's Office; and Amanda Wilson of the Public Interest Law Firm for their time and effort in support of this project. I would also like to thank Professors Martin Redish, Jane Larson, and William Marshall, and my wife, Kris, for their input and encouragement.

FN1. See, e.g., Daniel J. Monti, *Origins and Problems of Gang Research in the United States*, in *Gangs* 1, 1 (Scott Cummings & Daniel J. Monti eds., 1993) (noting sharp rise in gang-related crime over the last decade); John M. Hagedorn & Perry Macon, *People and Folks: Gangs, Crime and the Underclass in a Rustbelt City* 11-18 (1988) (comparing Milwaukee gangs to gangs in Los Angeles); Daniel J. Monti, *Gangs in More- and Less-Settled Communities*, in *Gangs*, supra, at 219 (discussing gang activity in St. Louis); N. Denise Burke, Comment, *Restricting Gang Clothing in the Public Schools*, 80 *Educ. L. Rep.* 513, 513 (1993) (noting increase in gang violence in Shreveport, Louisiana, and Bellingham, Washington); Gary Lee, *Big-City-Style Gangs Find a New Frontier on Plains of Kansas*, *L.A. Times*, Aug. 8, 1993, at B4 (Bulldog ed.) (reporting gang problems in Wichita). This conclusion is not universally shared. Some researchers suggest that the increase in reports of gang-related crime reflects changes in data collection rather than real increases in gang-related crime. E.g., Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 *Santa Clara L. Rev.* 739, 741 & nn.7, 8 (1990). Furthermore, variations in the way data on gang violence is collected throughout the country makes inferring national trends and making city-to-city comparisons problematic. See Cheryl L. Maxson & Malcolm W. Klein, *Street Gang Violence: Twice as Great, or Half as Great?*, in *Gangs in America* 71, 91 (C. Ronald Huff ed., 1990) (noting that estimates of gang violence in different cities vary with the definition of gang violence); Ira Reiner, Office of the District Attorney, *Gangs, Crime and Violence in Los Angeles* 148 (1992) (noting standards for reporting gang crime vary from department to department within the same jurisdiction).

FN2. For example, states have enacted statutes criminalizing participation in gangs. e.g., Ark. Code Ann. s 5 -74 -108 (Michie 1993); Cal. Penal Code s 186.22(a) (West Supp. 1994); Ga. Code Ann. s 16 -15 - 4 (Supp. 1993); Ind. Code Ann. s 35 - 45 - 9 -3 (West Supp. 1993); Iowa Code Ann. s 723A.1-.2 (West 1993); Mo. Ann. Stat. s 578.423 (Vernon Supp. 1994); Act of Dec. 10, 1993, s 128, 1993 Wis. Laws 98 (to be codified at Wis. Stat. s 895.77), enhancing sentences of gang members, e.g., Cal. Penal Code s 186.22(b) (West Supp. 1994); Ga. Code Ann. s 16 -15 -5 (Supp. 1993); Minn. Stat. Ann. s 609.229 (West Supp. 1994); Mo. Ann. Stat. s 578.425 (Vernon Supp. 1994); Nev. Rev. Stat. Ann. s 193.168 (Michie 1992); Martin Berg, *Oregon Raises Sentences for Gang Members*, *L.A. Daily J.*, Aug. 12, 1988, at 3, criminalizing the encouragement of minors to participate in gangs, e.g., Okla. Stat. Ann. tit. 21, s 856 (West Supp. 1994), subjecting street gangs to statutes designed to curb organized crime, e.g., Tex. Penal Code Ann. ss 71.01-71.05 (West Supp. 1994), and penalizing parents for their children's involvement in gangs, see *Williams v. Reiner*, 853 P.2d 507, 510 (Cal. 1993) (reasoning that 1988 amendment to juvenile delinquency statute was intended to enlist parents in the antigang fight); Mary S. Penn, *Parents Could Be Fined If Their Kids Join Gangs*, *Chi. Trib.*, Sept. 8, 1994, metro southwest sec., at 3 (reporting enactment of ordinance subjecting parents to fines and misdemeanor prosecution for their children's gang membership).

FN3. For example, states have enacted statutes authorizing buildings habitually used for gang activity to be declared public nuisances, e.g., Ark. Code Ann. s 5 -74 -109 (Michie 1993); Cal. Penal Code s 186.22a (West Supp. 1994); Fla. Stat. ch. 893.138 (Supp. 1993); Iowa Code Ann. s 657.2 (West Supp. 1993); La. Rev. Stat. Ann. s 15:1405 (West 1992); Mo. Ann. Stat. ss 578.430 -.433 (Vernon Supp. 1994); Tex. Civ. Prac. & Rem. Code Ann. s 125.063

(West 1994), authorizing a civil cause of action against gangs, e.g., 740 Ill. Comp. Stat. s 147/15 (Smith-Hurd Supp. 1994); La. Rev. Stat. Ann. s 15:1405.1 (West Supp. 1994), and authorizing the forfeiture of weapons used in gang activity, e.g., La. Rev. Stat. Ann. s 15:1405.1; Mo. Ann. Stat. s 578.435 -.437 (Vernon Supp. 1994).

FN4. Burrell, *supra* note 1, at 741 (noting that Southern California is facing "an unprecedented gang holocaust").

FN5. Reiner, *supra* note 1, at 83, 99, 148; Burrell, *supra* note 1, at 741. Paradoxically, gang violence in East Los Angeles has been decreasing over the past decade. Joan Moore, Gangs, Drugs, and Violence, in Gangs, *supra* note 1, at 27, 37. Regardless, the shocking nature of certain gang-related crimes, such as drive-by gang shootings and slayings of innocent bystanders and the intense media coverage that accompanies them have heightened public anxiety about gang violence even though these crimes may comprise only a small percentage of gang-related homicides. See Patrick Jackson & Cary Rudman, Moral Panic and the Response to Gangs in California, in Gangs, *supra* note 1, at 257, 264 - 65; Reiner, *supra* note 1, at 106 - 07.

FN6. Some California cities have passed ordinances banning gang members from certain areas. See Richard L. Colvin, Judge Issues Sweeping Injunction Against Gang, L.A. Times, Apr. 8, 1993, at B1 (home ed.) (reporting municipal ordinance banned gangs from parks in Pomona); Jim H. Zamora, Gang Ban Solves Problems for One Neighborhood, L.A. Times, Mar. 7, 1993, at B3 (Valley ed.) (reporting municipal ordinance banned gangs from parks in San Fernando). Other cities are considering similar ordinances. Patrick J. McDonnell, Plan to Ban Gangs from Parks Hit, L.A. Times, May 17, 1993, at B1 (home ed.) (reporting municipal ordinance banning gangs from parks being considered in Los Angeles); Matt Lait, City Ponders Law to Battle Drugs in Parks, L.A. Times, Sept. 28, 1993, at B1 (Orange County ed.) (reporting municipal ordinance banning gangs from parks being considered in Anaheim). Similar efforts by private citizens have proven less successful. See Sari Wilson, Big Suits, Am. Law., Sept. 1991, at 38; "Gang Members" Denied Entrance to Theme Park File Civil Rights Suit, The Recorder (San Francisco), July 31, 1991, at 3 (stating that amusement park dropped policy of excluding persons based on a gang-profile).

FN7. For example, police have begun conducting "gang sweeps," stopping and questioning suspected gang members often based merely upon how they are dressed. See Burrell, *supra* note 1, at 742- 43; Gordon Dillow, Police Bag the Baggy Pants Crowd in an Effort to Rid Mall of Gangs, L.A. Times, Dec. 31, 1993, at B5 (South Bay ed.) (reporting that police in Torrance conduct gang sweeps ordering gang members out of shopping malls). These methods have drawn severe criticism from civil libertarians. E.g., Debra R. Schultz, Comment, "The Right to be Let Alone": Fourth Amendment Rights and Gang Violence, 16 W. St. U. L. Rev. 725, 734 -35 (1989).

FN8. Nick Anderson, S.J. Makes Move to Reclaim Gang Territory, San Jose Mercury News, Mar. 10, 1993, at 1A (reporting that traditional police methods had proven insufficient to control gang activity in Rocksprings area of San Jose); Colvin, *supra* note 6 (reporting same in Blythe Street area of Van Nuys); Mark I. Pinsky, O.C. Anti-Gang Tactic Ruled Unconstitutional, L.A. Times, Aug. 31, 1993, at A1 (Orange County ed.) (reporting same in Westminster); Jim H. Zamora, Ban Loosens Gang's Grip on a Burbank Street, L.A. Times, Nov. 1, 1992, at B3 (Valley ed.) (reporting same in Burbank).

FN9. See Burrell, *supra* note 1, at 743 - 44 (noting Los Angeles County effort to enjoin gang-related graffiti as a public nuisance); Mark Thompson, A Gangland Nuisance, Cal. Law., Jan.-Feb. 1988, at 21 (same).

FN10. *People v. Playboy Gangster Crips*, No. WEC 118860 (Cal. Super. Ct. Los Angeles County Dec. 11, 1987); *People v. Blythe St. Gang*, No. LC 020525 (Cal. Super. Ct. Los Angeles County Apr. 7, 1993).

FN11. *People ex rel. Fletcher v. Acosta*, No. EC 010205 (Cal. Super. Ct. Los Angeles County Nov. 2, 1992).

FN12. *People ex rel. City Attorney v. Acuna*, No. 729322 (Cal. Super. Ct. Santa Clara County June 28, 1993); *People ex rel. City Attorney v. Avalos*, No. CV 739089 (Cal. Super. Ct. Santa Clara County Mar. 30, 1994).

FN13. *People ex rel. Jones v. Amaya*, No. 713223 (Cal. Super. Ct. Orange County Nov. 10, 1993).

FN14. *People v. "B" St. Boys*, No. 735405 - 4 (Cal. Super. Ct. Alameda County June 17, 1994).

FN15. *City of Norwalk v. Orange St. Locos*, No. VC 016746 (Cal. Super. Ct. Los Angeles County Aug. 25, 1994).

FN16. Other states have enacted statutes specifically authorizing street gangs to be enjoined as public nuisances. E.g., 740 Ill. Comp. Stat. s 147/35 (Smith-Hurd Supp. 1994); Tex. Civ. Prac. & Rem. Code Ann. s 125.062 (West 1994).

FN17. See, e.g., Mike Cassidy, S.J. Neighborhood on the Rebound: Crackdown on Gangs in Rocksprings Gets Credit for Drop in Crime, *San Jose Mercury News*, Sept. 15, 1993, at 1B (stating that city officials and community report Acuna injunction effective in reducing crime); Jeanette Regalado, A Reason to Celebrate: Blythe Street Residents Hold a Festival, Promising a New Era in the Crime-Ridden Neighborhood, *L.A. Times*, Aug. 14, 1994, at B1 (Valley ed.) (noting improvement in neighborhood since Blythe Street injunction); Westside Gang Crime Off, *L.A. Times*, June 2, 1988, s 2, at 3 (home ed.) (reporting that gang related crime dropped 30% since Playboy Gangster Crips injunction); Zamora, *supra* note 6 (noting that Acosta injunction was effective in curbing crime). Residents of neighborhoods in which antigang injunctions have recently been issued look forward to similar benefits. See Duke Helfand, *Judge Issues Injunction Against Gang in Norwalk*, *L.A. Times*, Aug. 26, 1994, at B1 (home ed.).

FN18. *Lee Harris*, Order Sought to Control Gang in Harbor City, *L.A. Times*, Apr. 22, 1993, s 5, at 7 (South Bay ed.) (reporting that Harbor City, California, is seeking an antigang injunction); Susan Leonard & Victoria Harker, "Use a Deadly Weapon, Go to Prison": Romley to Push Stiffer Terms, End of Plea Deals, *Ariz. Republic*, Sept. 15, 1993, at B1 (reporting that Phoenix is considering an antigang injunction); Paul F. Rosell, Public Forum: An Outcry on Crime, Punishment and Taxes, *Wichita Eagle*, Sept. 16, 1993, at 10a (calling on Wichita to seek an antigang injunction).

FN19. The difficulty of the constitutional issues is demonstrated by the different conclusions reached by the courts that have considered these injunctions' constitutionality. See *infra* notes 46, 49, 51-53 and accompanying text.

FN20. See *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2524 (1994) ("Injunctions ... carry greater risks of censorship and discriminatory application than do ordinances."); Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 *Hastings L.J.* 1325, 1407 (1991); Terence R. Boga, Note, Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space, 29 *Harv. C.R.-C.L. L. Rev.* 477, 494 - 99 (1994).

FN21. See Cheh, *supra* note 20, at 1329, 1389 - 94.

FN22. Because this Comment is primarily concerned with the potential use of antigang injunctions nationwide, it will focus on whether these injunctions violate the United States Constitution. Consequently, this Comment will not address issues that arise under state statutory and common law, such as the scope of nuisance doctrine or the application of equitable principles in issuing injunctions.

Nor will this Comment address issues that arise under state constitutions. State constitutional claims should not be ignored, however, since state constitutions also protect personal liberties. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489, 495 (1977) (noting that state constitutions have historically been the primary guarantor of civil liberties and that states are increasingly providing greater protection of civil liberties than provided by the United States Constitution). State constitutions often provide greater protection of individual rights than the federal constitution. Compare *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980) (holding zoning ordinance prohibiting unrelated persons from living together violated California's textually-based constitutional right to privacy) with *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (holding almost identical zoning ordinance did not violate federal non-textually-based constitutional right to privacy). It is noteworthy that one court based its refusal to grant an antigang injunction in part on the California Constitution's

right to privacy. *People ex rel. Jones v. Amaya*, No. 713223, slip op. at 4 (Cal. Super. Ct. Orange County Nov. 10, 1993) (order denying preliminary injunction). Another area in which state constitutions and courts may provide greater protection of gang members is equal protection, particularly if cities disproportionately enjoin minority gangs. See *State v. Russell*, 477 N.W.2d 886 (Minn. 1991) (subjecting statute that disproportionately burdened minorities to more penetrating scrutiny under the state constitution's equal protection clause than under the federal equal protection clause); Paul D. Murphy, Note, *Restricting Gang Clothing in Public Schools: Does a Dress Code Violate a Student's Right of Free Expression?*, 64 S. Cal. L. Rev. 1321, 1356-58 (1991) (noting equal protection problems if gang dress codes are enforced primarily against minority gangs).

FN23. *People v. Playboy Gangster Crips*, No. WEC 118860 (Cal. Super. Ct. Los Angeles County Dec. 11, 1987) (preliminary injunction); see Burrell, *supra* note 1, at 744 & n.19; Schultz, *supra* note 7, at 733-34; Boga, *supra* note 20, at 478-79; Thompson, *supra* note 9.

FN24. Under California law, a nuisance is defined as "anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or unlawfully obstructs the free passage or use, in customary manner of ... any public park, square, street or highway." Cal. Civ. Code s 3479 (West 1970). A public nuisance is defined as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of damage inflicted upon individuals may be unequal." s 3480. The proper way to abate a nuisance is with an injunction. s 3491. City Attorneys are authorized to bring actions to abate public nuisances. Cal. Civ. Proc. Code s 731 (West 1980).

FN25. *People v. Playboy Gangster Crips*, No. WEC 118860, slip op. at 3 (Cal. Super. Ct. Los Angeles County Dec. 11, 1987) (preliminary injunction); see also Los Angeles Prosecutors to Use Injunction Against Street Gang, *Crim. Just. Newsl.*, Jan. 4, 1988, at 20; *Regional News: California*, UPI, Dec. 11, 1987, available in LEXIS, News Library, UPI File.

FN26. Compare Complaint for Temporary Restraining Order, and for Preliminary and Permanent Injunction, to Abate Public Nuisance at 11-13, *Playboy Gangster Crips* (No. WEC 118860) (filed Oct. 26, 1987) with *People v. Playboy Gangster Crips*, No. WEC 118860, slip op. at 3 (Cal. Super. Ct. Los Angeles County Dec. 11, 1987) (preliminary injunction). See also Los Angeles Prosecutors to Use Injunction Against Street Gang, *supra* note 25.

FN27. See Paul Feldman, Judge Raps City Atty.'s Bid to Neutralize Gangs, *L.A. Times*, Dec. 11, 1987, s 2, at 3 (home ed.) [hereinafter Feldman, Judge Raps]; Paul Feldman, Judge OKs Modified Measures to Curb Gang, *L.A. Times*, Dec. 12, 1987, s 2, at 3 (home ed.). These quoted statements appear only on the decision and do not appear on the face of the order.

FN28. The preliminary injunction prohibited only trespassing, defacing property, blocking public ways, urinating or defecating in public, littering, and "annoy[ing], harass[ing], intimidat[ing], threaten[ing] or molest[ing] any resident, neighbor or citizen." *People v. Playboy Gangster Crips*, No. WEC 118860, slip op. at 3 (Cal. Super. Ct. Los Angeles County Dec. 11, 1987) (preliminary injunction); see also Feldman, Judge Raps, *supra* note 27.

FN29. See Harris, *supra* note 18.

FN30. See *id.*; Westside Gang Crime Off, *supra* note 17.

FN31. See Harris, *supra* note 18; Westside Gang Crime Off, *supra* note 17.

FN32. See Zamora, *supra* note 6.

FN33. Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctions to Abate a Public Nuisance, *People ex rel. Fletcher v. Acosta*, No. EC 010205 (Cal. Super. Ct. Los Angeles County filed Oct. 7, 1992).

FN34. Complaint for Preliminary and Permanent Injunction to Abate Public Nuisance, *People v. Blythe St. Gang*, No. LC 020525 (Cal. Super. Ct. Los Angeles County filed Feb. 22, 1993).

FN35. Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctions to Abate a Public Nuisance, *People ex rel. City Attorney v. Acuna*, No. 729322 (Cal. Super. Ct. Santa Clara County filed Feb. 26, 1993).

FN36. Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctions to Abate a Public Nuisance, *People ex rel. Jones v. Amaya*, No. 713223 (Cal. Super. Ct. Orange County filed June 30, 1993).

FN37. Complaint for Temporary Restraining Order, Preliminary and Permanent Injunction to Abate a Public Nuisance, *People ex rel. City Attorney v. Avalos*, No. CV 739089 (Cal. Super. Ct. Santa Clara County filed Mar. 16, 1994).

FN38. Complaint for Injunction and Equitable Relief to Abate a Public Nuisance, *People v. "B" St. Boys*, No. 735405 - 4 (Cal. Super. Ct. Alameda County filed May 18, 1994).

FN39. Complaint for Permanent Injunction to Abate a Public Nuisance, *City of Norwalk v. Orange St. Locos*, No. VC 016746 (Cal. Super. Ct. Los Angeles County filed July 21, 1994).

FN40. *People ex rel. Fletcher v. Acosta*, No. EC 010205 (Cal. Super. Ct. Los Angeles County Nov. 2, 1992) (order granting preliminary injunction); see also Boga, *supra* note 20, at 480 - 81. Reportedly, the Acosta injunction has not been seriously challenged in court. See Zamora, *supra* note 6.

FN41. *People v. Blythe St. Gang*, No. LC 020525 (Cal. Super. Ct. Los Angeles County Apr. 7, 1993) (order for preliminary injunction); see also Boga, *supra* note 20, at 481- 83. Available sources indicate that this injunction is currently being appealed. See Respondent's Brief, *People v. Gonzalez*, No. BR 33744 (Cal. App. Dep't Super. Ct. Los Angeles County filed Apr. 22, 1994) (concerning appeal by person convicted of violating Blythe Street injunction).

FN42. *People ex rel. City Attorney v. Acuna*, No. 729322 (Cal. Super. Ct. Santa Clara County June 28, 1993) (order granting preliminary injunction); see also Boga, *supra* note 20, at 483. Newspapers report that the Acuna injunction is being appealed. See Patricia Jacobus, *Oakland Goes After Gang with Lawsuit: Nuisance Law Used Against "B Street Boys"*, S.F. Chron. , May 21, 1994, at A17 (final ed.); David A. Sylvester, *San Jose Bans Gang Members from Area*, S.F. Chron. , Apr. 1, 1994, at A23 (final ed.).

FN43. *People ex rel. City Attorney v. Avalos*, No. CV 739089 (Cal. Super. Ct. Santa Clara County Mar. 30, 1994) (order granting preliminary injunction); see also Sylvester, *supra* note 42.

FN44. *City of Norwalk v. Orange St. Locos*, No. VC 016746 (Cal. Super. Ct. Los Angeles County Aug. 25, 1994) (preliminary injunction); see also Helfand, *supra* note 17; *City Wins an Injunction Against Violent Gang*, *The Record* (Los Angeles), Aug. 26, 1994, at A17 [hereinafter *City Wins Injunction*]; *Around the U.S.*, *Dallas Morning News* , Aug. 26, 1994, at 9A. The preliminary injunction was granted after the judge had initially denied the city's request for a temporary restraining order. *Judge Rejects Officials' Bid to Limit Activities of Gang*, *L.A. Times* , July 23, 1994, at B2 (home ed.); *For the Record*, *L.A. Times* , July 26, 1994, at B2 (home ed.) (correcting *Judge Rejects Officials' Bid to Limit Activities of Gang*, *supra*).

FN45. *People v. Blythe St. Gang*, No. LC 020525, slip op. (Apr. 7, 1993) (statement of decision).

FN46. *Id.* at 8 -16. In the opinions, the Blythe Street court also specifically endorsed the Los Angeles City Attorney's decision to proceed against the gang as an unincorporated association. *Id.* at 6 - 8; see also *infra* note 49.

FN47. See Thom Mrozek, *Unusual Anti-Gang Injunction Leads to Conviction of Man for Having Pager*, *L.A. Times* , Aug. 26, 1993, at B1 (Southland ed.) (reporting that Jessie "Speedy" Gonzalez was sentenced to 90 days in jail and

three years probation for violating Blythe Street injunction); Kurt Pitzer, Gang Suspect Gets 45 -Day Jail Term, L.A. Times , Nov. 30, 1993, at B3 (Valley ed.) (reporting that Rene Carlos Valdez was sentenced to 45 days in jail for violating Blythe Street injunction); Hugo Martin, Two Face Charges Under Blythe Street Gang Crackdown, L.A. Times , Nov. 23, 1993, at B5 (Valley ed.) (reporting that Cuthbert Sumayah and Ramon Rodrigo Aguilera have been charged with violating Blythe Street injunction). Interestingly, one of the alleged gang members convicted for violating the injunction has been arrested three additional times for violating the injunction. See Chip Johnson, Man Charged Again Under Blythe Street Court Order, L.A. Times , Jan. 12, 1994, at B6 (Valley ed.) (reporting that Jessie "Speedy" Gonzalez has been charged with violating injunction a second time); David Colker, Man Arrested Again Under Ban on Gangs, L.A. Times , Mar. 25, 1994, at B3 (Valley ed.) (reporting that Gonzalez has been charged with violating injunction for third and fourth times).

FN48. See Mary A. Ostrom, Gang-Control Action OK'd, San Jose Mercury News , June 29, 1993, at B1 (reporting that two people arrested and one person sentenced to 45 days in prison for violating Acuna injunction).

FN49. For example, the courts in Acosta, Blythe Street, Acuna, Avalos, and Orange Street Locos, granted prohibitions against appearing in public and associating with other gang members. See *infra* part II.B.1. Individual injunctions also contained bans on wearing gang insignia, see *infra* part II.B.3, and curfews, see *infra* notes 66 - 67 and accompanying text. All of these provisions were rejected in Playboy Gangster Crips. See *supra* notes 26 -28, *infra* note 68 and accompanying text.

It should also be noted that in three cases, the city attorneys did not request that the injunction be imposed against specific individuals and instead proceeded against the entire gang as an unincorporated association. See *People v. Blythe St. Gang*, No. LC 020525, slip op. at 1 (Cal. Super. Ct. Los Angeles County Apr. 7, 1993) (order for preliminary injunction); *People v. Playboy Gangster Crips*, No. WEC 118860, slip op. at 2 (Cal. Super. Ct. Los Angeles County Dec. 11, 1987) (preliminary injunction); see also *City of Norwalk v. Orange St. Locos*, No. VC 016746, slip op. at 1-2 (Cal. Super. Ct. Los Angeles County Aug. 25, 1994) (preliminary injunction) (proceeding against both named defendants and entire gang as unincorporated association). In those cases, the police made the final determination of whether a given individual should have been subjected to an antigang injunction. See *infra* note 151 and accompanying text.

FN50. *People v. "B" St. Boys*, No. 735405 - 4, slip op. at 2 (Cal. Super. Ct. Alameda County June 17, 1994) (order denying preliminary injunction); *People ex rel. Jones v. Amaya*, No. 713223, slip op. at 4 -5 (Cal. Super. Ct. Orange County Nov. 10, 1993) (order denying preliminary injunction); see also Patricia Jacobus, Judge Throws Out Oakland Suit Against Street Gang, S.F. Chron. , June 18, 1994, at A19 (final ed.); Hannah Nordhaus, City Can't Prohibit Gang's Movement, The Recorder (San Francisco), June 20, 1994, at 6. The Amaya court's refusal to issue a preliminary injunction followed its initial grant of a temporary restraining order. See Andrea Heiman, Injunction Bars Gang Activity in City, L.A. Times , July 3, 1993, at B3 (Orange County ed.). Available sources indicate that the rejection of the Amaya injunction is currently being appealed. See Bert Eljera, Judge's Ruling on Gangs Appealed, L.A. Times , Oct. 28, 1993, at B4 (Orange County ed.).

FN51. *People ex rel. Jones v. Amaya*, No. 713223, slip op. at 4 (Cal. Super. Ct. Orange County Nov. 10, 1993) (order denying preliminary injunction). Newspaper accounts report that the court grounded its decision in freedom of association and called the injunction "an 'impermissible invasion of privacy' under the First Amendment." Pinsky, *supra* note 8. However, this language does not appear on the face of the written order. *People ex rel. Jones v. Amaya*, No. 713223, slip op. at 4 (Cal. Super. Ct. Orange County Nov. 10, 1993) (order denying preliminary injunction).

FN52. *People v. "B" St. Boys*, No. 735405 - 4, slip op. at 2 (Cal. Super. Ct. Alameda County June 17, 1994) (order denying preliminary injunction); see also Mark I. Pinsky & Sam Enriquez, Tough Orange County Anti-Gang Law Voided, L.A. Times , Aug. 31, 1993, at B5 (Valley ed.).

FN53. Compare Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctions to Abate a Public

Nuisance at 7- 8, *Amaya* (No. 713223) with *People ex rel. City Attorney v. Acuna*, No. 729322, slip op. at 2 (Cal. Super. Ct. Santa Clara County June 28, 1993) (order granting preliminary injunction) and *People ex rel. Fletcher v. Acosta*, No. EC 010205, slip op. at 3 - 4 (Cal. Super. Ct. Los Angeles County Nov. 2, 1992) (order granting preliminary injunction); compare also Complaint for Injunction and Equitable Relief to Abate a Public Nuisance at 9 - 10, "B" St. Boys (No. 735405 - 4) with *People ex rel. City Attorney v. Avalos*, No. CV 739089, slip op. at 3 -5 (Cal. Super. Ct. Santa Clara County Mar. 30, 1994) and *People ex rel. City Attorney v. Acuna*, No. 729322, slip op. at 2-5 (Cal. Super. Ct. Santa Clara County June 28, 1993) and *People v. Blythe St. Gang*, No. LC 020525, slip op. at 1- 6 (Cal. Super. Ct. Los Angeles County Apr. 7, 1993) (order for preliminary injunction).

FN54. Focus is placed on only five types because other types of injunction terms are well established as proper subjects for nuisance abatement. Cal. Penal Code s 186.22a(e) (stating that firearms owned or possessed by gang member constituted nuisance); *Miller v. Interlake Steel Co.*, 649 P.2d 922 (Cal. 1982) (holding excessive noise constituted nuisance); *Phillips v. City of Pasadena*, 162 P.2d 625 (Cal. 1945) (holding blocking of public street constituted nuisance); *Kafka v. Bozio*, 218 P. 753 (Cal. 1923) (holding continuing trespass constituted nuisance); *O'Hagen v. Board of Zoning Adjustment*, 96 Cal. Rptr. 484 (Ct. App. 1971) (affirming lower court's holding that littering constituted nuisance); *City & County of San Francisco v. Burton*, 20 Cal. Rptr. 378 (Ct. App. 1962) (suggesting disorderly conduct is nuisance per se); *People v. Amdur*, 267 P.2d 445 (Cal. App. Dep't Super. Ct. 1954) (holding blocking of sidewalk constituted nuisance); *Burrell*, supra note 1, at 743 - 44 (noting California courts have held graffiti constituted nuisance). This is consistent with the law of other states, which have held that organizations that make excessive noise, e.g., *Sherk v. Indiana Waste Sys., Inc.*, 495 N.E.2d 815 (Ind. Ct. App. 1986); *Wade v. Fuller*, 365 P.2d 802 (Utah 1961), encourage underage drinking and the resulting violence, e.g., *Douglas v. Hayes*, 144 S.E.2d 756 (Ga. 1965); *State v. Cowdrey*, 17 N.W.2d 900 (N.D. 1945); *Gordon v. State*, 289 P.2d 396 (Okla. Crim. App. 1955); *Parker v. State*, 208 S.W.2d 380 (Tex. Civ. App.), aff'd, 212 S.W.2d 132 (Tex. 1948), and attract people who urinate and defecate in public, e.g., *Armory Park Neighborhood Ass'n v. Episcopal Community Servs.*, 712 P.2d 914 (Ariz. 1985), constitute public nuisances.

FN55. *People ex rel. City Attorney v. Avalos*, No. CV 739089, slip op. at 3 (Cal. Super. Ct. Santa Clara County Mar. 30, 1994); *People ex rel. City Attorney v. Acuna*, No. 729322, slip op. at 2 (Cal. Super. Ct. Santa Clara County June 28, 1993) (order granting preliminary injunction); *People ex rel. Fletcher v. Acosta*, No. EC 010205, slip op. at 3 (Cal. Super. Ct. Los Angeles County Nov. 2, 1992) (order granting preliminary injunction). In *Amaya*, the Westminster City Attorney requested this same provision and had it granted as part of the temporary restraining order; however, the *Amaya* court eventually rejected it along with the rest of the preliminary injunction. *People ex rel. Jones v. Amaya*, No. 713223, slip op. at 4 (Cal. Super. Ct. Orange County Nov. 10, 1993) (order denying preliminary injunction); *Eric Lichtblau et al., Westminster Gang Gets the Word -- In Writing*, L.A. Times, July 11, 1993, at A1 (Orange County ed.).

FN56. *People v. Blythe St. Gang*, No. LC 020525, slip op. at 4 -5 (Cal. Super. Ct. Los Angeles County Apr. 7, 1993) (order for preliminary injunction).

FN57. *City of Norwalk v. Orange St. Locos*, No. VC 016746, slip op. at 4 (Cal. Super. Ct. Los Angeles County Aug. 25, 1994) (preliminary injunction) (restraining defendants and unnamed gang members from "[c]ongregating in any public place with any other person for the purpose of engaging in any conduct prohibited by this injunction").

FN58. Compare Complaint for Temporary Restraining Order, and for Preliminary and Permanent Injunction, to Abate Public Nuisance at 11, *Playboy Gangster Crips* (No. WEC 118860) (requesting provision prohibiting gang members from "associat[ing] with any person who is a member of the Playboy Gangster Crips") with *People v. Playboy Gangster Crips*, No. WEC 118860, slip op. at 3 (Cal. Super. Ct. Los Angeles County Dec. 11, 1987) (preliminary injunction) (omitting that provision); see also Paul Feldman, *City Atty. Modifies Plan to Control Street Gang*, L.A. Times, Nov. 24, 1987, s 2, at 3 (home ed.) (reporting that Los Angeles City Attorney was no longer asking court to bar gang members from associating with one another after court refused to grant temporary restraining order).

FN59. *People v. Blythe St. Gang*, No. LC 020525, slip op. at 4 (Cal. Super. Ct. Los Angeles County Apr. 7, 1993)

(order for preliminary injunction).

FN60. *People ex rel. City Attorney v. Avalos*, No. CV 739089, slip op. at 4 (Cal. Super. Ct. Santa Clara County Mar. 30, 1994) (order granting preliminary injunction). The Oakland City Attorney unsuccessfully requested this same provision in "B" Street Boys. Complaint for Injunction and Equitable Relief to Abate a Public Nuisance at 10, "B" St. Boys (No. 735405 - 4).

FN61. Complaint for Preliminary and Permanent Injunction to Abate Public Nuisance at 17, Blythe St. Gang (No. LC 020525) (requesting ban on gang attire and hand signs); Complaint for Temporary Restraining Order, and for Preliminary and Permanent Injunction, to Abate Public Nuisance at 11, Playboy Gangster Crips (No. WEC 118860) (requesting ban on gang attire only).

FN62. *People ex rel. City Attorney v. Avalos*, No. CV 739089, slip op. at 4 -5 (Cal. Super. Ct. Santa Clara County Mar. 30, 1994) (order granting preliminary injunction); *People ex rel. City Attorney v. Acuna*, No. 729322, slip op. at 5 (Cal. Super. Ct. Santa Clara County June 28, 1993) (order granting preliminary injunction); see also Krysten Crawford, *Big Deals, Big Suits: California v. Acuna*, *The Recorder* (San Francisco), July 29, 1993, at 2.

FN63. See, e.g., Burke, *supra* note 1, at 524 (arguing that school dress codes banning gang colors raise vagueness problems unless carefully worded).

FN64. *People ex rel. City Attorney v. Avalos*, No. CV 739089, slip op. at 5 (Cal. Super. Ct. Santa Clara County Mar. 30, 1994) (order granting preliminary injunction); *People ex rel. City Attorney v. Acuna*, No. 729322, slip op. at 5 (Cal. Super. Ct. Santa Clara County June 28, 1993) (order granting preliminary injunction); see also Colvin, *supra* note 6; Crawford, *supra* note 62.

FN65. *City of Norwalk v. Orange St. Locos*, No. VC 016746, slip op. at 2 (Cal. Super. Ct. Los Angeles County Aug. 25, 1994) (preliminary injunction); *People ex rel. City Attorney v. Avalos*, No. CV 739089, slip op. at 4 (Cal. Super. Ct. Santa Clara County Mar. 30, 1994) (order granting preliminary injunction); *People ex rel. City Attorney v. Acuna*, No. 729322, slip op. at 4 -5 (Cal. Super. Ct. Santa Clara County June 28, 1993) (order granting preliminary injunction); *People v. Blythe St. Gang*, No. LC 020525, slip op. at 4 (Cal. Super. Ct. Los Angeles County Apr. 7, 1993) (order for preliminary injunction). A similar provision was requested and rejected in "B" Street Boys. Complaint for Injunction and Equitable Relief to Abate a Public Nuisance at 10, "B" St. Boys (No. 735405 - 4).

FN66. *City of Norwalk v. Orange St. Locos*, No. VC 016746, slip op. at 3 (Cal. Super. Ct. Los Angeles County Aug. 25, 1994) (preliminary injunction) (restraining juvenile defendants and gang members from being in a public place from 10 p.m. to sunrise unless "(1) accompanied by a parent or legal guardian, or (2) performing an errand directed by a parent or legal guardian, or (3) going to/from a meeting or entertainment open to the public, or (4) actively engaged in some business, trade, profession or occupation which requires such presence"); *People v. Blythe St. Gang*, No. LC 020525, slip op. at 5 (Cal. Super. Ct. Los Angeles County Apr. 7, 1993) (order for preliminary injunction) (prohibiting juvenile gang members from being in a 120 -block area from 8 p.m. to 6 a.m. unless carrying identification and proof that he or she was coming from either a school activity or a job.).

FN67. The Blythe Street injunction prohibited all persons, adults and minors alike, from being in a specified two-block area in the heart of the neighborhood at any time unless carrying identification and proof of residency in the area. *People v. Blythe St. Gang*, No. LC 020525, slip op. at 5 - 6 (Cal. Super. Ct. Los Angeles County Apr. 7, 1993) (order for preliminary injunction). The Orange Street Locos injunction restrained adults from being in a public place between midnight and sunrise unless "(1) going to/from a meeting or entertainment open to the public, or (2) actively engaged in some business, trade, profession or occupation which requires such presence." *City of Norwalk v. Orange St. Locos*, No. VC 016746, slip op. at 3 (Cal. Super. Ct. Los Angeles County Aug. 25, 1994) (preliminary injunction).

FN68. Compare Complaint for Temporary Restraining Order, and for Preliminary and Permanent Injunction, to Abate

Public Nuisance at 11, *Playboy Gangster Crips* (No. WEC 118860) with *People v. Playboy Gangster Crips*, No. WEC 118860, slip op. at 3 (Cal. Super. Ct. Los Angeles County Dec. 11, 1987) (preliminary injunction); see also Feldman, Judge Raps, *supra* note 27; Feldman, *supra* note 58.

FN69. *People v. Playboy Gangster Crips*, No. WEC 118860, slip op. at 3 (Cal. Super. Ct. Los Angeles County Dec. 11, 1987) (preliminary injunction).

FN70. *People ex rel. City Attorney v. Avalos*, No. CV 739089, slip op. at 3 - 4 (Cal. Super. Ct. Santa Clara County Mar. 30, 1994) (order granting preliminary injunction); *People ex rel. City Attorney v. Acuna*, No. 729322, slip op. at 4 (Cal. Super. Ct. Santa Clara County June 28, 1993) (order granting preliminary injunction); *People ex rel. Fletcher v. Acosta*, No. EC 010205, slip op. at 4 (Cal. Super. Ct. Los Angeles County Nov. 2, 1992) (order granting preliminary injunction). A similar provision was requested and rejected in "B" Street Boys and Amaya. Complaint for Injunction and Equitable Relief to Abate a Public Nuisance at 10, "B" St. Boys (No. 735405 - 4); Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctions to Abate a Public Nuisance at 8, Amaya (No. 713223).

FN71. *City of Norwalk v. Orange St. Locos*, No. VC 016746, slip op. at 2 (Cal. Super. Ct. Los Angeles County Aug. 25, 1994) (preliminary injunction).

FN72. *People v. Blythe St. Gang*, No. LC 020525, slip op. at 3 (Cal. Super. Ct. Los Angeles County Apr. 7, 1993) (order for preliminary injunction).

FN73. See *supra* notes 46, 51-52 and accompanying text. Injunctions, like statutes, are subject to challenge for infringing upon constitutional rights. If an injunction

inhibits protected free expression, unduly burdens or prohibits associational ties, or intrudes into protected privacy spheres, it may run afoul of the [F]irst and [F]ourteenth [A]mendments. Obviously a legislature cannot authorize courts to infringe on protected freedoms via injunctions any more than it can affect those rights directly through legislation. Cheh, *supra* note 20, at 1406 n.434.

FN74. See, e.g., *City of Dallas v. Stanglin*, 490 U.S. 19 (1989); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960).

FN75. E.g., *Roberts*, 468 U.S. at 617; *Stanglin*, 490 U.S. at 24.

FN76. E.g., *Claiborne Hardware*, 458 U.S. at 918 -20, 924 -26.

FN77. See, e.g., *Stanglin*, 490 U.S. at 24.

FN78. 357 U.S. 449 (1958).

FN79. *Id.* at 460.

FN80. 381 U.S. 479 (1965).

FN81. *Id.* at 483.

FN82. *Id.*; see also *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with

others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

FN83. E.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) (stating that freedom of association includes right of people to gather in public places for social or political purposes); *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1041- 42 (5th Cir. 1980) (overturning ban on minors in video arcades on basis of right to association), prob. juris. noted, 451 U.S. 981 (1981), rev'd on other grounds, 455 U.S. 283 (1982); *Sawyer v. Sandstrom*, 615 F.2d 311, 317 (5th Cir. 1980) (finding First Amendment right of association includes right to locomotion); cf. *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975) (holding freedom of movement is protected by substantive due process) (citing *Coates*, 402 U.S. at 611; *Griswold*, 381 U.S. at 500 (Harlan, J., concurring)), aff'd without opinion, 535 F.2d 1245 (3d Cir. 1976), cert. denied, 429 U.S. 964 (1976).

FN84. See *Dawson v. Delaware*, 112 S. Ct. 1093, 1097, 1099 (1992) (holding that absent some showing of relevance, admission of evidence of defendant's prison-gang membership in a sentencing hearing violated the defendant's First Amendment rights).

FN85. E.g., *City of Dallas v. Stanglin*, 490 U.S. 19 (1989); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 12 (1988).

FN86. 487 U.S. 1 (1988).

FN87. *Id.* at 12 (quoting *NAACP v. Alabama ex rel. Patterson*, 347 U.S. 449, 460 (1958)).

FN88. 490 U.S. 19 (1989).

FN89. *Id.* at 25 (quoting *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548 (1987)).

FN90. *Id.*

FN91. See *supra* notes 81- 82 and accompanying text.

FN92. *Stanglin*, 490 U.S. at 25.

FN93. See, e.g., *Lyng v. International Union, United Auto., Aerospace & Agric. Implement Workers*, 485 U.S. 360, 364 - 69 (1988); *Rotary*, 481 U.S. at 548; *Vieira v. Presley*, 988 F.2d 850, 852 (8th Cir. 1993); *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 244 (6th Cir. 1990); *Rathert v. Village of Peotone*, 903 F.2d 510, 517 (7th Cir.), cert. denied, 498 U.S. 921 (1990); *Swank v. Smart*, 898 F.2d 1247, 1250 -52 (7th Cir.), cert. denied, 498 U.S. 853 (1990); *Berg v. Commander, Fifth Coast Guard Dist.*, 810 F. Supp. 703, 711 (E.D. Va. 1992), aff'd without opinion, 27 F.3d 562 (4th Cir. 1994); *Bush ex rel. Bush v. Cassel-Cokato Bd. of Educ.*, 745 F. Supp. 562, 569 (D. Minn. 1990); *Welsh v. Boy Scouts*, 742 F. Supp. 1413, 1430 -31 (N.D. Ill. 1990); *Burrows v. Ohio High Sch. Athletic Ass'n*, 712 F. Supp. 620, 626 (S.D. Ohio 1988), aff'd, 891 F.2d 122 (6th Cir. 1989); accord *Graham v. Jones*, 709 F. Supp. 969, 972 (D. Or. 1989) (holding that traveling in vehicle with friends and co-workers does not constitute expressive association); *Sunset Amusement Ct. v. Board of Police Comm'rs*, 496 P.2d 840, 845 - 46 (Cal. 1972) (holding that simple physical activity or self-amusement without some element of communicating or advancing ideas or beliefs is not protected by freedom of association), appeal dismissed, 409 U.S. 1121 (1973); *People v. Katrinak*, 185 Cal. Rptr. 869, 874 (Ct. App. 1982) (holding that predominantly commercially and entertainment-oriented enterprise has no communicative element and thus is not protected by freedom of expressive association).

FN94. At recent gang summits, there were some calls for gangs to take a more active role in public affairs. See Lee Bey, *Gang Summit Stresses Politics*, Chi. Sun-Times, Oct. 21, 1993, at 1 (reporting that Chicago gang summit stressed political empowerment); James L. Tyson, *Black Leaders Call on Urban Gangs to Be "New Frontier of Civil Rights"*, Christian Sci. Monitor, Oct. 26, 1993, at 3 (same). However, the primary focus of these summits was to end gang-related violence, and gang leaders ultimately did not endorse this call for public activism. *Id.* But see George

Papajohn, A Peek Behind Gang's Talk of Political Action , Chi. Trib. , Oct. 2, 1994, news sec., at 1 (Chicagoland final ed.); George Papajohn & John Kass, 21st Century VOTE Giving Gangs Taste of Real Power , Chi. Trib. , Sept. 28, 1994, news sec., at 1 (north sports final ed.).

FN95. See Boga, *supra* note 20, at 495 - 99. But see *id.* at 499 -502 (arguing for a broader First Amendment right to peaceable assembly).

FN96. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2530 (1994); see also Donald T. Kramer, Annotation, The Supreme Court and the First Amendment Right of Association, 33 L. Ed. 2d 865, 895 - 98 (1973).

FN97. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 12 (1988).

FN98. *Madsen*, 114 S. Ct. at 2525 -30; *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 - 61 (1958).

FN99. 468 U.S. 609 (1984).

FN100. *Id.* at 623.

FN101. *Id.* at 626.

FN102. *Id.* at 623 -27.

FN103. *Id.* at 627; see also *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548 (1987) (noting that a restriction did not require Rotary Clubs to abandon their chosen goals).

FN104. 114 S. Ct. 2516 (1994).

FN105. *Id.* at 2525.

FN106. *Id.* at 2526 -30.

FN107. *Id.* at 2530.

FN108. See, e.g., *Leonardson v. City of E. Lansing*, 896 F.2d 190, 198 (6th Cir. 1990) (recognizing city had compelling interest in abating public nuisance caused by large, semiannual student party).

FN109. *Roberts*, 468 U.S. at 627; see also *Madsen*, 114 S. Ct. at 2524 n.2, 2530.

FN110. Courts have generally treated the freedom of intimate association as a First Amendment right. E.g., *Dawson v. Delaware*, 112 S. Ct. 1093, 1097, 1099 (1992); *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Arguably, freedom of association can be understood as an aspect of liberty protected by the Due Process Clauses as well. E.g., *Roberts*, 468 U.S. at 620; *Stanglin*, 490 U.S. at 28 (Stevens, J., concurring). However, given the narrow vision of due process liberty taken by the Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), it is unlikely that a due process approach will provide any more protection for intimate associations than will the First Amendment approach. See William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 81 (1986).

FN111. *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987) (quoting *Roberts*, 468 U.S. at 619 -20). See generally Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1990).

FN112. *Rotary*, 481 U.S. at 545 (quoting *Roberts*, 468 U.S. at 620) (alteration to quotation in original).

FN113. *Id.* at 546 (quoting *Roberts*, 468 U.S. at 620).

FN114. *Id.* at 546 - 47.

FN115. *Boga*, *supra* note 20, at 495 - 99.

FN116. Paul Feldman, Court Rejects City Attorney's Bid to Curb Westside Gang's Movements, *L.A. Times*, Nov. 6, 1987, s 2, at 1 (home ed.) (numbering Playboy Gangster Crips at more than 200 members); City Wins Injunction, *supra* note 44 (numbering Orange Street Locos at 60 members); Jim H. Zamora, Valley Is Model in Anti-Gang Effort, *L.A. Times*, Mar. 12, 1993, at B2 (Valley ed.) (numbering Blythe Street gang at 450 members). Size estimates for the other gangs were unavailable, although the substantial number of named defendants and unnamed "Does" suggests unnamed gangs of substantial size. See Complaint for Injunction and Equitable Relief to Abate a Public Nuisance at 1, *People v. "B" St. Boys*, No. 735405 - 4 (Cal. Super. Ct. Los Angeles County filed May 18, 1994) (18 defendants, 50 unnamed Does, and entire gang as unincorporated association); *People ex rel. City Attorney v. Avalos*, No. CV 739089, slip op. at 1 (Cal. Super. Ct. Santa Clara County Mar. 30, 1994) (24 defendants and 100 unnamed Does); Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctions to Abate a Public Nuisance at 1, *People ex rel. Jones v. Amaya*, No. 713223 (Cal. Super. Ct. Orange County filed June 30, 1993) (59 defendants and 100 unnamed Does); Complaint for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction to Abate a Public Nuisance at 2-3, *People ex rel. City Attorney v. Acuna*, No. 729322 (Cal. Super. Ct. Santa Clara County filed Feb. 26, 1993) (38 defendants and 100 unnamed Does); *People ex rel. Fletcher v. Acosta*, No. EC 010205, slip op. at 1-2 (Cal. Super. Ct. Los Angeles County Nov. 2, 1992) (order granting preliminary injunction) (88 defendants and 100 unnamed Does).

FN117. *People v. Blythe St. Gang*, No. LC 020525, slip op. at 7 (Cal. Super. Ct. Los Angeles County Apr. 7, 1993) (statement of decision) (noting Blythe Street gang members share common purpose to recruit new members); *Reiner*, *supra* note 1, at 22 (citing that most gangs "probably engage in some form of active recruitment").

FN118. *Reiner*, *supra* note 1, at 41- 44 (noting that nonmembers are allowed to participate in gang activities).

FN119. See, e.g., Memorandum of Points and Authorities of Amicus Curiae ACLU in Opposition to Motion for Preliminary Injunction at 16, *Blythe St. Gang* (No. LC 020525) (filed Mar. 10, 1993) (arguing that injunction violates freedom of association by preventing siblings from sitting together on their own front porch).

FN120. 487 U.S. 1 (1988).

FN121. *Id.* at 12 (citation omitted); see also *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2530 (1994); cf. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (holding that existence of First Amendment protections of freedom of association and expression do not preclude justifiable government regulation).

FN122. *Scales v. United States*, 367 U.S. 203, 229 (1961); *In re Alberto R. (People v. Alberto R.)*, 1 Cal. Rptr. 2d 348, 353 -54 & n.5 (Ct. App. 1991).

FN123. See *Kramer*, *supra* note 96, at 895.

FN124. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 -20 & n.55 (1982); *Rizzo v. Goode*, 423 U.S. 362, 373 - 87 (1976); *Healy v. James*, 408 U.S. 169, 186 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); see also 16A Am. Jur. 2d Constitutional Law s 539 (1979) (noting "[i]t is now clear from a number of the Supreme Court's later decisions involving freedom of association that one may not be presumed guilty because of the company he keeps"); *Kramer*, *supra* note 96, at 906 (collecting cases on guilt by association). However, "[i]t should be noted that a distaste for guilt by association has not always been a hallmark of Supreme Court decisions." *Id.* For example, in *Adler v. Board of Educ.*, 342 U.S. 485 (1952), the Court upheld the dismissal of a teacher, reasoning that "[f]rom time immemorial, one's reputation has been determined in part by the

company he keeps." *Id.* at 493; cf. *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (approving deprivation of liberties because of ancestry without any showing of individual participation in illegal activity); *id.* at 237-38 (Murphy, J., dissenting) (noting that internment was based only on generalizations about the entire group).

FN125. 458 U.S. 886 (1982).

FN126. *Id.* at 889, 908.

FN127. *Id.* at 889.

FN128. *Id.* at 897.

FN129. *Id.* at 920.

FN130. *Id.* at 918 -19.

FN131. *Id.* at 920 (quotations and footnote omitted).

FN132. 312 U.S. 287 (1941).

FN133. *Claiborne Hardware*, 458 U.S. at 924 (quoting *Milk Wagon Drivers*, 312 U.S. at 293).

FN134. *Id.* at 924 -26.

FN135. No. 729322 (Cal. Super. Ct. Santa Clara County June 28, 1993).

FN136. Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 4 n.5, *People ex rel. City Attorney v. Acuna*, No. 729322 (Cal. Super. Ct. Santa Clara County filed May 28, 1993). The risk of impermissible guilt by association is heightened by the fact that one of the primary sources of this type of information on gang members is so-called field identification or field inquiry (FI) cards, in which law enforcement officers note the circumstances of their contacts with suspected gang members. However, FI cards contain little information about what circumstances led to the person's identification as a gang member and are often screened by officers who lack the proper experience and training to ensure the cards' accuracy. See *id.* at 4; *Reiner*, *supra* note 1, at 141. Thus, FI cards often lack the details necessary to determine the alleged gang member's level of participation in gang activities.

FN137. Cf. *In re Lincoln J.* (*People v. Lincoln J.*), 272 Cal. Rptr. 852, 855 -56 (Ct. App. 1990) (holding that previous identification of self as a gang member to a police gang expert held insufficient to establish gang membership under California's Street Terrorism Enforcement and Protection Act).

FN138. Joan Moore, *Gangs and Gang Violence: What We Know and What We Don't*, in *Gang Violence Prevention* 23, 23 (Alfredo Gonzalez et al. eds., 1990).

FN139. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 & n.55 (1982); *Lincoln J.*, 272 Cal. Rptr. at 855 -56.

FN140. Ruth Horowitz, *Sociological Perspectives on Gangs: Conflicting Definitions and Concepts*, in *Gangs in America*, *supra* note 1, at 37, 45; *Reiner*, *supra* note 1, at 40 - 44; *Burrell*, *supra* note 1, at 750 & nn.45 - 46; *Moore*, *supra* note 138, at 28 -31. In fact, the District Attorney of Los Angeles County has noted that its database includes a large number of inactive gang members. *Reiner*, *supra* note 1, at 111. Unless local law enforcement verifies that a person is still an active member of the gang, using such databases to determine who should be subject to antigang injunctions presents serious risks of guilt by past association and would be unconstitutional.

FN141. Burrell, *supra* note 1, at 750 & n.48; Boga, *supra* note 20, at 486 - 89.

FN142. See *Claiborne Hardware*, 458 U.S. at 920 & n.55.

FN143. See Burrell, *supra* note 1, at 754 -55 (arguing that dressing like a gang member and tattooing are not conclusive of gang membership); Schultz, *supra* note 7, at 730 (questioning the use of clothing combined with skin color as a basis for concluding that a person is a gang member).

FN144. Reiner , *supra* note 1, at 41.

FN145. Burrell, *supra* note 1, at 755 n.65.

FN146. 458 U.S. 886 (1982).

FN147. *Id.* at 924 -26.

FN148. See *id.*

FN149. See *id.* This is particularly true because the known gang members' criminal acts were more than likely committed for the perpetrators' own benefit rather than for the benefit of the gang as a whole. See Reiner , *supra* note 1, at 55, 58; Burrell, *supra* note 1, at 750; Moore, *supra* note 5, at 38 -39. Therefore, it is far from clear that even if a person associates with known gang members, those other gang members' criminal activities should be attributed to that person. See *Claiborne Hardware*, 458 U.S. at 926 -32.

FN150. See *supra* note 49.

FN151. See Jim H. Zamora, Police Begin Serving Court Order to Gang, L.A. Times , May 9, 1993, at B3 (Valley ed.). This reliance on police experts' opinions is problematic since courts have held such opinions alone are insufficient to establish a gang's participation in illegal activity. See *In re Lincoln J.* (People v. Lincoln J.), 272 Cal. Rptr. 852, 855 -57 (Ct. App. 1990); *In re Leland D.* (People v. Leland D.), 272 Cal. Rptr. 709, 713 -14 (Ct. App. 1990).

FN152. This is particularly troublesome since under the collateral bar rule, by the time a violation reaches the contempt-of-court stage, the defendant is barred from contesting either the constitutionality or the factual sufficiency of the injunction and is restricted only to the issues of whether the court had the jurisdiction to issue the injunction and whether the defendant knowingly violated it. See *infra* note 280 and accompanying text.

FN153. Robert A. Destro, Gangs and Civil Rights, in *Gangs* , *supra* note 1, at 277, 280; Burrell, *supra* note 1, at 748 -50; Horowitz, *supra* note 140, at 43.

FN154. Cal. Penal Code ss 186.21-186.28 (West Supp. 1994).

FN155. The STEP Act defines a gang member as "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang," s 186.22(a), where a "pattern of criminal gang activity" is defined as the commission, attempt, or solicitation of seven specified offenses, s 186.22(e). Other states have adopted similar definitions. See, e.g., Ga. Code Ann. s 16 -15 -3 (1992); Iowa Code Ann. s 723A.1 (West 1993); La. Rev. Stat. Ann . s 15:1404 (West 1992); Minn. Stat. Ann. s 609.229 (West Supp. 1994); Mo. Rev. Stat. s 578.421 (West Supp. 1994); Nev. Rev. Stat. Ann. s 193.168 (Michie 1992); Act of Dec. 10, 1993, ss 133, 141, 1993 Wis. Laws 98 (to be codified at Wis. Stat . ss 939.22(9), 941.38(1)(b)).

FN156. *People v. Green*, 278 Cal. Rptr. 140, 145 - 46 (Ct. App. 1991); *In re Alberto R.* (People v. Alberto R.), 1

Cal. Rptr. 2d 348, 354 -55 (Ct. App. 1991); *People v. Gamez*, 286 Cal. Rptr. 894, 902 (Ct. App. 1991).

FN157. If judges require municipalities to make a constitutionally sufficient evidentiary showing for each gang member, just as is required for criminal sanctions such as the STEP Act, it is possible that antigang injunctions will lose much of their attractiveness. However, cities may remain interested in antigang injunctions nonetheless since easier evidentiary burdens are only one of many reasons that law enforcement agencies may prefer civil sanctions to criminal ones. See Cheh, *supra* note 20, at 1345 - 48.

FN158. See *NAACP v. Claiborne Hardware*, 458 U.S. 886, 920 & n.55, 924 -25 (1982).

FN159. See Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 9 -27, *People ex rel. City Attorney v. Acuna*, No. 729322 (Cal. Super. Ct. Santa Clara County filed May 28, 1993).

FN160. U.S. Const. amend. I.

FN161. See, e.g., *Associated Press v. NLRB*, 301 U.S. 103 (1937).

FN162. First Amendment concerns raised by limitations on gang members' ability to associate with one another have already been addressed in the discussion on freedom of expressive association. See *supra* part III.A.1. First Amendment concerns regarding the injunction provisions ordering defendants not to annoy or harass residents will be addressed in the discussion concerning overbreadth. See *infra* part IV.B.

FN163. *Boos v. Barry*, 485 U.S. 312 (1988). The First Amendment provides the greatest protection for pure speech, i.e., the spoken and written word. Expressive conduct receives a lesser degree of protection. See *infra* notes 174 - 84 and accompanying text.

FN164. Defendants and their amici have argued that antigang injunctions constitute prior restraints and should be subject to an even higher degree of scrutiny. Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction at 27-29, *People ex rel. Jones v. Amaya*, No. 713223 (Cal. Super. Ct. Orange County filed Aug. 19, 1993); Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 44 - 46, *Acuna* (No. 729322) (filed May 28, 1993); Memorandum of Points and Authorities of Amicus Curiae ACLU in Opposition to Motion for Preliminary Injunction at 14 -16, *People v. Blythe St. Gang*, No. LC 020525 (Cal. Super. Ct. Los Angeles County filed Mar. 10, 1993). However, the Court in *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994), held that "[n]ot all injunctions which may incidentally affect expression ... are 'prior restraints,' " particularly where the injunction was based on the defendants' prior unlawful conduct and where the injunction did not prevent the defendants from expressing their message in other ways. *Id.* at 2524 n.2.

FN165. *Barry*, 485 U.S. at 321; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In practice, subjecting a regulation to this level of scrutiny has been tantamount to finding it unconstitutional. See Laurence H. Tribe, *American Constitutional Law* s 12-2, at 790 - 92, s 12- 8, at 832-33, 836 -37 (2d ed. 1988).

FN166. If a restriction is content-neutral and the forum in question is a public forum such as a city street, *Frisby v. Schultz*, 487 U.S. 474, 480 (1988), the standard of review depends on whether the restriction is an ordinance or an injunction. Content-neutral ordinances may be held valid as a reasonable restriction on the time, place, or manner of speech so long as they serve a significant government interest and leave open adequate alternative channels of communication. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Perry Educ. Ass'n*, 460 U.S. at 45. Content-neutral injunctions run greater risks of censorship and discriminatory application than ordinances. Consequently, injunctions must "burden no more speech than necessary to serve a significant government interest" in order to be constitutional. *Madsen*, 114 S. Ct. at 2525.

FN167. *Madsen*, 114 S. Ct. at 2523; *Ward*, 491 U.S. at 791. The Court in *Madsen* rejected the argument that all

injunctions are content-based because they necessarily apply only to certain people. The Court reasoned that it was that group of people's past actions that led to their being enjoined, not the court's hostility to the content of their protest. Any restriction on their speech was "incidental" to their message. *Madsen*, 114 S. Ct. at 2523 -24.

FN168. E.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Although governments can regulate these categories of speech in a content-based manner, there remain limitations to the manner in which they regulate them. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2543 - 47 (1992) (holding cities cannot selectively regulate speech based on hostility or favoritism towards message even if speech is unprotected).

FN169. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The other categories of unprotected speech include fighting words, obscenity, libel, *Chaplinsky*, 315 U.S. at 572, and defamation, *Beauharnais v. Illinois*, 345 U.S. 250 (1952).

FN170. *Brandenburg*, 395 U.S. at 447; *Dennis v. United States*, 341 U.S. 494 (1951).

FN171. *Hess v. Indiana*, 414 U.S. 105, 108 (1973); see also *Watts v. United States*, 394 U.S. 705 (1969) (requiring government to prove a true "threat" to the life of the President for violation of statute).

FN172. See *supra* part II.B.2.

FN173. See *supra* notes 163 - 67 and accompanying text.

FN174. *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

FN175. 391 U.S. 367 (1968).

FN176. *Id.* at 376.

FN177. 490 U.S. 19 (1989).

FN178. *Id.* at 25.

FN179. 418 U.S. 405 (1974); see also *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (reiterating *Spence* test).

FN180. *Spence*, 418 U.S. at 410 -11.

FN181. *Johnson*, 491 U.S. at 403.

FN182. *Id.* For a description of the level of scrutiny for pure speech, see *supra* notes 163 - 67 and accompanying text.

FN183. 391 U.S. 367 (1968).

FN184. *Johnson*, 491 U.S. at 403; cf. Jeffrey S. Trachtman, Note, *Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power*, 58 N.Y.U. L. Rev. 1478, 1513 -18 (1983) (arguing that *O'Brien* should be applied to public nuisance injunctions against purveyors of obscenity). It is arguable that in the Court in *Madsen* established the proper standard of First Amendment review for injunctions regardless if the injunction provisions restricted pure speech or expressive conduct and that *O'Brien* does not apply at all to injunctions. The anti-abortion protests that gave rise to *Madsen* clearly involved the core of the First Amendment, and the fact that the Court discussed the applicability of time-space-manner doctrine clearly indicates that the Court regarded the enjoined activities as pure speech. However, it is unlikely that the Court would consider all activities restricted by injunctions to be pure speech because otherwise any enjoined party could automatically challenge the injunction on First Amendment grounds and invoke the more rigorous standard provided in *Madsen*. Therefore, courts are likely to continue to follow the *Johnson* framework with injunctions, applying *Spence* as a threshold requirement of expressiveness, evaluating

whether the regulation was related to the suppression of speech, and applying *Madsen* if the regulation was related to suppressing speech.

FN185. See *Tribe*, supra note 165, s 12- 8, at 825 -32 (noting the indeterminacy of the speech/conduct distinction).

FN186. 393 U.S. 503 (1969).

FN187. *Id.* at 504.

FN188. *Id.* at 505.

FN189. *Id.* at 514; see also *United States v. Sokolow*, 490 U.S. 1, 16 (1989) (Marshall, J., dissenting) (stating that what one wears is protected by the right to free expression); *Cohen v. California*, 403 U.S. 15 (1971) (holding that wearing a sign on the back of a jacket is protected by the First Amendment); *Schacht v. United States*, 398 U.S. 58 (1970) (holding that wearing military uniforms is protected by the First Amendment). Other cases have suggested that the right to control one's appearance is based on the liberty assurance of the Due Process Clause. E.g., *Zeller v. Donegal Sch. Dist. Bd. of Educ.*, 517 F.2d 600, 605 (3d Cir. 1975); *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970); *Braxton v. Board of Public Instruction*, 303 F. Supp. 958, 959 (M.D. Fla. 1969); see also *Kelley v. Johnson*, 425 U.S. 238, 244 (1976) (assuming without deciding that personal appearance falls within liberty of Fourteenth Amendment and noting lack of guidance provided by precedents); *id.* at 249 (Powell, J., concurring) (finding no implication of majority opinion as to whether personal appearance falls within liberty of the Fourteenth Amendment); *id.* at 251 (Marshall, J., dissenting) (arguing substantive due process protects against regulation of what citizens may or may not wear).

FN190. E.g., *Kelley*, 425 U.S. at 251 n.2 (Marshall, J., dissenting); *Jeglin ex rel. Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1461 (C.D. Cal. 1993); *Alabama & Coushatta Tribes v. Trustees of Big Shady Indep. Sch. Dist.*, 817 F. Supp. 1319, 1334 (E.D. Tex. 1993), remanded without opinion, 20 F.3d 469 (5th Cir. 1994); *Church v. Board of Educ.*, 339 F. Supp. 538 (E.D. Mich. 1972); see also *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970) (recognizing there may be an element of expression in one's appearance); *Breen*, 419 F.2d at 1036 (reasoning appearance may be within penumbra of First Amendment); *John D. Ingram & Ellen R. Domphe, The Right to Govern One's Personal Appearance*, 6 Okla. City U. L. Rev. 339, 343 & n.12 (1981) (arguing that better reasoned cases recognize a constitutional right to govern one's personal appearance).

FN191. See, e.g., *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971). See generally W.E. Shipley, Annotation, Validity of Regulation by Public School Authorities as to Clothes or Personal Appearance of Pupils, 14 A.L.R.3d 1201 (1967 & Supp. 1993) (collecting right to appearance cases that arose in a school context).

FN192. See *Ingram & Domphe*, supra note 190, at 345 - 46 & n.25 (listing twelve cases concerning students' right to control their hair length in which certiorari was denied); see also *Holsapple v. Woods*, 500 F.2d 49 (7th Cir.) (per curiam), cert. denied, 419 U.S. 901 (1974). Some courts have interpreted the Supreme Court's refusal to address the issue as an indication that the issue is not one of constitutional magnitude. *Royer v. Board of Educ.*, 365 N.E.2d 889, 891 (Ohio Ct. App. 1977); cf. *Fagan v. National Cash Register Co.*, 481 F.2d 1115, 1119 (D.C. Cir. 1973) (reasoning in sex discrimination case that hair length does not present a federal question); *Massie v. Henry*, 455 F.2d 779, 786 n.6 (4th Cir. 1972) (Boreman, J., dissenting) (reasoning that Supreme Court's refusal to grant certiorari on the issue indicates lack of importance).

The disagreement on the issue has unsurprisingly spawned extensive commentary. See, e.g., *Ingram & Domphe*, supra note 190; Lynda M. Grandinetti, Note, Twenty-Five Years Later: Schools and School Districts -- Discipline of Students -- Committee May Compel a "Proper Haircut" as Part of Mode of Dress, 25 New Eng. L. Rev. 215 (1990). For a list of 10 other such commentaries, see John Dingess, Note, *Kelley v. Johnson* : A Crew Cut Approach to Liberty, 10 Sw. U. L. Rev. 137, 142 n.45 (1978).

FN193. See supra note 167 and accompanying text.

FN194. 403 U.S. 15 (1971).

FN195. Id. at 18, 26.

FN196. Id. at 24; see also supra note 165 and accompanying text. Even if the restrictions on gang attire and hand signs are regarded as content-neutral, they still are unlikely to pass constitutional scrutiny. Although such restrictions do serve significant government interests, see supra note 108 and accompanying text, given the broad scope of the injunctions a court could easily find that they burden no more speech than necessary, *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2528 -30 (1994) (holding that injunction terms affecting private property, banning all "images observable," and prohibiting protesters from approaching others burdened more speech than necessary).

FN197. See supra notes 168 -71 and accompanying text. Two of the categories of unprotected speech, obscenity and libel, are not implicated and will not be discussed.

FN198. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Note that the fighting words doctrine has not been used to uphold a regulation since *Feiner v. New York*, 340 U.S. 315 (1951), and commentators have begun to question its vitality, see, e.g., *Murphy*, supra note 22, at 1351. However, the Court has never formally overruled the fighting words doctrine, and language in recent opinions indicates that the doctrine is still applicable. See *Madsen*, 114 S. Ct. at 2529 (suggesting that injunction provision would have been valid if protesters' speech had constituted fighting words); *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2547 (1992) (suggesting that hate-speech statute banning all fighting words might be constitutional); *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (discussing applicability of fighting words doctrine); see also id. at 430 -31 (Rehnquist, C.J., dissenting) (expressing willingness to apply fighting words doctrine).

FN199. *Chaplinsky*, 315 U.S. at 572.

FN200. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (holding speech must be "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest" to constitute fighting words).

FN201. *Johnson*, 491 U.S. at 409; cf. *Butts v. Dallas Indep. Sch. Dist.*, 436 F.2d 728 (5th Cir. 1971) (holding that wearing arm bands does not constitute fighting words).

FN202. See *Burke*, supra note 1, at 519; *Murphy*, supra note 22, at 1352 & n.193.

FN203. See *Murphy*, supra note 22, at 1329 -30, 1351; Glen Justice, *The Uniform of Peace?: A Dress Code in Long Beach Could Inspire Other Schools that Fear Gang Violence*, L.A. Times, Feb. 17, 1994, at E1 (home ed.) (quoting the Executive Director of the National Association of Elementary School Principals as questioning whether regulating attire addresses violence); see also supra notes 139 - 41 and accompanying text. In fact, any suggestion that wearing gang attire necessarily provokes violence is belied by the fact that nongang members often wear gang attire. See *Reiner*, supra note 1, at 41 (reporting that pre-gang children begin experimenting with gang attire and symbols as early as the second grade); see also supra notes 143 - 45 and accompanying text.

FN204. See supra note 170 and accompanying text.

FN205. See supra note 171 and accompanying text.

FN206. See supra notes 139 - 41 and accompanying text.

FN207. See *Burke*, supra note 1, at 520; *Murphy*, supra note 22, at 1330, 1351. Again, any suggestion that wearing

gang attire necessarily provokes violence is belied by the fact that non-gang members wear gang attire. See *supra* notes 143 - 45 and accompanying text.

FN208. See *supra* notes 179 - 80 and accompanying text.

FN209. *Burke*, *supra* note 1, at 516 (noting that gang clothing clearly satisfies the first prong of the *Spence* test and arguably satisfies the second prong as well); see also *Betts v. McCaughtry*, 827 F. Supp. 1400, 1407- 08 (W.D. Wis. 1993) (holding that clothing choices are expressive conduct within the *Spence* test; upholding regulation of clothing choices in prison on other grounds), *aff'd without opinion*, 19 F.3d 21 (7th Cir. 1994).

FN210. 491 U.S. 397 (1989).

FN211. *Id.* at 407- 09.

FN212. *Id.* at 408.

FN213. *Id.* at 408 - 09, 411-12; see also *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2549 (1992); *Boos v. Barry*, 482 U.S. 312, 321 (1988).

FN214. See *supra* notes 197-207 and accompanying text.

FN215. But see *Charles Mount, Judge Upholds Ban on Gang Insignias*, *Chi. Trib.*, Sept. 27, 1994, metro northwest sec., at 3 (northwest sports final ed.) (reporting that judge upheld ordinance banning gang insignia and hand signs against First Amendment challenge). Other cases have upheld restrictions on gang attire in the restricted environments of prisons and schools where greater limits on First Amendment rights are allowed. E.g., *Betts*, 827 F. Supp. at 1407- 08 (prison); *Olesen v. Board of Educ. of Sch. Dist. 228*, 676 F. Supp. 820, 822 (N.D. Ill. 1987) (school).

FN216. 394 U.S. 618, 634 (1969); See also *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254 & n.7 (1974). The Court has declined to specify the textual basis for this right. *Shapiro*, 394 U.S. at 630 -31; see also *Lutz v. City of York*, 899 F.2d 255, 258 -70 (3d Cir. 1990) (reviewing textual bases for right to travel).

FN217. E.g., *Shapiro*, 394 U.S. at 629 -31 (interstate travel); *Aptheker v. Secretary of State*, 378 U.S. 500, 505 - 06 (1964) (international travel).

FN218. *Memorial Hosp.*, 415 U.S. at 255 -56.

FN219. Compare *Lutz*, 899 F.2d at 268 - 69 (holding that substantive due process protects the right to "move freely about one's neighborhood or town") and *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971) ("It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."), *cert. denied*, 404 U.S. 863 (1971) with *Wardwell v. Board of Educ.*, 529 F.2d 625, 627 (6th Cir. 1976) (rejecting extension of right to travel to intrastate travel). See generally *Tracy Maclin, The Decline of the Right to Locomotion: The Fourth Amendment on the Streets*, 75 *Cornell L. Rev.* 1258, 1260 - 64 (1990) (reviewing cases discussing right to intrastate travel). Regarding California law, see *In re White*, 158 *Cal. Rptr.* 562, 567 (Cal. Ct. App. 1979) ("We conclude that the right to intrastate travel (which includes intramunicipal travel) is a basic human right protected by the United States and California Constitutions. Such a right is implicit in the concept of a democratic society and is one of the attributes of personal liberty under common law.").

FN220. See *Lutz*, 899 F.2d at 269 -70.

FN221. E.g., *Hirabayashi v. United States*, 320 U.S. 81, 95, 98 - 99 (1943) (holding wartime curfew for Japanese-Americans was reasonable); *Qutb v. Strauss*, 11 F.3d 488, 492- 95 (5th Cir. 1993) (holding juvenile curfew legitimate

restriction of freedom of movement), cert. denied, 114 S. Ct. 2134 (1994); Lutz, 899 F.2d at 269 -70 (holding cruising ban was a reasonable restriction on time, place, and manner of right to travel); *United States v. Chalk*, 441 F.2d 1277, 1283 (4th Cir. 1971) (holding curfew following student riots was reasonable), cert. denied, 404 U.S. 943 (1971); *In re Pedro Q. (People v. Pedro Q.)*, 257 Cal. Rptr. 821, 823 (Cal. Ct. App. 1989) (noting in dicta that well-tailored geographic probation restrictions on travel are constitutional). For a discussion of the constitutionality of juvenile curfews, see Note, *Juvenile Curfew Ordinances and the Constitution*, 76 Mich. L. Rev. 109 (1977); see also *id.* at 113 n.6 (listing other such commentary). For a more theoretical treatment, see Note, *Juvenile Curfews and Gang Violence: Exiled on Main Street*, 107 Harv. L. Rev. 1693 (1994).

FN222. *Korematsu v. United States*, 323 U.S. 214, 225 -26 (1944) (Roberts, J., dissenting); *People v. Continola*, 19 Cal. Rptr. 2d 225, 228 -29 (Cal. App. Dep't Super. Ct. 1993) (reversing convictions for violating curfew following Rodney King verdicts because prohibiting "mere presence" on the street was not a reasonable restriction); cf. *White*, 158 Cal. Rptr. at 566 (finding probation term that prohibited being in a designated area anytime day or night too harsh and oppressive).

FN223. 899 F.2d 255 (3d Cir. 1990).

FN224. *Id.* at 256.

FN225. *Id.* at 268.

FN226. *Id.* at 269; see also *supra* note 166.

FN227. Lutz, 899 F.2d at 270.

FN228. See *supra* note 108 and accompanying text.

FN229. See *supra* part II.B.4.

FN230. The Lutz court's application of time-place-manner doctrine to the right to travel is novel. However, even if courts do not follow the Lutz court's application of this doctrine, they will likely fashion a similar test of a restriction's reasonableness and will likely uphold the regulation. See *supra* notes 98 -107 and accompanying text.

FN231. Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction at 24 -27, *People ex rel. Jones v. Amaya*, No. 713223 (Cal. Super. Ct. Orange County filed Aug. 19, 1993); Supplemental Brief of Amicus Curiae ACLU in Opposition to Request for Preliminary Injunction at 4 -5, 7- 8, *People v. Blythe St. Gang*, No. LC 020525 (Cal. Super. Ct. Los Angeles County filed Mar. 26, 1993); Memorandum of Points and Authorities of Amicus Curiae ACLU in Opposition to Motion for Preliminary Injunction at 18 -22, *Blythe St. Gang* (No. LC 020525) (filed Mar. 10, 1993); Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 39 - 49, *People ex rel. City Attorney v. Acuna*, No. 729322 (Cal. Super. Ct. Santa Clara County filed May 28, 1993); see *supra* notes 46, 52 and accompanying text.

FN232. See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

FN233. Commentators have argued that what constitutes gang regalia can be hard to define and that a generalized ban on gang regalia would thus be void for vagueness. E.g., Burke, *supra* note 1, at 524 -25; James A. Maloney, Comment, *Constitutional Problems Surrounding the Implementation of "Anti-Gang" Regulations in the Public Schools*, 75 Marq. L. Rev. 179, 187 (1991). However, clear specification of what clothing constitutes gang regalia can cure these vagueness concerns. See Murphy, *supra* note 22, at 1356; Mount, *supra* note 215. Since the Avalos and Acuna injunctions limit themselves to attire bearing the gang's name or initials, see *supra* part II.B.3, they offer clearer standards for determining what is prohibited by the injunction than the situation discussed by these commentators, and

the arguments lose their force.

FN234. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974); *International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 74 -76 (1967); see *Cheh*, supra note 20, at 1406 n.434. The void-for-vagueness challenge is particularly important in the case of antigang injunctions because it is one of the few constitutional claims that is not precluded at the contempt of court stage by the collateral bar rule. See infra note 280 and accompanying text.

FN235. See supra parts III.B.1-2, III.C; see also *United States v. Salerno*, 481 U.S. 739, 745 (1967) (stating that overbreadth doctrine only applies to the First Amendment). But see *Aptheker v. Secretary of State*, 378 U.S. 500, 505 (1964) (applying overbreadth doctrine to right to travel).

FN236. *Kolender*, 461 U.S. at 357- 61; *Lanzetta*, 306 U.S. at 453.

FN237. *Kolender*, 461 U.S. at 360 - 61; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 -71 (1972).

FN238. See *Roth v. United States*, 354 U.S. 476, 491 (1957).

FN239. 306 U.S. 451 (1939).

FN240. *Id.* at 452.

FN241. *Id.* at 453 -55. The Court also expressed serious doubts about the constitutionality of the expression "known to be a member" on vagueness grounds. *Id.* at 458. But see *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2530 (1994) (holding enjoining those acting "in concert" with named defendants not vague).

FN242. *Lanzetta*, 306 U.S. at 453 -58.

FN243. See *Madsen*, 114 S. Ct. at 2524 (citing the special risk of discriminatory application posed by injunctions); see also supra notes 134 -52 and accompanying text.

FN244. See supra notes 1, 153 and accompanying text.

FN245. The risk of arbitrary enforcement increases in those cases where the gang was enjoined as an unincorporated association rather than as individually named defendants. See supra notes 49, 151 and accompanying text. Unlike in named-defendant cases, where a court reviews whether an injunction should be served upon a particular person, in unincorporated-association cases, police gang experts decide upon whom to serve injunctions. See supra notes 49, 151 and accompanying text. Thus, in unincorporated-association cases, the possibility of arbitrary enforcement appears in the decision to subject a person to the injunction as well as the determination of whether a person has violated the injunction.

FN246. See *People ex rel. City Attorney v. Acuna*, No. 729322, slip op. at 2 (Cal. Super. Ct. Santa Clara County June 28, 1993) (order granting preliminary injunction).

FN247. See *Lanzetta*, 306 U.S. at 455 -57. Vagueness concerns in the *Acuna* injunction are particularly acute because its use of the "known" gang member language that the Court found problematic in *Lanzetta*. See supra note 241; see also *Farber v. Rochford*, 407 F. Supp. 529, 531-32 (N.D. Ill. 1975) (holding statute that prohibited "known" prostitutes from associating with other known prostitutes or from loitering around bars to be unconstitutionally vague); *City of Detroit v. Bowden*, 149 N.W.2d 771, 776 (Mich. Ct. App. 1967) (same).

FN248. Municipalities have also employed a third approach to avoid vagueness challenges by including a requirement that a defendant refuse a police order to disperse before a gang member can be liable for associational activity. See

Lisa A. Kainec, Comment, Curbing Gang Related Violence in America: Do Gang Members Have a Constitutional Right to Loiter on Our Streets?, 43 Case W. Res. L. Rev. 651, 664 - 66 (1993) (concluding that inclusion of dispersal requirement in Chicago gang-loitering ordinance satisfies vagueness challenge). However, it is far from clear that such a dispersal requirement is sufficient to protect such a regulation from constitutional attack. Cf. Northern Va. Chapter, ACLU v. City of Alexandria, 747 F. Supp. 324, 325, 328 (E.D. Va. 1990) (holding drug loitering statute that included specific intent requirement to be unconstitutionally overbroad).

FN249. E.g., *People ex rel. Fletcher v. Acosta*, No. EC 010205, slip op. at 4 (Cal. Super. Ct. Los Angeles County Nov. 2, 1992) (order granting preliminary injunction) (prohibiting defendants from "standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant BER member named herein" (emphasis added)). This would necessarily entail foregoing enjoining gangs as unincorporated associations. See *supra* notes 49, 150 -52, 158 and accompanying text.

FN250. *Lanzetta*, 306 U.S. at 456 (noting vague terms may be saved if a court places a limiting construction on them). To be effective, this limiting construction should be made before a given defendant's case is considered, as it is unfair to argue that a construction made subsequent to arrest gave a defendant notice of what conduct was prohibited. *Id.*

FN251. Cal. Penal Code s 186.22(a), (e). For the text of this definition, see *supra* note 155. For a list of similar definitions in other jurisdictions, see *id.*

FN252. See *In re Alberto R.* (*People v. Alberto R.*), 1 Cal. Rptr. 2d 348 (Cal. Ct. App. 1991); *People v. Gamez*, 286 Cal. Rptr. 894 (Cal. Ct. App. 1991); *People v. Green*, 278 Cal. Rptr. 140 (Cal. Ct. App. 1991); accord *State v. Walker*, 506 N.W.2d 430, 432-33 (Iowa 1993) (upholding similar statute against vagueness challenge).

FN253. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Injunctions can be overbroad in the same manner as statutes. *Madsen v. Women's Health Ctr. Inc.*, 114 S. Ct. 2516 (1994); see also *Vance v. Universal Amusement Co.*, 445 U.S. 308, 321 n.1 (1980) (White, J., dissenting) (noting that review did not repudiate lower court's holding that "[w]ere a Texas court to issue an overbroad injunction restricting nonobscene (and therefore protected) matter, it would exceed both its constitutional and its statutory authority"); *Houchins v. KQED, Inc.*, 438 U.S. 1, 18 (1978) (Stewart, J., concurring) (noting injunctions must be framed to accommodate First Amendment).

FN254. *Hill*, 482 U.S. at 465 - 66; *Thornhill v. Alabama*, 310 U.S. 88, 95 - 98 (1940).

FN255. See *supra* part III.A.1-2.

FN256. See *supra* notes 94 -109 and accompanying text.

FN257. See *supra* notes 248 -52 and accompanying text.

FN258. See M. Katherine Boychuk, Comment, Are Stalking Laws Unconstitutionally Vague or Overbroad?, 88 Nw. U. L. Rev. 769, 784 (1994) (noting that the terms "harass" and "annoy" pose vagueness problems).

FN259. 402 U.S. 611 (1971).

FN260. *Id.* at 611.

FN261. *Id.* at 614 & n.4.

FN262. *Id.* at 614.

FN263. E.g., *Foods Inc. v. Leffler*, 240 N.W.2d 914, 923 (Iowa 1976) (dissolving injunction that prohibited "annoying

persons attempting to enter [a supermarket]" where what constituted annoying activity was not specified). Commentators have noted, however, that courts have applied Coates inconsistently, making any predictions based on Coates somewhat uncertain. See, e.g., Boychuk, *supra* note 258, at 785, 788.

FN264. See *supra* part II.B.5.

FN265. E.g., *Superior Sav. Ass'n v. Cleveland Council of Unemployed Workers*, 501 N.E.2d 91, 95 - 96 (Ohio Ct. App. 1986).

FN266. E.g., *State v. Zoellick*, 466 N.W.2d 911 (Wis. Ct. App.) (unpublished disposition available at 1991 WL 19070) (holding injunction containing explicit definition of "harassment" not unconstitutionally vague), review denied, 471 N.W.2d 510 (Wis. 1991); cf. *People v. Whitfield*, 498 N.E.2d 262 (Ill. App. Ct. 1986) (holding that "harass" used in statute not vague when viewed in light of context and purpose of statute); *State v. Smith*, 737 P.2d 723, 725 (Wash. Ct. App.) (holding statute containing explicit definition of "harassment" not unconstitutionally vague) *aff'd*, 759 P.2d 372 (Wash. 1988). But see *City of Seattle v. Huff*, 751 P.2d 879, 881- 82 (Wash Ct. App. 1988) (holding ordinance that did not contain explicit definition of "harass" or "intimidate" not vague), *aff'd*, 767 P.2d 572 (Wash. 1989). In the absence of such definitions on the face of the injunction, courts may wish to look to other statutory definitions of harassment to solve vagueness problems.

FN267. See Coates, 402 U.S at 614 -15; Boychuk, *supra* note 258, at 785 - 87.

FN268. See *supra* note 254 and accompanying text. As with void-for-vagueness challenges to injunctions using the terms "annoy" and "harass" without any further explanation, courts have been inconsistent with their views of such restrictions. Compare *Donley v. City of Mountain Brook*, 429 So. 2d 603, 611-13 (Ala. Crim. App. 1982) (upholding telephone harassment statute using terms without explanation as not overbroad), *rev'd* on other grounds *sub nom. Ex parte Donley*, 429 So. 2d 618 (Ala. 1983) with *City of Everett v. Moore*, 683 P.2d 617, 618 -19 (Wash. Ct. App. 1984) (invalidating general harassment statute using similar language as overbroad). See generally Boychuk, *supra* note 258 at 786 - 87 & n.101 (detailing cases dealing with overbreadth challenges to general harassment, telephone harassment, and disorderly conduct statutes using the terms "harass" and "annoy").

FN269. See *supra* notes 265 - 66 and accompanying text.

FN270. See *supra* notes 250 -52, 257, 266 and accompanying text.

FN271. See Cheh, *supra* note 20, at 1371- 89; Jonathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 Cornell L. Rev. 478, 482 (1974); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1798, 1843 (1992).

FN272. Charney, *supra* note 271, at 482, 516 -17; Cheh, *supra* note 20, at 1394 -1404; Mann, *supra* note 271, at 1871; see also Felix Frankfurter & Nathan Greene, *The Labor Injunction* 107 & n.105 (1963) (stating that "[t]o make the infraction of a criminal statute also a contempt of court is essentially an invention to evade the safeguards of criminal procedure and to change the tribunal for determining guilt").

FN273. See Cheh, *supra* note 20, at 1364 - 69; Earl C. Dudley, *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 Va. L. Rev. 1025, 1034 - 47 (1993).

FN274. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2524 (1994) (citations omitted).

FN275. See, e.g., Cal. Civ. Code ss 3479, 3480. For full text of these statutes, see *supra* note 24.

FN276. Cheh, *supra* note 20, at 1406, 1407.

FN277. Whether an injunction shall be granted is a matter resting in the sound discretion of the trial court. *Caterpillar Tractor Co. v. International Harvester Co.*, 106 F.2d 769 (9th Cir. 1939); *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.*, 82 P.2d 3 (Cal. 1938).

FN278. Cf. Cheh, *supra* note 20, at 1407- 08 (discussing the potential for judicial abuse in civil protection orders for domestic violence). The same potential for abuse Professor Cheh sees in civil protection orders exists with regard to antigang nuisance abatement orders.

FN279. Cheh, *supra* note 20, at 1368; Dudley, *supra* note 273, at 1032 & n.22. Note that increasing the procedural protections afforded enjoined gang members will likely reduce the attractiveness of antigang injunctions as a law enforcement tool. See *supra* note 157.

FN280. See *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *United States v. United Mine Workers*, No. 759, 330 U.S. 258 (1947); *Howat v. Kansas*, 258 U.S. 181 (1922). This rule is not universal. For example, the California Supreme Court in the past has allowed defendants to challenge the constitutionality of injunctions without moving to dissolve them notwithstanding the collateral bar rule. In *re Barry*, 436 P.2d 273, 280 -82 (Cal. 1968).

FN281. Cf. Cheh, *supra* note 20, at 1399 -1400, 1407 (questioning the sufficiency of *ex parte* procedures in civil forfeiture and recognizing that civil protection orders may be issued *ex parte*). The use of *ex parte* procedures may also put pressure against the Fifth Amendment privilege against self-incrimination in cases where the basis for the civil remedy may form the basis for a criminal prosecution as well. *Id.* at 1384 - 89.

FN282. See *id.* at 1394 - 95.

FN283. See Mann, *supra* note 271, at 1816 - 43.

FN284. 424 U.S. 319 (1976).

FN285. *Id.* at 333 -34.

FN286. 114 S. Ct. 492 (1993) (5 - 4 decision).

FN287. 452 U.S. 18 (1981) (5 - 4 decision).

FN288. Professor Mann has identified several paradigmatic distinctions between the civil and criminal law, including the presence of compensatory versus punitive purposes behind the regulation, the use of subjective versus objective liability, the types of remedies available, and the types of procedures used. Mann, *supra* note 271, at 1805 -13.

FN289. Cheh, *supra* note 20, at 1325, 1348 - 49; J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 Minn. L. Rev. 379, 397 (1976); Tamara R. Piety, *Comment, Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911, 943 (1991).

FN290. Note that these approaches should not be considered mutually exclusive. Supreme Court decisions have often combined formal and functional approaches. E.g., *United States v. Ward*, 448 U.S. 242, 248 - 49 (1980); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 - 69 (1963); *Helvering v. Mitchell*, 303 U.S. 391, 395, 398 - 405 (1938).

FN291. These rights include the right to a public trial, the right to confront one's accusers, the right of compulsory process, the right to a speedy trial, the right to be informed of the nature of the accusation, the right to a jury trial (when the possible incarceration exceeds six months), and the right to counsel. See Charney, *supra* note 271, at 478 - 89.

FN292. E.g., *Mitchell*, 303 U.S. at 399.

FN293. See *Stockwell v. United States*, 80 U.S. (13 Wall.) 531 (1871). See generally Mann, *supra* note 271, at 1820 - 23 (tracing the development of the formal approach); Lawrence A. Kasten, Note, Extending Constitutional Protection to Civil Forfeitures that Exceed Rough Remedial Compensation, 60 Geo. Wash. L. Rev. 194, 205 - 06, 210 (1991) (same).

FN294. E.g., *Mendoza-Martinez*, 372 U.S. at 168 - 69; *Helwig v. United States*, 188 U.S. 605, 610 -12 (1903). See generally Charney, *supra* note 271, at 491-505 (providing a complete catalog of instrumental criteria used by the Court).

FN295. See, e.g., *supra* note 24.

FN296. For example, although nuisance actions bear some of the indicia of a criminal action, see Charney, *supra* note 271, at 505 (state as the plaintiff), the vast majority of instrumental indicia indicate that nuisance actions are not criminal, because they are not initiated by indictment, do not require scienter, lack a sense of moral condemnation, and do not involve incarceration, see *id.* at 491-505.

FN297. Commentators have, *inter alia*, criticized the formal approach because it is circular -- a sanction is civil because it is civil, Mann, *supra* note 271, at 1823; Piety, *supra* note 289, at 920, and because deference to formal designations would obviate the Court's historical role in reviewing legislation to determine whether Congress has exceeded its constitutional authority, Charney, *supra* note 271, at 494.

FN298. See Clark, *supra* note 289, at 469 -75; Mann, *supra* note 271, at 1823 -30; Piety, *supra* note 289, at 958.

FN299. E.g., *Helvering v. Mitchell*, 303 U.S. 391, 401- 02 (1938) (characterizing in part 50% addition to tax deficiency as a reimbursement for investigation cost).

FN300. E.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 n.26 (1974) (calling forfeiture in part security for violations of the law); cf. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 -50 (1943) (analogizing double damages to liquidated damages) (superseded by statute).

FN301. Professor Mann termed the Court's characterization of certain sanctions as remedial to fit them into the paradigm a "legal fiction." Mann, *supra* note 271, at 1830; see also Clark, *supra* note 289, at 391- 92 & nn.38 - 40.

FN302. 116 U.S. 616 (1886). See generally Mann, *supra* note 271, at 1818 -19 (describing the functional approach).

FN303. *Boyd*, 116 U.S. at 634; see also Charney, *supra* note 271, at 516 (advocating the functional approach); Mann, *supra* note 271, at 1818 -19 (advocating the functional approach). But see Cheh, *supra* note 20, at 1360 (advocating a formal approach but arguing for expanded procedural protections in civil actions generally).

FN304. Injunctions are arguably poorly suited to functional analysis. Such analysis necessarily requires a comparison of the value of the sanction assessed against the defendant with the approximate costs to the government. See Halper v. *United States*, 490 U.S. 435, 446 - 48 (1989); Mann, *supra* note 271, at 1840. However, it is particularly difficult to determine the value remedies such as injunctions present to defendants, making it difficult for an enjoined party to demonstrate the kind of imbalance necessary to trigger the extension of procedural protections under functional analysis.

FN305. See, e.g., *United States v. Ward*, 448 U.S. 242 (1980) (declining to extend Boyd's Fifth Amendment protections in civil forfeiture cases to civil fines cases); see also Kasten, *supra* note 293, at 203 - 05 (noting that the Court has declined to apply other criminal procedural protections, such as the reasonable-doubt burden of proof, Fifth and Sixth Amendment procedural protections, the prohibitions of the Ex Post Facto Clause, and the Double Jeopardy

Clause, to civil forfeiture cases).

FN306. Even when the Court used a functional test, it did so in an extremely limited way. For example, in *Ward*, although the Court combined functional and formal tests in determining whether civil fines should be protected by the Fifth Amendment, it imposed a presumption in favor of Congress's designation of a statute as civil or criminal, requiring "the clearest proof" before the presumption would be displaced. *Ward*, 448 U.S. at 248 - 49. Thus, even though the Court nominally applied a functional test, in imposing a presumption in favor of the formal test, the Court effectively eviscerated the test. See *Kasten*, supra note 293, at 210 -11.

FN307. 490 U.S. 435 (1989).

FN308. See *Cheh*, supra note 20, at 1375 -76; *Mann*, supra note 271, at 1842- 43.

FN309. *Halper*, 490 U.S. at 437.

FN310. *Id.* at 438.

FN311. *Id.*

FN312. *Id.* at 446.

FN313. *Id.*

FN314. *Id.* at 448.

FN315. See, e.g., *Helvering v. Mitchell*, 303 U.S. 391, 402 (1938) (applying formal approach implicitly); *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 552 (1871) (applying formal approach explicitly); see also supra notes 292- 96 and accompanying text.

FN316. *Cheh*, supra note 20, at 1375 -76; *Mann*, supra note 271, at 1842- 43; *Kasten*, supra note 293, at 226 - 43.

FN317. See *Mann*, supra note 271, at 1842.

FN318. *Cheh*, supra note 20, at 1375 -76; *Mann*, supra note 271, at 1842- 43; *Kasten*, supra note 293, at 226 - 43.

FN319. *Cheh*, supra note 20, at 1377-79.

FN320. 113 S. Ct. 2801 (1993).

FN321. *Id.* at 2803.

FN322. *Id.* at 2805.

FN323. Note that *Austin* in no way repudiated the functional analysis of *Halper* and should not be interpreted as precluding a subsequent court from adopting a functional perspective.

FN324. *Austin*, 113 S. Ct. at 2805.

FN325. *Halper*, 490 U.S. at 448.

FN326. U.S. Const. amend. V. The Court has interpreted liberty and property broadly, subjecting actions to terminate welfare benefits, garnish wages, revoke a driver's license, and dismiss a federal employee to due process scrutiny.

Mathews v. Eldridge, 424 U.S. 319, 333 -34 (1976).

FN327. Mathews, 424 U.S. at 333 -34.

FN328. 424 U.S. 319 (1976).

FN329. Id. at 335.

FN330. United States v. James Daniel Good Real Property, 114 S. Ct. 492, 498 (1993) (5 - 4 decision); United States v. \$8,850, 461 U.S. 555, 562 n.12 (1983); Fuentes v. Shevin, 407 U.S. 67, 80 - 82 (1972); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

FN331. Good, 114 S. Ct. at 500 - 01.

FN332. Id. at 501 (quotations omitted); see also Fuentes, 407 U.S. at 82; Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

FN333. 114 S. Ct. 492 (1993) (5 - 4 decision).

FN334. Id. at 497.

FN335. Id.

FN336. Id. at 501.

FN337. Id.

FN338. 407 U.S. 67 (1972).

FN339. Id. at 70 -71 (cited in Good, 114 S. Ct. at 501).

FN340. Good, 114 S. Ct. at 501.

FN341. Id.

FN342. Id. at 502. The Court also noted that " 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' " Id. at 504 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 -72 (1951) (Frankfurter, J. concurring)).

FN343. Id. at 502 (quoting Connecticut v. Doeher, 501 U.S. 1, 15 (1991)).

FN344. Id.

FN345. Id. at 502- 04.

FN346. 416 U.S. 663 (1974).

FN347. Id. at 679.

FN348. Good, 114 S. Ct. at 502- 03.

FN349. See Cheh, *supra* note 20, at 1395.

FN350. See *Fuentes v. Shevin*, 407 U.S. 67, 70 -71 (1972).

FN351. See *supra* note 340 and accompanying text.

FN352. See *supra* notes 330 -31, 342 and accompanying text.

FN353. See *supra* part III.A.3.

FN354. See *supra* notes 20, 273 -78 and accompanying text. As noted earlier, the collateral bar rule makes the consequences of the erroneous imposition of an injunction particularly harsh. See *supra* notes 279 - 80 and accompanying text.

FN355. *Good*, 114 S. Ct. at 502.

FN356. *Id.*

FN357. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

FN358. Cf. Cheh, *supra* note 20, at 1405 & n.427 (noting use of *ex parte* relief in awarding court orders in emergency cases of domestic violence).

FN359. *Id.* at 1405.

FN360. See Nick Anderson, S.J. Vows to Rid Area of Gangs: Injunction Targets One Neighborhood, *San Jose Mercury News*, Mar. 10, 1993, at 1A (reporting that gang members subject to injunction are likely to leave area before enforcement is necessary). This distinguishes antigang injunctions from the special circumstances found in *Calero-Toledo* that justified proceeding *ex parte*. In *Calero-Toledo*, the government's interest in *ex parte* proceedings was strengthened because the chattels in question might disappear, which would have eliminated the basis for federal jurisdiction and would have allowed the defendants to hide them. *Calero-Toledo*, 416 U.S. at 679. In antigang injunctions, there is no question of jurisdiction, see *Good*, 114 S. Ct. at 502- 04, and the possibility that the gang members might disappear weighs in the other direction because their disappearance would facilitate rather than complicate the government's actions. Any argument that the government interest remains strong because the disappearance of the gang members merely transfers the problem to another neighborhood, while having some persuasiveness with regard to criminal sanctions, would be inappropriate in a civil nuisance action, which is aimed at protecting citizens' enjoyment of their property.

FN361. Cf. Jay A. Rosenberg, Note, Constitutional Rights and Civil Forfeiture Actions, 88 Colum. L. Rev. 390, 403 - 06 (1988) (arguing for appointed counsel in civil forfeiture actions). In fact, the ACLU requested the appointment of counsel in at least two antigang injunction cases. *People v. "B" St. Boys*, No. 735405 - 4, slip op. at 2 (Cal. Super. Ct. Alameda County June 17, 1994) (order denying preliminary injunction) (noting that order mooted pending motion for appointment of counsel); *People ex rel. Jones v. Amaya*, No. 713223, slip op. at 4 (Cal. Super. Ct. Orange County Nov. 10, 1993) (order denying preliminary injunction) (same); see also Amicus Curiae Brief in Opposition to Plaintiff's Motion for Preliminary Injunction at 17-19, "B" St. Boys (No. 735405 - 4) (filed June 14, 1994); Supplemental Memorandum in Support of Request for Appointed Counsel, Amaya (No. 713223) (filed Aug. 30, 1993).

FN362. 452 U.S. 18 (1981) (5 - 4 decision).

FN363. *Id.* at 20 -24.

FN364. *Id.* at 26 -27.

FN365. Id. at 30 -32. The Court also acknowledged that in no other case had a court held that an indigent parent in termination hearings was not entitled to appointed counsel. Id. at 30.

FN366. Id. at 31-32. This shift away from class-by-class determinations has been criticized by commentators. E.g., Jane E. Jackson, *Lassiter v. Department of Social Services : The Due Process Right to Appointed Counsel Left Hanging Uneasily in the Mathews v. Eldridge Balance*, 8 N. Ky. L. Rev. 513, 527-32 (1981) (discussing merits of previous practice of class-by-class balancing); Kevin W. Shaughnessy, Note, *Lassiter v. Department of Social Services : A New Interest Balancing Test for Indigent Civil Litigants*, 32 Cath. U. L. Rev. 261, 282- 83 (1982) (criticizing case-by-case approach).

FN367. *Lassiter*, 452 U.S. at 31.

FN368. Id. at 27, 31.

FN369. Id. at 27-28, 31.

FN370. Id. at 30.

FN371. Id. at 33.

FN372. Id. at 32-33.

FN373. Id.

FN374. See, e.g., *Cloutterbuck v. Cloutterbuck*, 556 A.2d 1082, 1085 - 87 (D.C. 1989) (applying *Lassiter* and holding no right to appointed counsel in civil protection order case despite the fact that violation of order would be enforced by contempt of court); *Resek v. State*, 706 P.2d 288 (Alaska 1985) (holding no right to appointed counsel in civil forfeiture); see also Shaughnessy, *supra* note 366, at 285 (predicting that *Lassiter* would "eviscerate [] the indigent's right to appointment of counsel" in all civil cases by "establish[ing] a virtually unattainable prerequisite for appointment of counsel"). Professor Cheh also states that courts are unlikely to order appointment of counsel in money penalty or RICO forfeiture cases. Cheh, *supra* note 20, at 1396 n.374. In certain civil actions, state legislators may opt for appointment of counsel. See *Lassiter*, 452 U.S. at 34 (noting 33 states and the District of Columbia statutorily provide for appointment of counsel in termination cases); cf., e.g., Wyo. Stat. Ann. s 35 -21-103(e) (Michie Supp. 1993) (providing for appointment of counsel in civil protection orders against domestic violence).

FN375. See *supra* notes 349 -60 and accompanying text.

FN376. See *supra* notes 337- 40, 349 -51 and accompanying text.

FN377. *Lassiter*, 452 U.S. at 27.

FN378. See *supra* part III.A.3.

FN379. Id. at 32.

FN380. See *supra* notes 279 - 80, 353 and accompanying text.

FN381. See *supra* notes 46, 49, 51-53 and accompanying text.

FN382. *Lassiter*, 452 U.S. at 32-33.

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1997 WL 4335463			

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San Francisco Examiner
Copyright 1997

Monday, March 10, 1997

NEWS

Drive-by killing sparks anger, fear in Mission Apparent bystander shot in head
at corner that's site of gang battles
Ray Delgado and Leslie Goldberg
EXAMINER STAFF

A drive-by shooting that killed an apparently innocent bystander has further angered Mission District residents who have been calling for more police action against gangs in their neighborhood.

An unidentified man in his early 40s was shot in the head after being caught in a barrage of bullets fired just after 8:30 p.m. Sunday at the intersection of Lexington and 20th streets - a corner that has become the site of frequent battles between rival Central American gangs, police said. He died at the scene.

A 17-year-old girl was treated and released at San Francisco General Hospital after being grazed in the ear by a bullet.

Police Capt. Ed Pecinovsky said at least one man fired multiple rounds at **gang members** from a dark brown sedan before speeding off. He was unsure if the driver intended to shoot the victim, but homicide inspectors speculated he was probably not the intended target, because he was older than most drive-by shooting victims.

Police did not have a description of the suspect, except that he was wearing dark clothing. At least three witnesses were interviewed.

"Exactly what we feared"

The shooting drew swift reaction from neighborhood residents, who have been very vocal recently about combating gang activity in their neighborhood.

"This is exactly what we feared," neighborhood activist Frank Morales said Monday. "This is exactly

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(Publication page references are not available for this document.)
what we believed would happen. I can't tell you how many times I've found myself on the street in the middle of five or six (**gang members**) and thought, "What if a car goes by and I become a target right along with them?" "

Morales and many of his neighbors are seeking a **restraining order** against known **gang members** in the area. He said San Jose has already taken such action and it has been upheld in court.

"There's been a lot of problems there," said neighborhood activist Hilda Bernstein, who lives two blocks away. "I think it's devastating to the people who work and live here. It prevents the growth of this community."

Recent shootings

The street corner has been particularly violent recently. On Feb. 18, a youth was shot in the leg near 20th and Lexington, a block from Mission Playground. Another youth was arrested in that gang-related incident, police said.

On Feb. 25, neighbors say, a young woman, believed to be part of a gang, was shot in the foot at 20th and Lexington after an argument in the playground.

Just Thursday, residents angrily complained to police and other city officials about gangs at Mission Playground, and received guarantees that police patrols would be stepped up immediately.

But Bernstein complained about a general lapse of police presence in the neighborhood, even after the Thursday meeting.

"That was only two or three days ago and certainly you don't expect miracles," Bernstein said. "While the playground needed the attention, the whole Mission District needs help."

Another resident, a woman who has lived in the neighborhood for 10 years and was afraid of having her name used, did not blame the police, however.

"They can't make an arrest until these kids actually do something," said the woman who lives with her 3-year-old child less than a block from Mission Playground. "They can move them from block to block, but the police can't be

(Publication page references are not available for this document.)
everywhere all the time."

"Disadvantaged children'

Saying she believed drugs were involved in the latest incident, she said, "I know many of these gang-bangers are disadvantaged children, but I don't think it gives them the right to go around killing and creating mayhem."

Although the incident was frightening, she said, the neighborhood should not run scared. "We should still fight," she said.

A student nurse who lives in the neighborhood said **gang members** hung around the park most of the day Sunday.

"We saw those kids hanging out there all day long," said the woman, who also was afraid to have her name used.

"The cops drove by several times, but the kids weren't doing anything. We're so experienced with this, we knew something was going to happen. We could feel the tension in the air. Somebody said, 'Should we call the cops?' but we decided not to because they weren't doing anything."

• She said she was first one to reach the mortally wounded man. "I saw this man die," she said. "I was the first person to get to him. I took him a blanket and I saw the girl who they were supposedly after just sitting on the curb. .

•
"We heard the shots - five shots came loud and fast. This was 8 o'clock at night. It could have been any of us out walking, going to buy a loaf of bread."

She said Commander Joaquin Santos, who heads the patrol division of the police department, was at Thursday's meeting and promised police would do what the could to quell police violence.

"I trust Commander Santos," she said. "He's always done right by us."

---- INDEX REFERENCES ----

KEY WORDS: GANGS; PLAYGROUNDS; NEIGHBORHOODS; PARKS; VIOLENCE; CRIME;
 SOCIAL PROBLEMS; CRIME PATROLS; LAW ENFORCEMENT; ACTIVISTS

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1997 WL 6746912			

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The Press-Enterprise Riverside, CA
Copyright 1997

Sunday, February 2, 1997

LOCAL

Officials cheer curb for gangs Court upholds injunctions
Gene Ghiotto

The Press-Enterprise

Staff writers Valeria Godines, Krista Olson, Courtney Perkes and George Rooney contributed to this report.

Local prosecutors and police who combat gang crime welcomed a California Supreme Court ruling that upheld the right of cities to seek court injunctions barring **gang members** from congregating in certain public places.

Deputy Riverside County District Attorney John Ruiz, who heads the district attorney's gang prosecution unit, said the decision "gives us a green light" to work with cities that seek such injunctions.

Thursday's ruling is encouraging for the Fontana Police Department, which received about 15 court orders about a year ago preventing troublesome **gang members** from gathering in a certain neighborhood, then had a judge later dismiss two of the injunctions.

"Any tool that can be used from keeping **gang members** out of the city will be used," said Fontana police Sgt. Alan Hostetter.

In Riverside County, Lake Elsinore is considering seeking court orders to bar **gang members** from congregating in certain areas, Ruiz said.

Thursday's Supreme Court ruling, which came in a challenge to an anti-gang court order obtained by San Jose, was the first in California to address such local efforts.

"I think it's a wonderful decision that should be very helpful to local communities to try to maintain some peace on the streets," said Deputy Riverside County District Attorney Mark Davison, a former gang prosecutor.

To obtain such injunctions requires authorities to document gang-related criminal activity by specific individuals. Under the Supreme Court ruling, Ruiz said, court injunctions may target these

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(Publication page references are not available for this document.)
individuals.

"We're going to want to be cautious in our approach," Ruiz said. "You can't over-reach. You have to establish that these individuals are **gang members** who have engaged in criminal conduct."

"Socializing on street corners is perfectly legal, but if you're a gang member with a proven history of criminal activity, that can now be enjoined," Ruiz said.

Davison said an anti-gang injunction could have been effective in one Lake Elsinore neighborhood several years ago, when an apartment complex on West Heald Avenue was virtually controlled by a gang.

"They pretty much ran that place, even though they didn't live there," Davison said. "People who lived in that area were quite afraid of them."

A similar situation came to a head about a year ago in Fontana, according to Fontana police Cpl. Fred Flores.

"The problem in Southridge was getting out of hand," he said.

The city, using guidelines police modeled after the program in San Jose, obtained and served **restraining orders** on about 15 **gang members** to prevent them from associating with each other in the neighborhood, Flores said.

Under the guidelines, officers do not target **gang members** who have stayed out of trouble for at least a year, Flores said. They do target those who repeatedly run afoul of the law or have been convicted of crimes.

Gang members who violate the court orders can be arrested, he said. Violations range from associating with other known **gang members** to trespassing to possessing materials associated with graffiti.

Two of the **gang members**, however, went to court and a local judge threw out the orders, ruling they were too vague, Flores said.

Fontana Sgt. Hostetter dismissed the notion that the **restraining orders** violate the rights of **gang members**.

"It's a silly argument that anybody would have a constitutional right to be a gang member," he said.

Gang activity continues to be a problem in the Southridge area, Flores said. But it has decreased in the past year and Flores

(Publication page references are not available for this document.)
attributed the drop to the **restraining orders**.

Some cities in Riverside County have gang problems but several, including Moreno Valley, have yet to decide if such court orders will be sought.

Gene Rogers, interim city manager for Moreno Valley, said Friday that city officials may review the San Jose case and high court ruling but there has not been a decision on whether to seek court orders to bar **gang members** from gathering in certain public places.

"That issue hasn't come up in that way," he said.

Beaumont Police Chief Pat Smith said the ruling, if it withstands further appeals, could be another law enforcement tool but probably only in certain cases.

Smith said it is not likely Beaumont would pursue similar measures because local **gang members** do not present the same problems as those in San Jose.

Banning City Attorney John Wilson called the ruling encouraging, but said the city has not taken action to prohibit **gang members** from gathering in a specific place. He said the city may pursue it if a situation arose like that in San Jose.

"It creates some new tools that can be used in the appropriate circumstances," he said.

Corona police Sgt. Brent Coleman, who supervises the department's two gang officers, said he had no immediate plans to seek injunctions against **gang members**.

"We don't really have the problems that a lot of the larger agencies do," Coleman said. "It's something we could evaluate."

The ruling was applauded by Yucaipa Police Chief Bernard Deyoung, who said, "I think the court ruling is a step in the right direction."

Yucaipa contracts with the San Bernardino County Sheriff's Department for law enforcement.

While the city does not have the need for an anti-gang order, Deyoung said allowing them could mean relief for neighborhoods under siege.

He recalled a time when he commanded a station in an area with gang problems and how the residents lived in constant fear.

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(Publication page references are not available for this document.)

Allowing cities to get the anti-gang orders could help police take back neighborhoods the gangs claim as their turf.

"Drastic circumstances require kind of drastic solutions,"
Deyoung said.

----- INDEX REFERENCES -----

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EDITION: MORENO VALLEY; ALL ZONES

Word Count: 917

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2/1/97 Press Democrat (Santa Rosa, Cal.) A1			
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The Press Democrat Santa Rosa, CA

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Saturday, February 1, 1997

MAIN

SR, PETALUMA SEEK WAY TO BATTLE UNRULY KIDS, GANGS

Robert Digitale Staff Writer

This article also appeared on The Press Democrat Home page (<http://www.pressdemo.com>).

Bolstered by a favorable state Supreme Court ruling, Petulama's police and downtown merchants are ready to obtain civil **restraining orders** on "unruly and harassing" people who frequent the downtown's Putnam Plaza.

The **restraining orders** would be similar to the court injunctions obtained in San Jose to prohibit suspected **gang members** from congregating in certain neighborhoods. The state Supreme Court upheld the use of such injunctions, which nearly a dozen California communities have obtained in their efforts to combat gangs.

As a result of the ruling, Santa Rosa's police chief said his staff will consider using such court orders to deal with gangs in at least two neighborhoods in and near the city. He declined to identify the areas.

Petaluma would use the court orders for a purpose other than gangs. Police and merchants propose to use them on alleged troublemakers -- typically teens and young adults -- who congregate in the downtown's Putnam Plaza. The public space is located on Petaluma Boulevard North between Washington Street and Western Avenue.

For months, merchants and their customers have complained some regulars in the plaza use excessive foul language, scream at people, block doorways, litter, take illegal drugs and engage in other activities that are "criminal or on the borderline of being criminal," said Police Capt. Pat Parks.

"This would be for very extreme cases, when somebody is really out of line," Parks said of the **restraining orders**.

Linda Buffo, executive director of the Petaluma Downtown Association, acknowledged that some of the young people's appearances may scare off potential downtown customers. But she

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(Publication page references are not available for this document.) insisted the **restraining orders** will deal only with inappropriate behavior, not whether someone wears counterculture clothes or sports purple hair.

Asked if the merchants will use the **restraining orders** this year, Buffo replied, "Absolutely. I'm surprised we haven't used them yet. We certainly have cases that qualify for them."

To obtain a **restraining order**, Parks said, police will work with merchants to document an individual's repeated, offensive behavior. The merchants or Downtown Association, not the city, will have to go to court to obtain the civil order. Police will serve the order on the person and arrest him or her if the order is violated.

Typically, Parks said, such orders would prohibit the affected person from coming within 100 yards of the merchant's business or the plaza -- essentially setting a good portion of the downtown off limits.

Sara Campos, a member of the Lawyers' Committee for Civil Rights in San Francisco, said she needed to know more about Petaluma's situation in order to adequately compare it with the use of the court orders in San Jose. But she said, "I think this might be even more of a stretch, based on what you're telling me."

She wondered why Petaluma police couldn't simply rely on laws rather than **restraining orders** to address any harmful behavior.

Parks said San Diego has used such orders to deter prostitution. Had the Supreme Court ruled against San Jose, Petaluma likely would have dropped its plan. But the court ruling upholds the use of such orders.

Parks and Buffo said the court orders will attempt to keep merchants and downtown visitors from repeatedly suffering the inappropriate behavior of a few individuals.

"You just can't believe what some people endure down here over and over again," Buffo said.

Elsewhere in Sonoma County, four police officials applauded the Supreme Court ruling allowing the injunctions as a method for combating gangs. Most said they would consider using court orders if needed. But three said they had no plans to do so now because gangs in their communities haven't taken over one neighborhood, as occurred in San Jose..

Windsor Police Chief Bill Cogbill said the town has had gang problems but they are "just not concentrated enough" in one locale

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(Publication page references are not available for this document.)
to benefit from using the court orders.

However, Santa Rosa Police Chief Michael Dunbaugh said there was one neighborhood inside the city and another nearby that "deserve real close scrutiny" for using the court orders. He declined to identify them but said the county gang task force would discuss using such orders to combat gangs.

Dunbaugh said he wants to review the Supreme Court ruling before speculating on whether police would seek to use the court orders for problems in two other areas: the Santa Rosa Plaza shopping center and the downtown's Old Courthouse Square. Both are places that attract sizeable numbers of young people, some of whom have drawn criticisms from merchants for their behavior.

----- INDEX REFERENCES -----

KEY WORDS: GANG; JUVENILE

EDITION: FINAL

Word Count: 747

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11/5/96 L.A. Times A3			
1996 WL 12753216			

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Los Angeles Times
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Tuesday, November 5, 1996

Metro Desk

Court Urged to Approve Anti-Gang Injunctions Law: State justices hear San Jose case closely watched in Southland. ACLU says orders impose 'parole conditions before crimes are committed.'

MAURA DOLAN
TIMES LEGAL AFFAIRS WRITER

SACRAMENTO -- The California Supreme Court, grappling with how to protect public safety without infringing on civil liberties, heard arguments Monday that courts should be allowed to prohibit **gang members** from associating in neighborhoods traumatized by gang violence.

The San Jose case before the court has strong ramifications for Southern California, where cities have used state public nuisance laws to obtain injunctions prohibiting **gang members** from congregating in certain neighborhoods.

San Jose, Westminister and seven communities in Los Angeles County have obtained such injunctions, and police and prosecutors contend that the court orders have helped rid troubled communities of gangs.

Chief Justice Ronald George and Justice Marvin Baxter appeared ready to support the anti-gang tactic. But Justice Stanley Mosk, the member usually considered least likely to vote with the conservative majority, mocked portions of the San Jose injunction that prevented certain individuals from climbing trees or carrying razors, nails, marking pens or spray-paint in a four-block section of the city.

The city's lawyers had argued that someone in a tree might be acting as a lookout during a crime.

The popularity of anti-gang injunctions has been growing in California as a way of preventing violence in communities where it has overwhelmed police. Civil libertarians, however, balk at portions that are broadly aimed at vague activities and predict that the injunctions will proliferate if the state high court upholds San Jose's action.

In comments that bode well for San Jose, George indicated that its injunction was sufficiently narrow because it applied only to four blocks. "To me," George said, "that would be a very significant consideration as opposed to a citywide ban."

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For other California communities fighting for similar injunctions, a ruling supporting San Jose would set a favorable precedent.

In Orange County, Deputy Dist. Atty. Greg Robischon is fighting to retain a Westminster anti-gang injunction that aims to keep apart members with a local street gang.

"We're really hoping that the state Superior Court will come out on San Jose's side," Robischon said. "It would tell our Court of Appeals, essentially, how to decide our case."

In 1993, Westminster secured a temporary **restraining order** that declared the "West Trece" gang a public nuisance, and banned 59 young men from "standing, sitting, walking, driving, gathering or appearing anywhere in public view" with any other members in a 25-square-block neighborhood.

But Orange County Superior Court Judge Richard J. Beacom struck down that court order two months later, calling it unconstitutional because it banned association rather than conduct. Beacom added that the court order targeted offenses already covered in criminal codes such as loitering.

Robischon said the Westminster case is waiting for a hearing date in the Court of Appeals.

"If they don't rule in our favor, we'll go to the state Supreme Court," unless that court already has struck down the San Jose case, Robischon said.

In the San Jose case, the injunction was handed down in 1993 after residents in a four-block neighborhood known as Rocksprings became so terrorized by **gang members** that they were afraid to let their children out, city officials said. The residents complained that their friends were scared to visit and that **gang members** dealt drugs, spread graffiti and threatened anyone who tried to intervene.

In the year before the court's action, police made more than 400 arrests in the neighborhood. The injunction applied to 38 alleged **gang members**, 11 of whom joined the appeal.

Amitai Schwartz, who argued against the injunction on behalf of the American Civil Liberties Union, said the order amounted to "imposing parole conditions before crimes are committed."

Baxter asked him whether residents have any other options to stop "tormenting" by gangs. The state Legislature could enact more anti-gang laws or police could be added to the streets, Schwartz replied.

Describing the fears of the residents, George retorted: "You are saying they should just go to the Legislature or call the police? How often can they do this?"

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(Publication page references are not available for this document.)

A Court of Appeal last year rejected several portions of the San Jose injunction, limiting its scope to a ban on activities that are already illegal. The city of San Jose, without conceding anything, decided not to challenge portions of the ruling that rejected sections preventing identified individuals from carrying paint, climbing trees or wearing certain gang colors and clothing.

But the city asked the court to reinstate provisions that restrict members from sitting or standing in the neighborhood with another gang member and from annoying, harassing and threatening residents.

Schwartz did not dispute the city's contention that noncriminal activities can be prohibited by injunctions. But he complained that the mere wearing of a Raiders jacket would be enough to annoy some residents and spark punishment. A civil violation could bring up to five days in jail and a \$1,000 fine.

Justice Mosk repeatedly challenged San Jose's lawyer to reject the most controversial provisions that the city is no longer defending. Assistant City Atty. George Rios declined to disavow them, and it was unclear whether the court would rule on them.

"So these Hispanic young men possess a razor blade or climb a tree, they can be prosecuted?" Mosk demanded. When Rios said the injunction was needed because police work was inadequate, Mosk snapped: "Well, make it adequate."

The court will rule on the case within 90 days.

Also contributing to this report was Times staff writer Tina Nguyen.

---- INDEX REFERENCES ----

KEY WORDS: CALIFORNIA SUPREME COURT; INJUNCTIONS; GANGS -- CALIFORNIA;
CIVIL RIGHTS; PUBLIC NUISANCES; NEIGHBORHOODS

NEWS SUBJECT: Public-Policy and Regulatory Issues (PBP)

STORY ORIGIN: SACRAMENTO

NEWS CATEGORY: FULL RUN

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REGION: California (CA)

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11/2/96 L.A. Times B3			
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Los Angeles Times
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Saturday, November 2, 1996

Metro; Metro Desk

South Bay Crime Drops 90% Since Filing of Gang Injunction

Since filing a gang injunction six months ago, crime in north Redondo Beach has been reduced by almost 90% and graffiti have decreased by 71%, according to a police report issued Friday.

The report also said that 24 of the 28 **gang members** served with a temporary **restraining order** have been arrested on various violations of the law.

When the city was granted a preliminary injunction in June it had three goals, according to City Prosecutor Mike Webb:

- * To keep a pending war between the Northside Redondo 13 gang and rival Lawndale 13 from escalating;

- * To recapture Perry Park so it could be used safely by the public rather than as a gang headquarters;

- * To reduce the crime in north Redondo Beach, the area most affected by gang crime.

Webb said the city has reached all its goals and residents have reported that their neighborhood is safe again.

"It's going really well," Webb said.

"It's exceeded all that we ever hoped for."

Webb said the preliminary injunction, granted in June, is good for three years.

The city will have to go back to court at that point to seek a permanent injunction.

----- INDEX REFERENCES -----

KEY WORDS: CRIME STATISTICS; GANGS; CRIME PREVENTION; REDONDO BEACH (CA); INJUNCTIONS

NEWS SUBJECT: Law Enforcement (LEN)
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NEWS CATEGORY: BRIEF

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1996 WL 10560851			

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The Cincinnati Post
Copyright 1996

Friday, September 13, 1996

NEWS

SUE GANGS, SAY COUNCILMEN:

LOCAL REPORT Update

Two Cincinnati City council members today suggested using lawsuits to fight youth gangs. Dwight Tillery and Charlie Winburn proposed a gang nuisance abatement and civil injunctions program aimed at fighting neighborhood gangs. Under the plan, used successfully in Los Angeles, **restraining orders** could be issued prohibiting **gang members** from congregating within specific areas. **Gang members** caught violating the order could be arrested and taken to court. The proposal calls for funding an additional assistant city solicitor to work with the city's Gang Unit and Juvenile Major Offender Unit in identifying **gang members** and carrying out the injunction.

----- INDEX REFERENCES -----

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9/13/96 CINPOST 15A
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1996 WL 7006510			

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The Orange County Register

Wednesday, January 17, 1996

NEWS

STATE BRIEFLY

:From Register news services

Wilson urges use of injunctions to keep gangs under control

Gov. Pete Wilson urged the Legislature to establish a \$2.5 million fund to help cities fight gang violence with court injunctions that prevent the gangs from functioning.

Standing in the Huntington Park neighborhood where Erika Izquierdo, 11, was killed in a drive-by shooting last month, Wilson said the fund would be used to help communities prevent **gang members** from carrying graffiti materials and, in the case of both adults and minors, staying out after curfew.

Such injunctions have been effective in reducing gang violence in several communities, and leaders in other cities have asked for similar help, Wilson said.

Assembly bill would
restore chain gangs

Assemblyman Brett Granlund, R-Yucaipa, said Tuesday that he has introduced a bill to make California the fourth state in the nation to restore prison chain gangs.

"After working 12 hours for 30 to 90 days, shackled to four other prisoners, an inmate is going to think twice about committing another crime," Granlund said

Alabama became the first state to reinstate chain gangs in May, with Florida and Arizona quickly following suit.

Granlund's measure would require the state Department of Corrections to implement a chain-gang program by Dec. 1, 1997, requiring inmates to perform labor wearing leg irons in chained work groups.

Assembly bill revokes
methyl bromide ban

(Publication page references are not available for this document.)

A bill to allow the fumigant methyl bromide to be used to kill root-killing worms after a March 30 deadline was approved Tuesday by the state Assembly.

Backers say the bill, heavily backed by agricultural groups, is needed to save the California economy an estimated \$346 million in revenues and 9,894 jobs. Opponents say the chemical is toxic and dangerous and threatens the health of farm workers and people living near fields.

"Large areas of our economy and thousands of jobs are at stake," said the author, Assemblyman Peter Frusetta, R-Tres Pinos.

The bill was approved 45-28 and was sent to the Senate.

Lungren backs funding
to upgrade crime labs

Attorney General Dan Lungren said Tuesday that he will seek passage of a \$32 million bond measure to upgrade the state's crime labs, and urged that more funding be made available to automate state law-enforcement data bases.

In his annual "State of the Public Safety" address, delivered in Sacramento, Lungren said the state's crime labs suffer from outdated equipment and cramped quarters.

Lungren also credited the victim's rights movement, a wave of anti-crime legislation and California's "Three Strikes" law with bringing the crime rate down.

Retiree is killed trying
to stop Metrolink train

An 85-year-old man was killed about 5:30 p.m. Monday near Corona while trying to wave off an oncoming train with a flashlight to save his stalled car.

The 800-ton train was going 50 mph when the engineer hit the brakes and blew the horn, said Metrolink spokesman Peter Hidlago.

Retired minister Oswald Mieger stood his ground waving the light overhead to protect his gray Oldsmobile Cutlass, he said. The impact killed Mieger and sent the car spinning off the tracks down an embankment.

The three-car Metrolink train was headed to Riverside from Irvine with 102 passengers.

Rodney King ordered

(Publication page references are not available for this document.)
to pay support to wife

Rodney King was ordered Tuesday in Los Angeles to stay away from his estranged wife and to pay her child and spousal support pending their divorce.

Lawyers for Crystal King would not discuss why she sought the **restraining order**, nor how much she would receive in support from her husband, who won a \$3.8 million judgment for a 1991 videotaped beating by police.

---- INDEX REFERENCES ----

KEY WORDS: CA

REGION: California; North America; Pacific Rim (CA NME PRM)

EDITION: MORNING

Word Count: 592

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1995 WL 9843980			

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Los Angeles Times

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Friday, November 10, 1995

Metro; PART-B; Metro Desk

Official Business

Injunction Seeks to Prevent Gang Activity in Neighborhood

A Pasadena Superior Court judge Thursday granted the city a preliminary injunction barring alleged **gang members** from riding bicycles, carrying beepers and participating in other activities--many of which would otherwise be legal--within a specific neighborhood.

The 35 named defendants, who authorities say terrorize a particularly violent residential area, are also barred from various criminal and criminally related activities within the roughly 20-square-block area of northwest Pasadena, between Washington and Orange Grove boulevards and Fair Oaks and Marengo avenues.

Thursday's ruling by Pasadena Superior Court Judge J. Michael Byrne replaces a temporary **restraining order** granted to the city last month.

Four defendants were granted continuances until early December to give them time to consult attorneys. They are still bound by the temporary order, however, which bars them from the same activities outlined in the preliminary injunction.

---- INDEX REFERENCES ----

KEY WORDS:	RESTRAINING ORDERS; COURT RULINGS; GANGS; PASADENA (CA) -- ORDINANCES; CRIME PREVENTION
NEWS SUBJECT:	Law & Legal Issues; Law Enforcement (LAW LEN)
NEWS CATEGORY:	COLUMN; BRIEF
REGION:	California; United States; North America; Pacific Rim (CA US NME PRM)
EDITION:	HOME EDITION

Word Count: 135

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1995 WL 9841834			

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Los Angeles Times

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Friday, November 3, 1995

Metro; PART-B; Metro Desk

San Gabriel Valley; Pasadena Defends **Restraining Order**

To the outrage of many in Pasadena's African American community, city officials and prosecutors on Thursday rejected a demand that the city drop a **restraining order** that prohibits reputed **gang members** in a troubled neighborhood from carrying beepers, riding bicycles and other usually legal activities.

Calling the **restraining order** a license to harass African Americans, the president of the Pasadena Branch of National Assn. for the Advancement of Colored People said he expects his organization to sue the city and district attorney.

. "Their actions are an insult to every member of the African American community," said NAACP leader Charles Bereal, who called the order unconstitutional.

Last week, at the request of Dist Atty. Gil Garcetti and the city, a Superior Court judge granted a temporary **restraining order** against 35 alleged members of the Pasadena Denver Street Lanes gang who are believed to control an area of Northwest Pasadena between Washington and Orange Grove boulevards and Fair Oaks and Marengo avenues.

Within the area, those named in the complaint are barred not only from illegal activities but also from possession of such things as cellular phones, and none of them can be on the street after midnight.

But Pasadena Mayor William Paparian and Deputy Dist. Atty. Deane Castorena, in a later press conference, said each of the 35 under the **restraining order** could contest it in court Nov. 9. "There is no conspiracy to harass anybody or infringe on anybody's rights," Castorena said.

Castorena and police said that what had been the meanest streets in Pasadena have become calm since the order. And Paparian said the city will seek injunctions against other gangs.

---- INDEX REFERENCES ----

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KEY WORDS: **RESTRAINING ORDERS;** PASADENA (CA) -- ORDINANCES; GANGS --
LOS ANGELES COUNTY; BLACKS; COMPLAINTS; CRIME PREVENTION

NEWS SUBJECT: Law & Legal Issues; Lifestyle; Law Enforcement (LAW LIF LEN)

NEWS CATEGORY: BRIEF

REGION: California; United States; North America; Pacific Rim (CA US
NME PRM)

EDITION: HOME EDITION

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West's Legal News			
Criminal Justice: Quick Takes			
November 1, 1995			

CALIFORNIA INJUNCTIONS AGAINST GANG ACTIVITIES - VIOLATION OF RIGHTS OR LAWFUL PREVENTION?

Compiled by Jon Kerr
Staff Writer of West's Legal News

Pasadena gets **restraining order** against gangs: Pasadena on Oct. 26 became the third Los Angeles County community to attack gang activity in a troubled neighborhood by **restraining order**. Pasadena Superior Court Judge Coleman A. Swart granted a temporary **restraining order** against 35 people which prohibits alleged **gang members** from possessing a cellular phone or walkie-talkie; being on the premises of an uninhabited apartment or building; being on any roof; possessing any controlled substance or paraphernalia; blocking vehicular or pedestrian traffic; possessing or using any graffiti tools; gambling; and acting as a lookout for police by whistling, yelling or otherwise signaling police presence to cohorts, among other things. A first offense for violating the order gets a defendant 10 days in jail. Further offenses will draw harsher penalties. The injunction is part of a strategy by the district attorney against gang environments, which he began two years ago with an injunction against a Norwalk gang. A temporary **restraining order** was granted against a Long Beach gang earlier this month.

-- Abstracted from the Los Angeles Times, "Pasadena Gets **Restraining Order** Against Reputed **Gang Members**; Order names 35 people, bans beepers, phones, bicycles and restricts many activities, ACLU protests," Page 3, Oct. 27, 1995, WESTLAW Find: 1995 WL 9839474

RELATED CASE

---- See People v. Acuna, 40 Cal.Rptr.2d 589 (Cal.App. 6 Dist. April 24, 1995). (City of San Jose may use injunction to abate gang activity).

RELATED WLN STORIES

---- "Court issues injunction barring L.A. **gang members** from graffiti painting, whistling," Criminal Law and Procedure, Oct. 10, 1995.

---- "State Supreme Court will review gang clampdown," Criminal Law and Procedure, July 31, 1995.

JUDGE

---- Hon. Coleman A. Swart, California Superior Court, Pasadena, WESTLAW: WLD-JUDGE database

--Orange County grand jury warns about gangs and bankruptcy: The Orange County Grand Jury on Oct. 26 warned that the county's bankruptcy problems could threaten efforts to stop development of youth gangs. A gang awareness program established by the Orange County Chiefs' and Sheriff's Association lost its funding after the bankruptcy. The report noted that there were 18,872

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(Publication page references are not available for this document.)

identified youth **gang members** in Orange County last year - or double the number in 1988.

---- Abstracted from the Los Angeles Times, "Grand Jury sounds alarm about gangs," Oct. 27, 1995, WESTLAW Find: 1995 WL 9839674

State: California

Region: National

11-1-95 WLN 3432

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1995 WL 9833174			

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Los Angeles Times

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Saturday, October 7, 1995

Metro; PART-B; Metro Desk

Judge Issues Limits on Gang in Long Beach; Violence: Order bans being armed, painting graffiti and includes a curfew. Neighbors praise action, but ACLU calls it a 'shortcut around the law.'

JOHN COX

SPECIAL TO THE TIMES

At the request of the Los Angeles County district attorney's office, a Superior Court judge issued an order Friday prohibiting members of a notorious Long Beach gang from carrying weapons, staying out late at night and painting graffiti.

Prosecutors and Long Beach city officials requested the temporary **restraining order** against 30 of the most active members of the West Side Longos, who authorities say have terrorized a 20-square-block community for at least two decades. Judge Victor Barrera signed the injunction.

"Residents have literally been held hostage," Dist. Atty. Gil Garcetti said at a news conference before the order was issued. He said the Latino gang has stricken such fear in the neighborhood that witnesses to recent slayings will not cooperate with police because they are afraid of retribution.

Authorities said members of the gang have committed crimes that include murder, shootings and robberies. Like a similar **restraining order** against a Norwalk gang that was recently made permanent, the tactic hinges on showing that the gang represents a public nuisance.

An attorney with the American Civil Liberties Union criticized the action, calling it a "shortcut around civil law."

"Why don't they actually charge these people with those criminal offenses?" asked Mark Silverstein, a staff attorney with the ACLU Foundation of Southern California. Silverstein expressed concern that the defendants could be denied free legal defense because the action was filed in civil, not criminal, court.

But a 10-year resident of the neighborhood, Frank Ferrow, thanked prosecutors for their work. Nevertheless, he said he remains terrified of the gang and plans to move out of the area.

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(Publication page references are not available for this document.)

"I am literally afraid to go to my car in the morning," Ferrow said. "I just want to get out of Long Beach."

So far, no other city gang turf is being targeted for similar action, prosecutors and city officials said. But prosecutors added that they may focus later on other problem areas.

Deputy Dist. Atty. Jessica Goulden, who has worked on the case since January, said the Longos have become increasingly active and violent recently. Graffiti activity has dramatically increased in the last few weeks, she said, as have drive-by shootings in nearby areas.

"These are really, really hard-core people," Goulden said.

City officials said the injunction will help efforts to improve and reclaim the neighborhood. With the support of city officials, property owners have begun repairing dilapidated buildings, forming community groups and working more closely with police.

"Every neighborhood deserves basic human dignity . . . and that's what we are giving back," said City Councilwoman Jenny Oropeza, whose district includes the neighborhood, which is bounded by 20th Street, the Long Beach Freeway, Pacific Coast Highway and Santa Fe Avenue.

Earlier this year, the federal Department of Housing and Urban Development demolished a building in the area that **gang members** had apparently inhabited and filled with bullet holes and graffiti.

The **restraining order** is in effect for three weeks. After that there will be a hearing to consider extending it. Prosecutors ultimately hope to make the order permanent, which would restrict the **gang members'** activities in the area for the rest of their lives.

Defendants who defy the restrictions could face criminal charges for activities that normally are not criminal violations. For instance, the order would prohibit members from whistling to warn others of police in the neighborhood. Also, the injunction would set curfews of 8 p.m. for the gang's minors and midnight for adult members.

In September, a Superior Court judge signed an injunction against 22 members of a Norwalk gang. Police say they have received far fewer complaints from residents since the initial **restraining order** was issued in August, 1994.

Other cities across the nation are considering using the legal tactic, including Chicago and Houston.

(Publication page references are not available for this document.)

The state Supreme Court is now considering an appeal by San Jose **gang members** who say that a similar injunction against them would restrict their constitutional rights of association.

----- INDEX REFERENCES -----

KEY WORDS: GANGS -- LOS ANGELES COUNTY; COURT RULINGS; INJUNCTIONS;
CRIME PREVENTION; LONG BEACH (CA)

NEWS SUBJECT: Law & Legal Issues; Law Enforcement (LAW LEN)

REGION: California; United States; North America; Pacific Rim (CA US
NME PRM)

EDITION: HOME EDITION

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1994 WL 2354065			

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Los Angeles Times

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Thursday, October 13, 1994

Metro; PART-B; Metro Desk

A Legal Turf Battle Gangs: Court injunction for a 20-square-block area of Norwalk has tamed Orange Street Locos with curfews and weapons restrictions.

Many residents are delighted, but some say targeting one group is unfair.

DUKE HELFAND

TIMES STAFF WRITER

By most accounts, the tiny Orange Street neighborhood in Norwalk is a changed place.

Children play soccer just feet from an alley where **gang members** used to fire guns. Families take afternoon strolls down streets they once avoided. One resident who planned to move now intends to stay and remodel her house.

In recent years, this modest enclave of bungalow-style homes and aging apartment buildings, a mile south of Norwalk City Hall, had been a virtual war zone. Authorities and residents say the Orange Street Locos gang terrorized the neighborhood by firebombing homes, taunting passersby, using drugs in public and breaking into cars.

Now, the city has resorted to an unusual weapon-a court-ordered injunction that curbs the gang's activities in the 20-square-block area-and the strategy appears to be working.

"The difference is like night and day," said Ralph Garcia, who has resumed nighttime walks to a nearby market. "Obviously, someone is getting through to them."

But **gang members** and their parents condemn the legal assault.

"You can't spit on the ground without getting a ticket," complained one 19-year-old Locos member who keeps a watchful eye as he walks through the neighborhood.

The injunction, one of the first used to combat gang violence in Los Angeles County, bars 22 Locos members from carrying baseball bats, crowbars and other potential weapons in public. It also prohibits **gang members** from harassing people, blocking public thoroughfares and trespassing on property.

(Publication page references are not available for this document.)

The court order lists 19 restrictions, including a 10 p.m. curfew for **gang members** under 18 and a midnight curfew for adult members. Violators could face up to six months in jail and \$1,000 fines.

Most of the targeted **gang members** have criminal records, including arrests for auto theft, burglary and possession of firearms. Some have been convicted of assault, armed robbery and arson. All have been stopped by sheriff's deputies for allegedly loitering, trespassing or drinking in public.

Since the injunction was granted in August by Norwalk Superior Court Judge Lois Anderson-Smaltz, Locos members have stopped hanging out on the streets and no longer party at night in alleys, residents and authorities say. Sheriff's deputies have had little contact with the Locos and have not arrested anyone for violating the court order.

The gang's "OSL" graffiti moniker, meanwhile, has virtually disappeared from garage doors and apartment buildings. City graffiti removers have not received a call since the injunction was issued.

Residents are thrilled with the changes, prompted in part by additional sheriff's deputies who saturated the area in the weeks after two firebombings last February.

"I feel safe when I'm outside," said Aurora Alcantara, 18. "There's no cholos around like years before, no fights, no noise at night."

The court order follows successful efforts by Los Angeles and Burbank to use injunctions against gangs. In Los Angeles, a judge has upheld two separate convictions against a gang member arrested under terms of its injunction.

In Norwalk, **gang members** denounce the city's action as unnecessary and complain about overzealous sheriff's deputies harassing and humiliating them at every turn. Some say they cannot leave their homes without being stopped, searched and photographed.

"It's like being picked on," said one gang member. "I don't like the feeling of being up against the car for no reason. People think you're a criminal."

Another Locos member, also 19, put it this way: "They stop us for any reason. All of a sudden, they want to kick everybody out."

Sgt. Larry Anderson, the sheriff's liaison to the city, said the deputies are just doing their job to keep the neighborhood safe.

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(Publication page references are not available for this document.)

But parents of **gang members** question why their sons are being singled out when larger gangs are wreaking havoc in other parts of the city. The Locos gang, with about 60 members, is one of the smallest of 11 gangs in Norwalk, which has an estimated 2,500 **gang members** in all.

Some parents also complain that their sons have been wrongly named in the injunction. "He don't do drugs. He don't shoot guns. He don't hang out in alleys," one mother said of her son. "But he gets stopped on weekends. It upsets me. He was raised here."

The city, parents say, has overstated the problem and failed to recognize that **gang members** are responsible young men working hard to improve their lives. "These kids are very bright," said Steve Estrella, whose two sons, ages 18 and 20, are named in the injunction. "They're getting a raw deal."

City officials say they decided to target the Locos because of the severity of incidents, including the two recent firebombings. **Gang members** had become increasingly defiant in recent years, even throwing rocks and bottles at sheriff's deputies patrolling the area, authorities said.

Depictions of day-to-day life in the Orange Street area are as varied as the descriptions of **gang members** themselves.

On one hand, residents and city officials point to signs of trouble such as wrought-iron gates in alleys meant to keep **gang members** from painting graffiti on walls and breaking into vacant buildings.

Five of the **gang members** named in the injunction already are behind bars or in juvenile facilities for offenses ranging from drinking in public to armed robbery. Another Loco, 19-year-old George Chavez, was sentenced last month in Norwalk Superior Court to five years in state prison for the two firebombing incidents, which authorities believe may have been drug-related. No one was injured either time.

Locos members, their parents and even residents with no gang connections reject violent characterizations of their predominantly Latino neighborhood. They speak of a quiet community filled with poor families struggling to make ends meet. Some residents say they are unaware of the gang, while others say the Locos are friendly.

"I've lived here 20 years, and I haven't had trouble," said Norman Miller, 69, who walks through the neighborhood three times a day. "There are guys walking around in baggy pants. I wave to them."

(Publication page references are not available for this document.)

There was a time, about a year ago, when all sides in the conflict were on the brink of an understanding.

The city and the gang agreed to meet. Officials promised summer jobs; **gang members** promised to cool down. The onetime enemies even joined forces for a weekend cleanup and picnic where the mayor and Locos leaders laughed and ate hot dogs together. But the good will soon fizzled. **Gang members** say the city reneged on the jobs and plans to open a neighborhood schoolyard in the evenings so they could play sports. Officials say the **gang members** failed to show up at City Hall to fill out job applications and then refused to cooperate after an article in a local newspaper portrayed them as weak.

Gang members and their parents scorn city officials and-in particular-the city's director of public safety, Kevin Gano, who orchestrated the short-lived truce.

After the city initiated legal action against the gang in July, Locos members painted "GANO 187" on an alley wall-referring to the state penal code for homicide.

Gano said the writing on the alley wall, which has since been removed, did not bother him. He has encountered no trouble on recent visits to the neighborhood. "They had to lash out at somebody," Gano said.

Norwalk officials say they are still willing to hash out differences with the gang. But Gano and other officials are exuberant at the apparent success of the injunction, the first obtained under a year-old pilot program involving the district attorney's office and Norwalk. Now they are thinking of seeking injunctions against other gangs.

Courting Peace

Norwalk officials are using an injunction to crack down on a gang accused of terrorizing a small neighborhood. The court order prohibits Orange Street Locos members from blocking streets, trespassing on private property and carrying baseball bats and crowbars, within a 20-square-block area around Orange Street.

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

MAP: COLOR, Courting Peace, HELENE WEBB / Los Angeles Times

---- INDEX REFERENCES ----

KEY WORDS: GANGS - LOS ANGELES COUNTY; NEIGHBORHOODS; NORWALK (CA) -
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6/10/94 S.F. Chron. A19			
1994 WL 4074077			

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The San Francisco Chronicle
Copyright 1994

Friday, June 10, 1994

NEWS

Judge Puts Limits on East Oakland Turf War Patricia Jacobus, Chronicle Correspondent

A lawsuit to chase an East Oakland gang off its turf drew initial skepticism yesterday from Judge James Lambden in Alameda County Superior Court.

Oakland city attorneys filed the lawsuit May 18, citing public nuisance laws, to keep 18 members of the B-Street Boys off their turf -- a nine-block area of East Oakland.

"This sounds to me like a tool to avoid the criminal process where the standards of proof are higher," Lambden responded during yesterday's hearing.

But Rocio Fierro, deputy city attorney, called the laws an "important new tool to fight this problem" of **gang members** "terrorizing" neighborhoods. She is seeking a **restraining order** that would prevent the members from coming within 1,000 yards of a zone between 92nd and 98th avenues and A through C streets.

Lambden took the case under submission and allowed Ed Chen, an attorney with the American Civil Liberties Union, to file a brief on behalf of the defendants by Wednesday, when the matter will be heard again.

The judge also said the city is proposing too wide a restricted area. He said he would only consider a much narrower zone that would zero in on the gang's reputed hangouts near East 14th Street.

Chen argued that the **restraining order** was a violation of the constitutional right to assemble.

"It should be left to the criminal justice system to deal with crimes," Chen said. "Many of the defendants who showed up today don't have attorneys to represent them."

At least nine of the defendants named in the lawsuit sat in the
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(Publication page references are not available for this document.)
audience covering their faces and shaking their heads. None of them wore the trademark attire of the B-Street Boys: black T-shirts and baseball caps with the letter "B" or the number "93." Five of the reputed **gang members** are being held in jail on assorted charges.

While acknowledging Lambden's concerns, Fierro said that despite heavy police presence in the area, violent criminal activity has increased.

The members are accused of committing more than 1,000 crimes in the neighborhood, including five killings, from January 1992 to February 1994.

Selling drugs is the gang's main operation, and members use "fear, intimidation and assaults on neighborhoods to maintain control of the area," the lawsuit states, adding that families have had to move because they were being harassed for cooperating with police.

But if defendants live in the area, they would have to carry identification such as a driver's license or utility bill as proof if Lambden grants the order.

Damon Usher, identified as one of the **gang members**, said he lives on B Street, an area he would have to stay away from. He said he knows nothing about a gang and denied having participated in any of the criminal activities outlined in the lawsuit.

"They're just using our street as an example because there are so many young black men who live there," he said, sitting alone across from the other defendants. "I know them, but we're just friends. We see each other (on the street) and throw the peace sign. That's how we do it in Oakland."

Oakland is not the first city in the state to go after gangs using public-nuisance laws. But Ferrio's strategy of keeping **gang members** off their own turf is a new approach.

Last year, San Jose won a **restraining order** against a gang known as VSL/VST, preventing the 34 members from hanging out together in the Rocksprings neighborhood. Police had suspected that the gang was dealing drugs.

"People now walk the streets without fear, children are playing outdoors . . . this is something that was never seen before," said Joan Gallo, San Jose city attorney. "Residents have totally been able to reclaim their neighborhood."

Since the city won its case, three of the **gang members** violated conditions of the **restraining order** and were sent to jail for at least five days.

(Publication page references are not available for this document.)

---- INDEX REFERENCES ----

KEY WORDS: BAY AREA; CITIES; DISTRICTS; CRIME; GANGS; DISTRICTS; CIVIL
LIBERTIES;
NEWS SUBJECT: LAW ENFORCEMENT; LIFESTYLE; LAW & LEGAL ISSUES (LEN LIF LAW)
GOVERNMENT: LOCAL GOVERNMENT (LOC)
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ABA Journal
October, 1996

News

***24 GOING GANGBUSTERS**

**Prosecutors Fight Gangs with Injunctions Banning Conduct Such as Using Beepers
and Applying Graffiti**

Arleen Jacobius

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Three years ago, California prosecutors came up with a new tack to fight youth violence: Obtain injunctions barring gang activities.

One civil injunction was issued against 138 alleged members of two San Jose street gangs. It prohibited conduct generally associated with gang activity such as drinking, vandalism, possessing weapons, using drugs, using gang hand signs, appearing with known gang members, applying graffiti and using beepers in public.

Los Angeles County deputy district attorneys obtained civil injunctions against gang members in six other cities, including Los Angeles. The orders often imposed a curfew and, in an effort to stop drug sales near apartment buildings, forbade trespassing on private property. A Pasadena injunction went further, prohibiting gang members from carrying pagers, cellular telephones or walkie-talkies.

Constitutional Questions

While prosecutors say their tactics are a good way to fight gangs, some courts and critics have voiced concerns about the constitutionality of such measures.

The California Supreme Court will soon add its voice to the debate, as it considers the San Jose injunction in *People v. Acuna*, No. H011802.

In a decision last year, a California appellate court struck down part of the injunction, upholding only the bar on criminal acts. The remaining prohibitions were held to be overbroad, vague and an infringement on free speech.

San Jose City Attorney Joan R. Gallo says her office is awaiting the latest ruling before applying for more gang injunctions. Currently, the city has two that are outstanding, including the one being considered by the state supreme court.

Chicago's legal department also has reviewed the civil injunction tool but is waiting until the Illinois Supreme Court hears an appeal of a decision striking down the city's gang loitering ordinance, *City of Chicago v. Youkhana*, 660 N.E.2d 34 (1995).

An Illinois appeals court held the measure infringed on freedoms of association, assembly and expression; criminalized the status of being a gang member; and permitted police officers to avoid probable cause requirements.

Some prosecutors have been unsuccessful at the trial level as well. In a Los Angeles County case, a judge issued a temporary restraining order aimed at gangs in Westminster, but refused to grant a preliminary injunction.

The setbacks have not dampened the enthusiasm of prosecutors for the injunctions, which are enforced with the contempt remedy.

The San Jose injunction had an immediate effect, sending gang members packing from a four-square-block area that they had taken over, says Gallo.

And in an interview, Los Angeles District Attorney Gil Garcetti proclaimed his community-based gang-fighting program "a phenomenal success." He says it is his belief that the injunctions his deputies have obtained will pass constitutional muster because they are more specific than the San Jose order.

His office has since applied for injunctions in two other cities, one of which is Inglewood, home of the Los Angeles Lakers.

Deanne Castorena, the Los Angeles deputy district attorney who obtained the county's first injunction in Norwalk two years ago, says many community members support the program and have come forward with affidavits.

The Los Angeles County effort is part of a larger program being called Strategy Against Gang Environments. Part of that strategy involves sending gang prosecutors from the district attorney's office to cities where they set up an office. Once they arrive, they begin working with police, notifying them of gang members' parole and probation restrictions. These can include the waiver of Fourth Amendment requirements, permitting them to be searched without cause.

Not everyone is as enthusiastic about using civil injunctions to control gang activity. Houston City Attorney Gene Locke says he declined to use the strategy, and instead opted for the "more traditional legal measures" such as prosecuting gang members individually for violating nuisance laws.

Locke says his office was concerned about possible liability for civil liberties violations, the overall effectiveness of injunctions, and the cost of such a program.

Others say the injunctions could result in broad sweeps of ethnic and low-income neighborhoods. "Innocent kids [will] get arrested because they look like gang members," says one government attorney who refused to be identified.

END OF DOCUMENT

ARKANSAS CODE OF 1987 ANNOTATED
TITLE 5. CRIMINAL OFFENSES
SUBTITLE 6. OFFENSES AGAINST PUBLIC HEALTH, SAFETY, OR WELFARE
CHAPTER 74. GANGS
SUBCHAPTER 1. ARKANSAS CRIMINAL GANG, ORGANIZATION, OR ENTERPRISE ACT

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Current through End of 1995 First Extraordinary Session

5-74-109 Premises and real property used by criminal gangs, organizations, or enterprises, or used by anyone in committing a continuing series of violations -- Civil remedies.

(a) Intent. The intent of the General Assembly of the State of Arkansas herein is to enact civil remedies that eliminate the availability of any premises for use in the commission of a continuing series of criminal offenses.

(b) Common nuisance declared. Any premises, building, or place used to facilitate the commission of a continuing series of three (3) or more criminal violations of Arkansas law is declared to be detrimental to the law-abiding citizens of the state and may be subject to an injunction, a court-ordered eviction, or a cause of action for damages as provided for in this subchapter.

(c) Action to abate -- Permanent injunction -- Verification of complaint. (1) Whenever there is reason to believe such a common nuisance is kept or maintained, or exists in any county, the prosecuting attorney of the county in the name of the state, or the city attorney of any incorporated city, or any citizen of the state or a resident of the county in his or her own name, may enjoin permanently the person conducting or maintaining the nuisance and the owner, lessee, or agent of the building or place in or upon which the nuisance exists from directly or indirectly maintaining or permitting the nuisance.

(2) Unless filed by the prosecuting attorney, the complaint in the action shall be verified.

(d) Inspection warrant. Where there is reasonable cause to believe that any premises are being maintained in violation of this section, any judicial officer may, upon the petition of the prosecuting attorney, issue an inspection warrant for the premises.

(e) Temporary injunction -- Bond required -- Exceptions. (1) If the existence of the nuisance is shown in the action to the satisfaction of the court, the court shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of the nuisance.

(2) On granting the temporary writ, the court shall require a bond on the part of the applicant to the effect that the applicant will pay to the enjoined defendant such damages, not exceeding an amount to be specified, as the defendant sustains by reason of the injunction should the court finally decide that the applicant was not entitled to the injunction. No bond shall be required where the proceeding is instituted by the prosecuting attorney or city attorney.

(f) Precedence of action -- Exceptions. The action shall be filed in the chancery court and have precedence over all other actions except election contests and hearings on injunctions.

(g) Dismissal for want of prosecution. If the complaint is filed by a citizen, it shall not be dismissed by him or for want of prosecution except upon a sworn statement made by him setting forth the reasons why the action shall be dismissed, and by dismissal ordered by the court.

(h) Costs. If the action is brought by a citizen and the court finds there was reasonable ground or cause for the

action, costs shall be assessed against him.

(i) Order of abatement -- Lien for costs -- Enforcement. (1) If the existence of the nuisance is established in the action, an order of abatement shall be entered as part of the judgment in the case, and plaintiff's costs in carrying out the order are a lien upon the building or place.

(2) The lien is enforceable and collectible for execution issued by order of the court.

(j) Order of abatement -- Damages. (1) If the existence of the nuisance is established in the action, an order of abatement shall be entered as part of the judgment, which order shall direct the removal from the building or place of all fixtures and other movable property used in conducting, maintaining, aiding, or abetting the nuisance and shall direct their sale in the manner provided for the sale of chattels under execution.

(2)(A) The order shall provide for any appropriate equitable relief as determined by the court to be necessary to abate the nuisance and may further provide, if determined to be the least restrictive alternative available to effectively accomplish the abatement, for the effectual closing of the building or place for such period of time as determined to be necessary by the court as adequate to abate the nuisance.

(B) An alternative to closure may be considered only as provided in this section.

(3)(A)(i) If the court finds that any vacancy resulting from closure of the building or place may create a nuisance or that closure is otherwise harmful to the community, in lieu of ordering the building or place closed, the court may order the person who is seeking to keep the premises open to pay damages in an amount equal to the fair market rental value of the building or place, for such period of time as determined appropriate by the court, to the city attorney or county prosecutor.

(ii) These funds are to be used to investigate and litigate future nuisance abatement actions, or they are to be used by the city or county in whose jurisdiction the nuisance is located for the purpose of carrying out its drug prevention and education programs.

(iii) If awarded to a city, eligible programs may include those developed as a result of cooperative programs among schools, community agencies, and the local enforcement agency.

(iv) If awarded to a county, funds shall be used for those programs that are part of any county program in place or used by the county law enforcement agency.

(v) These funds shall not be used to supplant existing city, county, state, or federal resources used for drug prevention and education programs.

(B)(i) For purpose of subdivision (j)(3) of this section, the actual amount of rent being received for the rent of the building or place, or the existence of any vacancy therein, may be considered, but shall not be the sole determinant of the fair market rental value.

(ii) Expert testimony may be used to determine the fair market rental value.

(4)(A) In addition, the court may award damages equal to the plaintiff's cost in the investigation and litigation of the abatement action, not to exceed five thousand dollars (\$5,000), against any or all of the defendants based upon the severity of the nuisance and its duration.

(B) The damages may be collected in any manner provided for the collection of any civil judgment.

(k) Custody of building. While the order of abatement remains in effect, the building or place is in the custody of the court.

(l) Fees -- Closing of building or place. For removing and selling the movable property, the city, county, or responsible law enforcement agency is entitled to charge and receive the same fees as could be charged and received for levying upon and selling like property on execution, and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court.

(m) Disposition of sale proceeds. The proceeds of the sale of the movable property shall be applied as follows:

- (1) First, to the fees and costs of the removal and sale;
- (2) Second, to the allowances and costs of closing and keeping closed the building or place;
- (3) Third, to the payment of the plaintiff's costs in the action; and
- (4) Fourth, the balance, if any, to the owner of the property.

(n) Release of the building to owner. (1) If the owner of the building or place has not been guilty of any contempt of court in the proceedings and appears and pays all costs, fees, and allowances that are liens on the building or place and files a bond in the full value of the property conditioned that the owner will immediately abate any nuisance that may exist at the building or place and prevent it from being a nuisance within a period of one (1) year thereafter, the court may, if satisfied of the owner's good faith, order the building or place to be delivered to the owner and the order of abatement cancelled so far as it may relate to the property.

(2) The release of property under the provisions of this section does not release it from any judgment, lien, penalty, or liability to which it may be subject.

(o) Fine as lien -- Enforcement. (1) Whenever the owner of a building or place upon which the act or acts constituting contempt have been committed, or the owner of any interest therein, has been guilty of contempt of court and fined in any proceedings under this subchapter, the fine is a lien upon the building or place to the extent of his interest in it.

(2) The lien is enforceable and collectible by execution issued by order of the court.

(p) Violations -- Criminal penalties. A violation of or disobedience of the injunction or order for abatement is punishable as contempt of court by a fine of not less than two hundred dollars (\$200) nor more than one thousand dollars (\$1,000) or by imprisonment in the county jail for not less than one (1) month nor more than six (6) months, or by both.

(q) Forfeiture. This section does not provide for the property to be forfeited to the state, but the state may at any time amend its petition to seek forfeiture if the property is subject to forfeiture under other Arkansas law.

History. Acts 1993, No. 1002, § 1; 1995, No. 1296, § 10.

Amendments. The 1995 amendment, in (c)(1), substituted "enjoin" for "maintain" and substituted "maintaining the nuisance" for "maintaining it."

A.C.A. § 5-74-109

AR ST § 5-74-109

END OF DOCUMENT

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 720. CRIMINAL OFFENSES
OFFENSES AGAINST THE PUBLIC
ACT 570. ILLINOIS CONTROLLED SUBSTANCES ACT
ARTICLE IV. VIOLATIONS AND PENALTIES

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Current through P.A. 89-719, approved 3/7/97

570/405.2. Streetgang criminal drug conspiracy

§ 405.2. Streetgang criminal drug conspiracy.

(a) Any person who engages in a streetgang criminal drug conspiracy, as defined in this Section, is guilty of a Class X felony for which the offender shall be sentenced to a term of imprisonment as follows:

- (1) not less than 15 years and not more than 60 years for a violation of subsection (a) of Section 401;
- (2) not less than 10 years and not more than 30 years for a violation of subsection (c) of Section 401.

For the purposes of this Section, a person engages in a streetgang criminal drug conspiracy when:

- (i) he or she violates any of the provisions of subsection (a) or (c) of Section 401; and
- (ii) such violation is part of a conspiracy undertaken or carried out with 2 or more other persons; and
- (iii) such conspiracy is in furtherance of the activities of an organized gang as defined in the Illinois Streetgang Terrorism Omnibus Prevention Act; [FN1] and
- (iv) he or she occupies a position of organizer, a supervising person, or any other position of management with those persons identified in clause (ii) of this subsection (a).

The fine for a violation of this Section shall not be more than \$500,000, and the offender shall be subject to the forfeitures prescribed in subsection (b).

(b) Subject to the provisions of Section 8 of the Drug Asset Forfeiture Procedure Act, [FN2] any person who is convicted under this Section of engaging in a streetgang criminal drug conspiracy shall forfeit to the State of Illinois:

- (1) the receipts obtained by him or her in such conspiracy; and
 - (2) any of his or her interests in, claims against, receipts from, or property or rights of any kind affording a source of influence over, such conspiracy.
- (c) The circuit court may enter such injunctions, restraining orders, directions or prohibitions, or may take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property, claim, receipt, right or other interest subject to forfeiture under this Section, as it deems proper.

CREDIT(S)

1997 Electronic Pocket Part Update

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P.A. 77-757, § 405.2, added by P.A. 89-498, Art. 5, § 5-115, eff. June 27, 1996.

[FN1] 740 ILCS 147/1 et seq.

[FN2] 725 ILCS 150/8.

< General Materials (GM) - References, Annotations, or Tables >

CROSS REFERENCES

First degree murder, aggravating factors, streetgang criminal drug conspiracy, see 720 ILCS 5/9-1.

720 I.L.C.S. 570/405.2

IL ST CH 720 § 570/405.2

END OF DOCUMENT

**WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA REVISED STATUTES
TITLE 15. CRIMINAL PROCEDURE
CHAPTER 12. CRIMINAL STREET GANGS**

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Current through all 1996 1st Ex.Sess. and Reg. Sess. Acts

§ 1405. Premises used by criminal street gang; nuisances; actions for injunction, abatement, and damages; other remedies for unlawful use; exceptions

A. Every private building or place used by members of a criminal street gang for the commission of a pattern of criminal gang activity is a nuisance and may be the subject of an injunction or cause of action for damages or for abatement of the nuisance as provided for in this Chapter.

B. Any person may file a petition for injunctive relief with the appropriate court seeking eviction from or closure of any premises used for commission of a pattern of criminal gang activity by a criminal street gang. Upon proof by the plaintiff that the premises are being used by members of a criminal street gang for the commission of a pattern of criminal gang activity, the court may order the owner of record or the lessee of the premises to remove or evict the persons from the premises and order the premises sealed, prohibit further use of the premises, or enter such order as may be necessary to prohibit the premises from being used for the commission of a pattern of criminal gang activity and to abate the nuisance.

C. Any action for injunction, damages, abatement, or other relief filed pursuant to this Section shall proceed according to the provisions of the Louisiana Code of Civil Procedure.

D. The court shall not issue an injunction or assess a civil penalty against any owner of record or the lessee of the private building or place, unless that person knew or should have known or had been notified of the use of the premises for a pattern of criminal gang activity. Any injunctive relief other than that specifically authorized in Subsection F of this Section shall be limited to that which is necessary to protect the health and safety of the residents or the public or that which is necessary to prevent further criminal activity. In addition to any other damages or injunction awarded, the court may assess a civil penalty not to exceed five thousand dollars against any or all of the defendants, as provided in Paragraph F(4) of this Section.

E. A petition for injunction shall not be filed until thirty days after notice of the unlawful use or criminal conduct has been provided to the owner of record or the lessee, by mail, return receipt requested, postage prepaid, to the last known address, or by personal service. If the premises are abandoned or closed, or if the whereabouts of the owner of record or lessee is unknown, all notices, process, pleadings, and orders required to be delivered or served under this Section may be attached to a door of the premises, and this shall have the same effect as personal service on the owner of record or lessee. No injunctive relief authorized by Subsection F of this Section shall be issued in the form of a temporary restraining order.

F. If the court has previously issued injunctive relief ordering the owner of record or the lessee of the premises to close the premises or otherwise to keep the premises from being used for the commission of a pattern of criminal gang activity, the court, upon proof of failure to comply with the terms of the injunction and that the premises continue to be used for the commission of a pattern of criminal gang activity, may do one or more of the following:

- (1) Order the premises demolished and cleared at the cost of the owner.
- (2) Order the premises sold at public auction and the proceeds from the sale, minus the costs of the sale and the

expenses of bringing the action, delivered to the owner.

(3) Order the defendant to pay damages to persons or local governing authorities who have been damaged or injured or have incurred expense as a result of the defendant's failure to take reasonable steps or precautions to comply with the terms of any injunction issued pursuant to the provisions of this Chapter.

(4) Assess a civil penalty not to exceed five thousand dollars against the defendant based upon the severity of the nuisance and its duration. In establishing the amount of any civil penalty, the court shall consider all of the following factors:

(a) The actions taken by the defendant to mitigate or correct the problem at the private building or place or the reasons why no such action was taken.

(b) The failure of the plaintiff to provide notice as required by Subsection E.

(c) Any other factor deemed by the court to be relevant.

G. No nonprofit or charitable organization, which is conducting its affairs with ordinary care or skill, and no governmental entity shall be enjoined pursuant to the provisions of this Chapter.

H. Nothing in this Chapter shall preclude any aggrieved person from seeking any other remedy provided by law.

CREDIT(S)

1992 Main Volume

Added by Acts 1990, No. 230, § 1. 1997 Electronic Update

Amended by Acts 1994, 3rd Ex.Sess., No. 97, § 1.

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

1997 Electronic Update

The 1994 amendment inserted ", abatement," in the section heading; inserted "or for abatement of the nuisance" in subsec. A; inserted "or the lessee" following "owner of record" and "and to abate the nuisance" in the second sentence of subsec. B; inserted "abatement," in subsec. C; inserted "or the lessee of the private building or place," in the first sentence of subsec. D and added a third sentence relating to a civil penalty to that subsection; inserted "or the lessee," following "owner of record" and ", or by personal service" in the first sentence of subsec. E, and added a new sentence, relating to abandoned or closed premises, in the second position of that subsection; in the introductory paragraph of subsec. F, added "or the lessee" following "owner of record" and substituted "proof of failure" for "proof that the owner of record has failed"; in par. F(3), substituted "Order the defendant" for "Order the owner of record" and "defendant's failure" for "owner's failure"; and added a new par. F(4), including subpars. (a) to (c), setting forth factors to be considered in assessing a civil penalty.

Pursuant to the statutory revision authority of the Louisiana State Law Institute, in this section as amended in 1994, "Paragraph F(4) of this Section" was substituted for "Subsection F(4)" in the third sentence of Subsection D.

1992 Main Volume

This section, enacted by Acts 1990, No. 230, § 1 as R.S. 15:1404, was redesignated, pursuant to the statutory revision authority of the Louisiana State Law Institute, as R.S. 15:1405.

Another R.S. 15:1405, added by Acts 1990, No. 230, § 1, was redesignated as R.S. 15:1406 pursuant to the statutory revision authority of the Louisiana State Law Institute.

LSA-R.S. 15:1405

LA R.S. 15:1405

END OF DOCUMENT

VERNON'S ANNOTATED MISSOURI STATUTES
TITLE XXXVIII. CRIMES AND PUNISHMENT; PEACE OFFICERS AND PUBLIC DEFENDERS
CHAPTER 578. MISCELLANEOUS OFFENSES
CRIMINAL STREET GANGS

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Current through End of 1996 2nd Reg. Sess.

578.430. Rooms, buildings and structures used for criminal street gang activities--public nuisance--injunction--parties to suit

1. Any room, building, structure or inhabitable structure as defined in section 569.010, RSMo, which is used by a criminal street gang in a pattern of criminal street gang activity shall be deemed a public nuisance. No person shall keep or maintain such a public nuisance.

2. The attorney general, circuit attorney or prosecuting attorney may, in addition to any criminal prosecutions, prosecute a suit in equity to enjoin the public nuisance. If the court finds that the owner of the room, building, structure or inhabitable structure knew that the premises were being used for criminal street gangs in a pattern of criminal street gang activity, the court may order that the premises shall not be occupied or used for such period as the court may determine, not to exceed one year.

3. All persons, including owners, lessees, officers, agents, offenders or employees, aiding or facilitating such a nuisance may be made defendants in any suit to enjoin the nuisance.

CREDIT(S)

1995 Main Volume

(L.1993, H.B. No. 562, § A(§ 4, subsec. 1 to 3).)

< General Materials (GM) - References, Annotations, or Tables >

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

City of Chicago,
Petitioner,

v.

Jesus Morales, et al.,
Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF OHIO, CALIFORNIA,
ILLINOIS, KANSAS, LOUISIANA, MICHIGAN,
MISSISSIPPI, NEBRASKA, NEVADA, SOUTH
CAROLINA, SOUTH DAKOTA AND THE
COMMONWEALTHS OF PENNSYLVANIA
AND VIRGINIA IN SUPPORT OF THE PETITION

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STATEMENT OF AMICI INTEREST

The State of Ohio, together with twelve other *amici* States, join the City of Chicago in urging the Court to review the decision of the Supreme Court of Illinois. Because the *amici* States share the City's concerns about the urban crime, violence and disruption of community life that criminal gangs continue to spawn throughout the country and because they share with their political subdivisions the essential lawmaking responsibility for rooting out these problems, they agree that the Court should clarify the permissible scope of police power that the Constitution tolerates in this important area.

The problems that youth gangs have brought to local communities are new in kind, and indeed would have surprised most prior generations of American adults. A 1995 survey of over 4000 local law enforcement agencies confirms the pervasive scope of youth gang influence in modern America: It shows the existence of gang activity in all fifty states; it demonstrates a gang presence in rural as well as urban counties; and it shows a total of 23,388 youth gangs and a total of 664,906 gang members. See 1995 National Youth Gang Survey, published by the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice, p. xi. The overwhelming majority of law enforcement agencies report that gang problems in recent years either have stayed the same or are getting worse, with almost half reporting worse. *Id.* The National Institute of Justice reports similar statistics. In 1993, when there were 16,643 gangs with 555,181 members, the Institute projected 580,331 gang crime incidents nationwide. D. Curry et al., *Estimating the National Scope of Gang Crime from Law Enforcement Data* (Nat'l Institute of Justice, Aug. 1996), at 3-4. The volume of such crimes, the Institute estimated, grew from eight to 11 times the number that existed in 1991. *Id.*

To their credit, State and local governments have attempted to respond to these disturbing developments through a number of different strategies. At the State level, for example,

Ohio has proposed a new felony to "actively promote or assist" pending legislative "STEP" legislative prevention"), first since then. Cal. findings), 186.2. promoting or assisting (definitions), 186 in a gang), 186 (West Supp. 199

In like manner, gang participation related nature of a §§ 13-105 (defining criminal gang participation) §§ 5-74-102 (legislative finding 104 (defining offenses), 5-74- (offense of using a (unlawful discharge (enhancement of (findings), 5-74-2 gang membership (legislative finding of felonies committed Ga. Code Ann. (definitions), misconduct) (M (definitions), 35- (compelling membership Ann. 570/405 2 (West Supp. 199 723A.2 (gang participation

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Ohio has proposed legislation that makes it a second degree felony to "actively participate" in a criminal gang and to promote or assist in the commission of specified crimes. The pending legislation in Ohio follows the lead of California's "STEP" legislation ("street terrorism enforcement and prevention"), first enacted in 1988 and amended several times since then. Cal. Penal Code §§186.20, 186.21 (legislative findings), 186.22(a) (prohibiting active participation plus promoting or assisting with predicate offenses), 186.22(c), (f) (definitions), 186.26 (offense of coercing a minor to participate in a gang), 186.28 (offense of supplying firearms to gang) (West Supp. 1998).

In like manner, several other States either criminalize gang participation or enhance penalties based on the gang-related nature of a criminal act. *See, e.g.,* Ariz. Rev. Stat. Ann. §§ 13-105 (definitions), 13-2308(G) (class 2 felony offense of criminal gang participation) (West Supp. 1997); Ark. Code Ann. §§ 5-74-102 (legislative findings), 5-74-103 (definitions), 5-74-104 (defining first and second degree gang participation offenses), 5-74-203 (gang recruitment offenses), 5-74-105 (offense of using another's property for gang activity), 5-74-107 (unlawful discharging of firearms from vehicle) 5-74-108 (enhancement of penalties acting in concert), 5-74-201 (findings), 5-74-202 (definitions), 5-74-203 (offense of soliciting gang membership) (Michie 1997); Fla. Stat. ch. 874.02 (legislative findings), 874.03 (definitions), 874.04 (enhancement of felonies committed as part of pattern of gang activity) (1993); Ga. Code Ann. §§ 16-15-2 (legislative findings), 16-15-3 (definitions), 16-15-4 (enhancement of gang-related misconduct) (Michie 1996); Ind. Code §§ 35-45-9-1, 2 (definitions), 35-45-9-3 (gang participation offense), 35-45-9-4 (compelling membership in gang) (1993); 720 Ill. Comp. Stat. Ann. 570/405.2 (offense of street criminal drug conspiracy) (West Supp. 1997); Iowa Code Ann. §§ 723A.1 (definitions), 723A.2 (gang participation offense) (West 1993 & Supp. 1997);

Kan. Stat. Ann. § 21-4704(k) (sentencing guidelines presume imprisonment for gang offense) (Supp. 1996); La. Rev. Stat. Ann. §§ 15:1402 (legislative findings), 15:1403 (gang participation offense), 15:1404 (definitions) (West 1992 & Supp. 1998); Mass. Gen. Laws Ann. ch. 265, § 44 (offense of coercing minor to join gang) (West Supp. 1997); Minn. Stat. § 609.229 subd. (1) (definitions), subd. (2) (participation offense) (1992 & Supp. 1993); Mo. Ann. Stat. §§ 578.421 (definitions), 578.423 (participation offense), 578.425 (enhancements), 578.435 (offense of possessing weapons for gang crime) (West 1995); Mont. Code Ann. §§ 45-8-402, 405 (definitions), 45-8-403 (offense of coercing membership), 45-8-404 (enhancement of sentence for gang-related felony), 45-8-406 (offense of supplying firearms to gang) (1997); Nev. Rev. Stat. § 193.168 (doubling prison term for gang-related crime) (1997); Okla. Stat. Ann. §§ 21-856 (offense of willfully recruiting minor into gang) (West Supp. 1998); S.D. Codified Laws §§ 22-10-14 (definitions), 22-10-15 (enhancements) (Michie Supp. 1997); Tex. Penal Code Ann. §§ 71-01(d) (definition), 71-02 (participation offense) (West Supp. 1998). Alaska also uses gang-participation as an element in some crimes. Second degree murder, for instance, occurs when the individual causes the death of a non-participant while committing or attempting to commit a felony. *See* Alaska Stat. § 11.41.110(4) (Michie 1996). The State also makes gang participation an aggravating factor in sentencing, § 12.55.155(28), and outlaws gang recruitment, § 11.61.160, 165 (Michie 1996).

The Chicago ordinance follows a similar path in trying to inhibit gang violence and maintain public order. Based on extensive testimony before the City Council, the ordinance tries carefully to strike at the following evils: the intimidation of law-abiding residents by gang loitering; and the creation of a context and cover for gang criminal activities as well as a method of recruitment. The Illinois Supreme Court did not appear to doubt any of this. Yet under its holding society's power to

defend itself against gang violence is curtailed. It would seem that local government's power to regulate rights and regulations in the community's streets is a basic component of the legislative tool. The community police should grant review to the Court to clarify the

REASON

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defend itself against these acknowledged evils was sharply curtailed. It would seem to be an essential function of State and local government to determine the proper balance between rights and regulations concerning access to and enjoyment of a community's streets, above all to ensure equal access to this basic component of urban life. Because the *amici* States need the legislative tools to engage in criminal gang control and community policing, they respectfully submit that the Court should grant review of the decision of the Illinois Supreme Court to clarify this essential area of the law.

REASONS FOR GRANTING THE WRIT

At the same time the Illinois Supreme Court recognized that "[c]riminal street gangs are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens," Pet. App. 17a, the court struck a debilitating blow to the reasonable efforts of State and local governments to abate youth gang crime. The problem with the decision is not that it contradicts *dicta* in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). It is precisely that broad *dicta* in *Papachristou* would seem to sanction not just the lower-court decision but virtually any other decision that invalidates sensible lawmaking efforts like these. See Pet. App. 9a (citing *Papachristou* for the proposition that a law is infirm if it "makes criminal" activities which "by modern standards are normally innocent"); *id.* 17a ("The Court observed [in *Papachristou*] that such activities [loafing, loitering and nightwalking] are amenities of American life").

The breadth of the *Papachristou dicta* not only overprotects criminal gangs but also underprotects other members of urban communities. If walking the streets or even sauntering about them are constitutional "amenities of American life," for example, *Papachristou*, 405 U.S. at 164, then surely they are amenities to be enjoyed by all American citizens.

When a city like Chicago thus determines that brazen, intimidating, even coercive, members of its community are infringing the enjoyment of these amenities by all citizens, it ought to have the police power to ensure that the allocation of these amenities is fairly distributed. Current law, however, makes that very difficult.

A. The Deliberate Nature Of Chicago's Efforts To Regulate Criminal Gang Loitering Contrasts Markedly With The Anachronistic Jacksonville Ordinance Invalidated In *Papachristou*.

As an initial matter, it is important to emphasize the differences between the Chicago ordinance and the Jacksonville (and State-law) provisions invalidated by *Papachristou* 26 years ago. The *Papachristou* ordinances addressed a problem whose time had come and gone. As a brief review of the provisions confirms, see *Papachristou*, 405 U.S. at 158, "Jacksonville's ordinance and Florida's statute were derived from early English law, and employ[ed] archaic language in their definitions of vagrants," *id.* at 161 (quotation omitted). Even though "the theory of the Elizabethan poor laws" that perpetuated and harshened these laws "no longer fits the facts," and even though the "conditions which spawned these laws may be gone," the "archaic classifications remain[ed]" in Florida in the early 1970's. *Id.* at 161-62 (quotations omitted).

In conspicuous contrast to the *Papachristou* laws, which after years of innocuous desuetude were suddenly enforced in Florida, the Chicago ordinance takes aim at a distinctly modern problem with a fresh set of legislative facts to support it. As the Illinois Supreme Court recognized, the ordinance represents the culmination of significant study and consideration. It starts out (Pet. 60a) by identifying the policy judgments that prompted the law -- an increasing murder rate as well as an increase in violent

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and drug-related crimes, an assessment that criminal street gang activity bears a substantial responsibility for the problem, and the use of loitering by criminal gangs to maintain control over identifiable areas and to intimidate others from using those areas. The ordinance then proceeds to define "criminal street gang" as

any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more . . . enumerated [criminal acts], and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Pet. 61a- 62a. A "pattern of criminal gang activity" in turn means "two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other." *Id.* at 63a.

Unlike the *Papachristou* ordinances, the Chicago law regulates a current and serious problem, and does so on the basis of up-to-date legislative findings. The provision also uses familiar definitions of crime. The definition of a "pattern of criminal gang activity," for instance, parallels the familiar concepts of "enterprise" and "pattern of racketeering activity" found in federal and state RICO legislation. See *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *United States v. Turkette*, 452 U.S. 576, 578-79 (1980). This of course helps to distinguish the law from other cases as well. See *Lanzetta v. New Jersey*, 306 U.S. 451, 453-54 (1939) (finding law vague because it defined "gang" to mean simply "two or more persons" without also defining impermissible gang conduct).

In further contrast to the *Papachristou* laws, Chicago's delegation of authority to disperse loiterers based on an officer's objective determination that one of them is likely to be a criminal gang member represents an innovation in community policing. It is typical of other urban initiatives designed to abate youth gang street crime by moving away from a crime-solving model of law enforcement to a preventive, community-policing model. The new approach rests upon the insight that by declining to tolerate mild levels of public disorder, cities can avoid the all-too-familiar spiral into more severe disorder, crime and community dysfunction. See D. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L.Rev. 551, 581-82 (1997) (citing empirical research supporting the "broken windows" thesis -- that unremediated disorder leads to greater disorder). While this model plainly offers a fresh approach to urban crime, it also coincides with the concern of residents in many urban communities that "passivity in the face of outrageous street behavior" constitutes a critical law-enforcement shortcoming. G. Kelling & C. Coles, *Disorder and the Court*, 116 Pub. Interest 57, 70 (1994).

Nor is the new Chicago ordinance the first one to fall victim to the broad *dicta* in *Papachristou*. In 1989, the District of Columbia passed an "illegal drug zone" ordinance, 36 D.C. Reg. 2835, authorizing the Chief of Police to disperse persons who congregate within the specially-designated zones for up to five days. The D.C. Superior Court invalidated the law on vagueness and overbreadth grounds. See *United States v. Kennedy*, 118 Daily Wash. L. Rep. 873 (Jan. 12, 1990). Unlike the present law, the D.C. ordinance potentially subjected any assemblage to dispersal within the zone (even a First Amendment activity), and failed to give the police any express standard as to which congregations of people should be dispersed and which should not be. Like the lower court here, however, the D.C. court invoked broad language from

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Papachristou, stating that "the freedom to be with intimate relations and close friends in public places would seem as fundamental as the liberty of the individual simply to walk or loiter in those places, which the Supreme Court in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163-65 (1972) found protected by substantive due process." 118 Daily Wash. L. Rep. at 877.

B. The Chicago Ordinance Is Not Unconstitutionally Vague.

The Chicago ordinance does not violate the Constitution's prohibition against vague criminal laws. In particular, it steers clear of the two flaws that characterize such laws: They fail either to "provid[e] fair warning" of what is prohibited or to "provide explicit standards" to limit the discretion of those who enforce the law. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Neither defect applies here. In plain terms, the ordinance (1) authorizes the police to issue a dispersal order when they reasonably believe that one or more loiterers is a criminal gang member; (2) gives additional notice to all persons covered by the law when they are told to disperse; and (3) sanctions only those who disobey the police orders.

Chicago, then, chose not to regulate loitering in and of itself, but only to regulate it when combined with criminal gang activity and when police orders to disperse are ignored. These features of the law bring it well within the parameter of other laws the Court has upheld. *See, e.g., Grayned*, 408 U.S. at 113 (1972) (upholding conviction for creating noise near school where police discretion was cabined by required showing of interference with school activities); *Colten v. Kentucky*, 407 U.S. 104, 108-09 (1972) (upholding conviction under disorderly conduct statute that required compliance with dispersal order

and that required intent to cause public inconvenience) (Cf. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965) (upholding disobedience-to-police-order law when coupled with element of sidewalk blockage).

Instead of stopping here and relying on this authority, however, the lower court proceeded. It took the view that these features of the law did not suffice to save it, even when combined with an order of dispersal and a careful definition of criminal gang activity, because the individual "has no way of knowing whether an approaching police officer has a reasonable belief that the group contains a member of a criminal gang." Pet. 11a-12a. In the lower court's view, in other words, the validity of requiring compliance with police orders turns on whether the individuals subject to the order themselves perceive an objective basis for the order, not whether the officers have an objectively reasonable basis for issuing the order. No doubt other courts have voiced similar sentiments. See, e.g., *City of Akron v. Rowland*, 618 N.E. 2d 138, 145 (Ohio 1993) (drug loitering ordinance held invalid where, "without being able to read the officers' minds," a suspect could not ascertain the reasonableness of police suspicion). But these views cannot be squared with traditional methods for balancing a community's collective interests in security against the individual's interest in liberty.

Left unreviewed, this position also threatens to upset time-honored understandings of the legitimate authority of the police to investigate, ferret out and stop crime. The Fourth Amendment has long used "reasonable suspicion" and "probable cause" as objective touchstones for determining when government may interfere with individual liberty. See *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968) (discussing probable cause and reasonable suspicion standards as the basis for "assur[ing] that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of

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a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances") Indeed, the Fourth Amendment itself refers just to "unreasonable searches and seizures," and has never assessed compliance with the standard from the perspective of the *individual's*, as opposed to the officer's, objective determination of whether cause exists to request an accounting of the individual's conduct.

Case law proves the point. The Court has frequently examined the objective reasonableness of law-enforcement action from the standpoint of the officer involved, not the individual suspected of crime. See *Ornelas v. United States*, 116 S.Ct. 1657, 1661-62 (1996) ("components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether those historical facts, *viewed from the standpoint of an objectively reasonable police officer*, amount to reasonable suspicion or to probable cause"); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (standard for reviewing Fourth Amendment reasonableness is "would the *facts available to the officer* at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate") (internal quotation omitted). Under the *Terry*-stop rule, as a result, police may briefly detain an individual on "reasonable suspicion" that crime is afoot even though probable cause does not yet exist. In the words of Justice Brennan: "The *Terry* doctrine permits police officers . . . [i]f they have the *requisite reasonable suspicion* . . . [to] use a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official 'show of authority,' the use of physical force to restrain him, and a search of the person for weapons." *Kolender v. Lawson*, 461 U.S. 352, 364 (1983) (Brennan, J., concurring). As these cases illustrate, the

authority of law enforcement to intrude upon an individual's liberty simply does not turn on the suspect's insight into the reasonableness of the officer's action.

In addition generally to looking at these requirements from the perspective of the law-enforcement officer, the Court's search-and-seizure decisions also have applied these reasonableness principles specifically to similar types of law-enforcement action. Just as Chicago authorizes an officer to stop "a person whom he reasonably believes to be a criminal street gang member," 8-4-015(a), so too federal drug enforcement agents frequently stop travelers in an airport who fit the profile of a drug courier. In the drug interdiction context, the Court has frequently permitted such detentions (which, it is worth adding, pose far more risk of arrest and loss of liberty than an order to disperse). See *United States v. Sokolow*, 490 U.S. 1 (1989); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). Roadside stops also may be justified by particularized, articulable suspicion of drug trafficking. See, e.g., *United States v. Sharpe*, 470 U.S. 675 (1985). Even without reasonable suspicion, the Court has permitted random drug testing and random roadside stops to end drunk driving. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Michigan Dept. Of State Police v. Sitz*, 496 U.S. 444 (1989).

Surely, in the light of these precedents, Chicago does not offend the Constitution when it authorizes officers to impose a *de minimis* restriction on individual liberty with a far greater explanation for doing so than these Fourth Amendment decisions require. Here, officers observed a group of persons loitering in a public place. They formed a "reasonable belief" that the individuals belonged to a criminal gang. They asked them to disperse. Then and only then did the officers arrest anybody, and even then only for failing to do what all citizens in a civil society customarily have been expected to do -- obey the

police. See *Colten*, 407 U.S. 105 (1965) ("[c]ivil liberties exist only in the context of the existence of a society, without which they are unrestrained and meaningless").

As in *Colten*, the Chicago ordinance illustrates a city's legitimate interest in this function. The criteria for detention are not anomalous if they are consistent with the criteria of the Fourteenth Amendment's seizure requirements.

No such argument is made by the lower-court's majority. The ordinance is not overbroad. 331-32 (1988). The ordinance is not a limiting demonstration to permit disorderly conduct that a threat to public safety is present. *Grayned*, 408 U.S. 104 (1972). The ordinance precludes "requires the police to arrest as confined, or to arrest as confined, or to arrest as confined." *Colten*, 407 U.S. 105 (1965). The refusal to obey the police is a threat to public safety.

All this is to say is that the group goes beyond the constitutional limits of a civil society.

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police. See *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses"); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (maintaining public order protects liberty itself from being "lost in the excesses of anarchy").

As in the Court's drug-profile cases, moreover, the general police order implementing the Chicago ordinance illustrates a city policy ensuring that trained officers will perform this function, Pet. App. 65a, and sets forth identifiably objective criteria for determining gang membership, Pet. App. 67a-68a. See also *Sokolow*, 490 U.S. at 10. In the end, it would seem anomalous if the vagueness limitation of the due process clause of the Fourteenth Amendment prohibited what the search-and-seizure requirement of the same clause positively permits.

No such anomaly, however, exists. Contrary to the lower-court's decision, similar rules have governed vagueness and overbreadth challenges. See *Boos v. Barry*, 485 U.S. 312, 331-32 (1988) (rejecting vagueness challenge to ordinance limiting demonstrations at embassies because it was interpreted to permit dispersal "only when the police reasonably believe that a threat to the security or peace of the embassy is present"); *Grayned*, 408 U.S. at 114 (acknowledging that enforcing ordinance prohibiting noisy interference with school activity "requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible"); *Colten*, 407 U.S. at 109 (upholding conviction for disorderly refusal to obey dispersal order where "police had cause for apprehension . . . [of] the risk of accident").

All things considered, the Chicago ordinance advances the group goals of security without infringing on individual constitutional rights. In many respects, the legality of this

ordinance poses a far less severe risk to liberty than the customary right of officers to detain individuals reasonably suspected of crime. Notably, Chicago does not authorize a detention based upon loitering with a gang member, but only upon refusal to obey the dispersal order. Far from requiring detention, the police officer's order assumes detention will be avoided when the individual complies with the order. Accordingly, while the Chicago ordinance contemplates that the individual will exercise his or her freedom to walk away, a Fourth Amendment seizure contemplates that the police will "restrain[] his freedom to walk away," *Terry*, 392 U.S. at 16. At most, in other words, the dispersal order intrudes upon a generalized privilege of casual association in public places -- a privilege that receives no special constitutional protection under *City of Dallas v. Stanglin*, 490 U.S. 19 (1989). The lower-court's contrary position should be reviewed and reversed.

C. The Chicago Ordinance Does Not Violate Substantive Due Process.

In addition to misjudging vagueness law, the lower court erred in striking the law in all of its applications (*i.e.*, facially) on substantive due process grounds. While the court properly recognized that the law was subject to rational-basis review and could be invalidated only if it "intrude[s] upon personal liberties arbitrarily or in an utterly unreasonable manner," Pet. 18a, it nonetheless found the law unconstitutional. This, too, was error, and ought to be reviewed.

It is difficult to see how the Chicago ordinance falls short of meeting the modest requirement of rational lawmaking. While the laws at issue in *Papachristou* may not have contained a rational means-end fit, Pet. 18a-19a, this law certainly does. It takes on the acute problems of youth gang crime by carefully regulating criminal gang loitering in the urban setting. Three specific harms form the basis for the law:

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liberty than the individuals reasonably expect. It does not authorize a police officer to detain a member, but only to arrest him from requiring detention will be consistent with the order. The templates that the police use to walk away, and that the police will use, 392 U.S. at 16. It intrudes upon a person's privacy in public places -- a violation of protection under the Fourth Amendment (1989). The lower court's decision is reversed.

Not Violate

Now, the lower court's decision (i.e., facially) on the ground that the court properly applied rational-basis review and that the ordinance does not violate personal liberties under the Fourteenth Amendment, Pet. 18a, it is reversed.

This, too, was

The ordinance falls within the scope of rational lawmaking. It does not have contained any unconstitutional provisions. It certainly does not violate the First Amendment by carefully defining the crime by carefully defining the crime in a setting. Three

- * **Intimidation.** By occupying a specific street corner or some other public place, criminal gang members chill ordinary, legitimate passage by law-abiding citizens, thereby securing an area from which to conduct criminal activity -- most prominently and most usually, drug-dealing.
- * **Facilitation.** The presence of loitering criminal gang members provides a context in which crime flourishes. A drug transaction in a loitering crowd, for example, provides cover, allows perpetrators to evade being caught, and creates a group dynamic of lawlessness that is larger than the sum of its individual parts. The conspicuous public presence of the gang also makes it difficult for innocent youths to resist the temptation (or outright pressure) to join one or another criminal gang.
- * **Victimization.** A particularly cruel feature of criminal gang activity is the loss of young lives through gang shootings, be they the lives of fellow gang members or those of unfortunate bystanders. Loitering by persons with identifiable gang membership, the Chicago experience has shown, creates a frequent target for rival gangs.

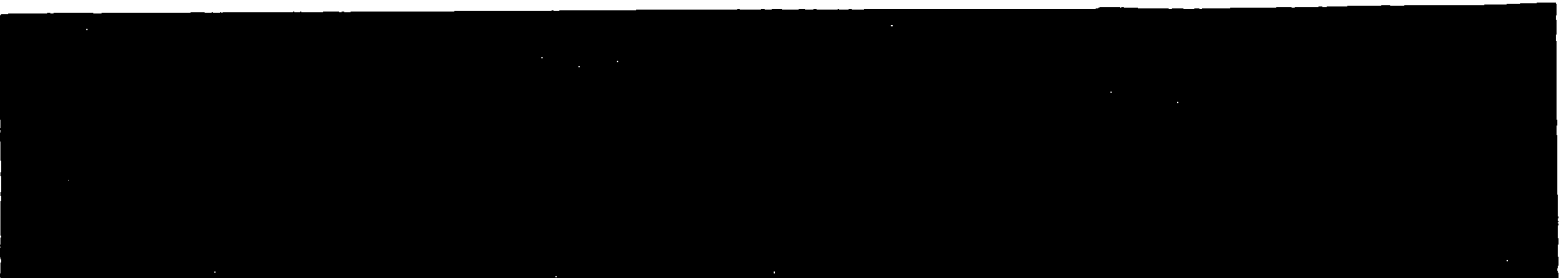
Plainly, these reasons together with those identified in the extensive hearings before the Chicago City Council, suffice to establish a rational basis for enacting this law.

But even if these rational bases did not support the legislation in some circumstances, they most assuredly supply sufficient grounds to prevent the Illinois Supreme Court from striking the law facially, which is to say in all of its applications. A facial challenge is the most difficult to sustain. Because courts have a duty to save, not destroy, legislation, *see Adams*

Fruit Co. v. Barrett, 494 U.S. 638, 647 (1990), the Court has long held that a facial challenge may succeed only after the claimants have met their burden of showing "no set of circumstances" in which the law may be constitutionally applied." *United States v. Salerno*, 481 U.S. 739, 745 (1988); *See Reno v. Flores*, 507 U.S. 292, 301 (1993). A similar rule governs vagueness challenges. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (facial challenge must be rejected unless the law is "impermissibly vague in all of its applications"). In some circumstances, if not in most or all circumstances, the police clearly do not violate substantive due process when they order individuals reasonably suspected of criminal gang activity to disperse.

For the foregoing
urge the Court to grant
decision.

March 9, 1998



CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to grant the writ and reverse the lower-court decision.

Respectfully submitted,

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March 9, 1998

In the Supreme Court of the United States

October Term, 1997

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

(Corrected)

BRIEF OF THE UNITED STATES CONFERENCE OF
MAYORS, THE NATIONAL LEAGUE OF CITIES,
THE NATIONAL ASSOCIATION OF COUNTIES,
THE INTERNATIONAL CITY/COUNTY
MANAGEMENT ASSOCIATION, THE
INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION and THE INTERNATIONAL
ASSOCIATION OF CHIEFS OF POLICE AS AMICI
CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE¹

The organizations filing this amicus brief all have a vital interest in legal issues affecting the powers and responsibilities of local governments. The United States Conference of Mayors is the official nonpartisan organization of the more than 1,000 cities in the United States with populations of 30,000 or more. The National League of Cities is the country's oldest and largest organization serving municipal government. Its direct members include more than 1,400 cities of all sizes and 49 state municipal organizations; its total membership includes over 17,000 municipalities. The National Association of Counties represents over 3,000 counties. The International City/County Management Association is the professional association that represents the interests of over 8,800 appointed local government managers.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan organization consisting of over 1,400 local governments and their attorneys. Member governments operate IMLA through their chief legal officers. The International Association of Chiefs of Police, Inc. is the largest organization of police executives and managers in the world, consisting of more than 15,000 members from 72 nations.

¹ The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Chicago's gang-loitering ordinance is a narrowly tailored response to the very serious problem of gang intimidation on city streets. As demonstrated in Part I below, urban gang violence has reached epidemic proportions as gangs have gained a stranglehold on many inner-city neighborhoods. Law-abiding citizens have become prisoners in their own homes, afraid to venture out because of the gang members who loiter in the streets outside their doors. Chicago's gang-loitering ordinance was designed to give police a weapon to break the gangs' stranglehold, by allowing officers to order groups of gang members congregating for no apparent purpose to disperse and to arrest those who refuse to "move on."

Purporting to apply this Court's decision in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Illinois Supreme Court struck down the ordinance on grounds that would make it impossible for local governments to enforce almost any loitering ordinance. First, the court below found the very concept of "loitering" to be too vague to provide a predicate for the imposition of criminal penalties—even though in this case, the ordinance permitted a person loitering in the company of gang members to be arrested only if he or she refused a police order to "move on." Then, the court went even further, suggesting that a valid gang loitering ordinance could never be constructed, no matter how precise its wording, because it would inevitably infringe on a perceived constitutional right to loiter.

This Court should grant the City's Petition in order to remedy the confusion apparent in the lower courts concerning the proper reach of this Court's decision in *Papachristou*. As demonstrated in Part II below, the Illinois Supreme Court's conclusion that Chicago's gang-loitering ordinance is unconsti-

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Communities throughout the country are searching for new and innovative ways to control gang violence and intimidation. Decisions like this one inevitably chill legitimate experimentation. This Court should grant certiorari and reverse the decision below.

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ARGUMENT

I. The Chicago Ordinance Is An Appropriate Response To Gang Warfare

A. Urban Gang Violence Has Reached Epidemic Proportions

America's cities are under siege. In most large urban areas, and increasingly in medium and small ones as well, stories of innocent persons shot in gang war crossfires have become staples of newspaper headlines and TV news. *E.g.*, Gammon, *Suspected Gang Member Held in Fatal Shooting of 13-Year-Old*, L.A. Times, Feb. 27, 1998, at B5; Power, *Boy headed to school killed by gang member, police say*, Dallas Morning News, Jan. 29, 1998, at 21A; Craig & Boyd, *Police order crackdown after drive-by killings*, Ft. Worth Star-Telegram, Jan. 7, 1998, at 1.

There are over 23,000 youth gangs in the United States, with over 650,000 gang members. U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention Fact Sheet #72 (Dec. 1997) ("OJJDP Fact Sheet"). Gangs are active in 98 percent of municipalities with populations over 100,000. Statement of Steven R. Wiley, Chief of FBI's Violent Crimes and Major Offenders Section, before the U.S. Senate Committee on the Judiciary, Apr. 23, 1997 ("Wiley Statement"). Chicago has some 125 street gangs, with more than 100,000 members. James B. Burns, U.S. Attorney, *Anti-Violent Crime Initiative Fact Sheet Northern District of Illinois* (1996). Four of Chicago's gangs—the Gangster Disciples, the Vice Lords, the Latin Kings, and the Latin Disciples—account for half of the city's gang members, dominate vast sections of the city, and have extended their tentacles into 35 states. Wiley Statement, *supra*.

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These street gangs are not benign associations of disadvantaged youths, but sophisticated criminal enterprises. A recent study, based on interviews with 99 gang members in St. Louis, found that most members "define their gang in terms of criminal involvement." G. David Curry & Scott H. Decker, *What's in a Name?: A Gang by any Other Name isn't Quite the Same*, 31 Val. U. L. Rev. 501, 504 (1997). After statistically demonstrating that young people commit more crimes, and more serious crimes, during periods of gang membership than prior to entering or after leaving the gang, the study's authors concluded: "Gangs facilitate the commission of crime. To ignore that is to ignore (or worse, to excuse) the violence gang members commit against each other and their communities." *Id.* at 514.

Although criminal gangs have long been part of the urban landscape, they have taken a dramatic new direction in recent years, away from small-scale and localized activities to highly organized takeovers of entire neighborhoods based on the acquisition of lethal weaponry financed by the lucrative trade in crack cocaine. See Herbert C. Covey et al., *Juvenile Gangs* 101 (1992); Mills & Bunuel, *Small Gang's Big Grip Troubles Neighborhood—The Saints Have Grown More Violent And More Diverse Since Forming In The 1960s*, Chi. Trib., Feb. 11, 1998, at B1. Brass knuckles and baseball bats are no longer the weapons of choice. See *There Are No Children Here*, Economist, Dec. 17, 1994, at 21 ("Now automatic and semi-automatic assault weapons are *de rigueur*"). Chicago and Los Angeles alone accounted for over 1,000 gang homicides in 1994. OJJDP Fact Sheet, *supra*. As one researcher has concluded, "The amount of lethal violence currently directed by youth gangs in major cities both against one another and against the general public is without precedent." Covey, *Juvenile Gangs*, *supra*, at 27.

Vast stretches of the nation's cities have become the equivalent of war zones. A study of Chicago's gangs labeled them "a mobilized army, in the tens of thousands." Chicago Crime Commission, *Gangs: Public Enemy Number One* (1995). Gang-dominated parts of Los Angeles have been described as "small armies of youths fighting one another and the police." Stanley, *Child Warriors*, Time, June 18, 1990, at 30. Indeed, the U.S. Army has trained its doctors in a South Central hospital to familiarize them with the types of gunshot wounds they may encounter on the battlefield. Stanley, *Los Angeles: All Ganged Up*, Time, June 18, 1990, at 50.

The gangs themselves view their operations militarily. The Economist reported on an "area co-ordinator" of Chicago's Gangster Disciples who controls a stretch of turf ten blocks long and five blocks wide and who has 150 "soldiers" working for him. *There Are No Children Here, supra*. These gang "soldiers" are becoming progressively younger. See Thomas, *Putting Children on the Front Lines*, Wash. Post, June 20, 1996, at A1; Mills & Bunuel, *Not yet 13—and a murder suspect*, Chi. Trib., Feb. 4, 1998, at A1; *There Are No Children Here, supra* (citing Chicago anti-gang counselor's estimate that 80% of boys aged 13 to 15 in the area where he works are involved in gangs). Children growing up in gang-dominated neighborhoods often show signs of post-traumatic stress disorder. Alfredo Gonzalez et al., *Introduction to Gang Violence Prevention* 5-6 (1990). As one journalist reported several years ago, "many of the children emerge from the streets of Los Angeles more psychologically scarred than the young mujahedin who patrol the mountain passes of Afghanistan." Stanley, *Child Warriors, supra*, at 30.

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B. The Gangs Use Street Intimidation As A Military Tactic

Stationing small groups of gang members on the streets is vital to the success of the gangs' criminal operations. These groups stake out and lay claim to gang turf, sell drugs to finance the procurement of arms, recruit new members (often coercively), serve as lookouts and intelligence gatherers, and intimidate neighborhood residents and passers-by. See Pet. 3. Intimidation takes many forms, including wearing gang colors and clothing, flashing gang signs, and plastering buildings with graffiti. See Michael Genelin, *Gang Prosecutions: The Hardest Game in Town*, in *The Gang Intervention Handbook* 417 (1993). Street-corner squads of gang members also facilitate the commission of violent gang crimes. See Malcolm W. Klein, *The American Street Gang* (1995); *Man Demanding Gang Affiliation Shoots Teen Standing on Street*, Chi. Trib., Feb. 17, 1998, at B3.

Law-abiding citizens are effectively imprisoned in their homes as a result of the mere presence of gang members on the streets. A California State Task Force on Gangs and Drugs observed that "[s]ome communities are literally held captive by the violence, intimidation and decay." California Council on Criminal Justice, State Task Force on Gangs and Drugs, *Final Report* 16 (1989). One woman told a court that the presence of gang members made her afraid to walk down her street to buy a loaf of bread in broad daylight. Zane, *Judgment against Owner of Crime-Ridden Building*, S.F. Chron., Mar. 21, 1995, at A18. Civil rights leader Jesse Jackson expressed the feelings of many when he stated, "Just to think we can't walk down our

own streets, how humiliating." Johnson, *Crime: New Frontier*, Chi. Sun-Times, Nov. 29, 1993, at 4.²

The California Supreme Court has vividly portrayed what can happen to a community when gang members are permitted to congregate without any effective control. Describing a four-square-block neighborhood in San Jose as "occupied territory," the court explained:

Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency—openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on

² Although some would argue that the police action authorized by the Chicago ordinance might have a harsh and disproportionate impact on minority youths, prominent African-American scholars have recognized that the failure of municipalities to take back the streets from gang members will permit the much harsher impact of gang violence to continue to flourish. In the words of Randall Kennedy, "the main problem confronting black communities in the United States is not excessive policing and invidious punishment but rather a failure of the state to provide black communities with the equal protection of the laws." Randall Kennedy, *The State, Criminal Law, and Racial Discrimination*, 107 Harv. L. Rev. 1255, 1256 (1994). See also Christo Lassiter, *The Stop and Frisk of Criminal Street Gang Members*, 14 Nat'l Black L.J. 1, 2 (1995) (urging the need to "stop and frisk" street gang members and to permit identifiable membership in a criminal gang to "alone constitute reasonable suspicion"). There can be no dispute that the most frequent victims of gang violence are law-abiding residents of minority communities. See Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, and Unequal* 179-198 (1992) (detailing racial demographics of crime victims).

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the hoods of residents' cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. * * * The people of this community are prisoners in their own homes.

People ex rel. Gallo v. Acuna, 929 P.2d 596, 601 (Cal. 1997).

Unchecked gang intimidation has a snowballing effect: law-abiding citizens feel pressured to move out of gang-ridden communities, leaving behind a neighborhood of increasingly concentrated criminal activity. Those who stay behind are unlikely to venture out into the streets, where "their simple presence would otherwise be a deterrent to crime." Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 371 (1997). Indeed, residents may be afraid even to report a crime, because cooperating with the authorities may be perceived not only as dangerous, but useless as well. *Id.* at 376.

Children are particularly vulnerable to the intimidation of gang members congregating on the streets. Fear is the primary tool of gang recruitment. If you're a child and not in a gang, a Chicago anti-drug counselor told the Economist, "you're a target wherever you go." *There Are No Children Here, supra*. In Chicago, the heavy gang presence on the streets around the Robert Taylor Homes housing project has resulted in "waves of fear-induced absenteeism" from neighborhood

schools, prompting hundreds of volunteers to band together to shepherd children to school and the School Board to hire dozens of parents to serve as escorts. Braun, *Shepherds for a Flock in the Cross-Fire*, L.A. Times, Jan. 16, 1998, at A1; Martinez, *Parents paid to walk line between gangs and school*, Chi. Trib., Jan. 21, 1998, at A1.

C. Prophylactic Measures, Such As The Chicago Ordinance, Are Vital Tools.

Traditional police methods, even when coupled with increasingly stiff penalties on gang offenders, have failed to control gang violence and intimidation. See C. Ronald Huff, *Denial, Overreaction, and Misidentification*, in *Gangs in America* 310, 313 (C. Ronald Huff ed., 1990); Walter B. Miller, *Why the United States Has Failed to Solve Its Youth Gang Problem*, in *Gangs in America* 263, 267; *Steps Needed to Combat Gangs*, L.A. Times, Feb. 15, 1998, at B9 ("Efforts to rid our communities of gangs are either nonexistent or not working"). Gang-related violence "is so sporadic, so random, so hard to predict, that it's hard to stop," according to a police official in Elgin, a small city close to Chicago. "There's nothing that we haven't done or haven't tried to stop the gangs." Grandziel, *Gang Shootings Riddle the Peace Amid Local Rivals*, Chi. Trib., Jan. 15, 1998, at B1.

Studies show that gang murders are less likely to be solved than other murders, in part because they generally take place on the street and thus leave few physical clues. See *Gang Killings Exceed 40% of L.A. Slayings*, L.A. Times, Dec. 5, 1996, at A1. Moreover, gang intimidation often succeeds in frightening potential witnesses away from the courtroom, leaving prosecutors without a case. See *Acuna*, 929 P.2d at 614 (noting that numerous residents "refused to furnish declarations, fearing for their lives if any gang member should

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In light of the failure of traditional policing methods, leading criminologists have stressed the need for forceful preventive measures against gang activity. See James Q. Wilson, *Just Take Away Their Guns*, N.Y. Times Mag., Mar. 20, 1994, at 46-47. Local governments have taken a number of different approaches. For example, nearly a dozen cities in California—including Los Angeles, Pasadena, Norwalk, and San Jose—have sought civil injunctions against gang actions that constitute a public nuisance. Savage & Rivera, *Court Upholds Injunction Against Gangs*, L.A. Times, June 28, 1997, at A1. Other communities have stepped up enforcement of teen curfews.

Like the Chicago ordinance, these approaches seek to prevent serious crime *before* it occurs by breaking the gangs' stranglehold on the streets and destroying their aura of invincibility. Dispersing gang members and arresting them for violating a loitering or similar ordinance disrupts their ability to commit more serious crimes. Moreover, it sends a clear signal that the community will no longer tolerate gang intimidation and disorder. Over time, that strategy should allow law-abiding citizens to regain control of the streets and encourage young people who are now forced into gangs to resist their recruitment efforts. See David Matza, *Delinquency and Drift* 52-59 (1990). In fact, the empirical evidence cited by the City in its Petition shows that the Chicago ordinance did succeed in substantially decreasing gang crime. See Pet. 9.

For all of the reasons outlined below and in the City's Petition, the Chicago ordinance is "a legitimate and appropriate



means by which to combat the problems of escalating violence and crime in American cities." Lisa A. Kainec. Comment. *Curbing Gang Related Violence in America*. 43 Case W. Res. L. Rev. 651, 652 (1993). Indeed, in many ways, it is a more effective and less restrictive alternative than other measures that have been found constitutional. The kind of injunctions against gang activity upheld by the California Supreme Court in *Acuna* have proven difficult to enforce. See L. Sherman, *Oceanside gang becoming active despite injunction, police confirm*, San Diego Union-Trib., Feb. 18, 1998, at B3. And teen curfews are much more intrusive than Chicago's narrowly-targeted loitering ordinance, since they restrict the liberty of *all* teenagers.³

II. The Illinois Supreme Court's Interpretation Of *Papachristou* Conflicts With Numerous Cases Upholding The Validity Of Loitering Ordinances.

This Court long has recognized that cities have the right to prevent "antisocial conduct" on their streets and sidewalks through ordinances directed with "reasonable specificity" toward the prohibited conduct. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). In this case, however, the Illinois Supreme Court struck down Chicago's gang-loitering ordinance on the ground, among others, that it failed to provide a sufficient explanation of the conduct prohibited and left too much discretion to individual police officers to decide who could and could not be ordered, on pain of arrest, to "move on."

³ Curfews are also difficult and costly to enforce. A recent survey by *amicus* U.S. Conference of Mayors found that 276 of 347 responding cities had nighttime curfews for teenagers, but reported that many respondents complained of the high costs involved in enforcing those curfews. See *More cities use curfews to try to cut youth crime*, Chi. Trib., Dec. 1, 1997, at A10.

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The court rejected the argument that the officer's discretion was properly limited by the requirement that an order to disperse be given only if he "reasonably believe[d]" that a group of loiterers included a member of a criminal street gang. Pet. App. 61a. Citing this Court's decision in *Papachristou*, the court below treated that limitation as immaterial, concluding that Chicago's ordinance effectively allowed police to arrest anyone they deemed to be undesirable. Pet. App. 17a.

In fact, the ordinance does no such thing. No one can be arrested without first disobeying an order to "move on." Moreover, an order to "move on" will not be valid unless the officer had a reasonable suspicion that one of the people standing around in a group for no apparent purpose was a member of a criminal gang. The Chicago City Council expressly found that "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity." Pet. App. 60a-61a. Thus, the ordinance is designed to allow an officer to issue an order to "move on" only in circumstances where there is a reasonable apprehension of a likely threat to the safety of persons or property.

The Chicago ordinance is similar in many respects to more traditional loitering ordinances, which have often—although not always—been upheld against vagueness challenges. For example, in *City of Milwaukee v. Nelson*, 439 N.W.2d 562, 563 n.1 (Wis. 1989), the Wisconsin Supreme Court rejected a vagueness challenge to an ordinance that prohibited loitering "in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that

warrant alarm for the safety of persons or property."⁴ Accord *State v. Ecker*, 311 So. 2d 104, 109 (Fla. 1975); *Bell v. State*, 313 S.E.2d 678 (Ga. 1984) (upholding a similar ordinance); *Salt Lake City v. Savage*, 541 P.2d 1035, 1036 (Utah 1975) (same); *State v. Starks*, 186 N.W.2d 245 (Wis. 1971) (same); *City of Seattle v. Drew*, 423 P.2d 522 (Wash. 1967) (same). In *Ecker*, the Florida Supreme Court rejected the argument that the ordinance was unconstitutional because it was subject to the kind of arbitrary enforcement condemned in *Papachristou*, noting that the circumstances that would permit an officer to make a stop pursuant to the ordinance "are not very different from those that the United States Supreme Court described as 'specific and articulable facts' in *Terry v. Ohio*, [392 U.S. 1, 21 (1968)]." 311 So. 2d at 110.

Although a number of courts have disagreed and struck down similar loitering ordinances,⁵ *Terry* provides a logical framework for limiting an officer's discretion under traditional loitering ordinances and under the Chicago ordinance as well. In *Terry*, this Court reached a reasonable accommodation between individual and community rights by permitting police officers to pat down suspects whom they reasonably suspect of contemplating a crime. That decision allayed the same kinds of concerns about arbitrary enforcement voiced by the Illinois

⁴ The ordinance challenged in *Nelson* is based on the American Law Institute's Model Penal Code § 250.6. See 439 N.W.2d at 565.

⁵ See *City of Bellevue v. Miller*, 536 P.2d 603 (Wash. 1975) (striking down an ordinance similar to that upheld in the *Nelson* case); accord *City of Portland v. White*, 495 P.2d 778 (Or. Ct. App. 1972); *Powell v. Stone*, 507 F.2d 93 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465 (1976); *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974), aff'd, 420 U.S. 283 (1975); *People v. Berck*, 300 N.E.2d 411 (N.Y. 1973).

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Supreme Court here, by crafting an objective standard—"reasonable suspicion"—based on how "a reasonably experienced police officer" would construe the facts at hand. 392 U.S. at 21-22. The Chicago ordinance is simply an application of the *Terry* principle that an experienced police officer should be able to take appropriate crime prevention measures based on a reasonable suspicion informed by objective factors. See also *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (reaffirming *Terry* reasonableness standard); *id.* at 380 (Scalia, J., concurring) (under the common law at the time the Bill of Rights was ratified, it was "reasonable to detain suspicious persons for the purpose of demanding that they give an account of themselves").

Like a *Terry* stop, an order to disperse under the Chicago ordinance and the implementing Police Department Order (see Pet. App. 66a-67a) has to be based on objective criteria that lead to reasonable suspicion by an experienced police officer. But those criteria are relatively easy to define. Gang members make a point of flaunting their membership, via particular tattoos, jackets, clothing colors, clothing position (e.g., the direction their hats or belt buckles face), hand signals, and hair styles. See Martin S. Jankowski, *Islands in the Street: Gangs and American Urban Society* (1991); *Davis v. State*, 1998 WL 57720, at *9-*10 (Ala. Feb. 13, 1998) (describing how bandanna colors identify gang affiliation). As a result, gang membership lends itself to articulable, objective, and reasonable discernment by well-trained and experienced police officers.⁶

⁶ Indeed, an identification of gang membership is likely to be a good deal more objective than the kind of drug courier profile that this Court found to be sufficient to justify detention of an alleged
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The Illinois Supreme Court's void-for-vagueness analysis is indicative of the confusion that surrounds loitering ordinances generally.⁷ *Amici* urge this Court to grant the City's Petition in order to dispel that confusion and enable local governments to enforce reasonably drawn measures to control crime, like Chicago's gang-loitering ordinance.

III. The Illinois Supreme Court Erred In Concluding That The Ordinance Unreasonably Intrudes Upon Constitutional Protected Activity.

This Court should also grant the City's Petition to review the Illinois Supreme Court's conclusion that *Papachristou* recognizes an apparently absolute constitutional right to loiter. As the City points out, the California Supreme Court recently considered—and rejected—the very same argument in *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal.

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drug trafficker in *United States v. Sokolow*, 490 U.S. 1 (1989).

⁷ The courts are also sharply divided on whether *Papachristou* requires invalidating ordinances that proscribe "loitering plus." Compare, e.g., *City of Tacoma v. Luvone*, 827 P.2d 1374, 1379 (Wash. 1992) (upholding a drug-loitering ordinance that makes it unlawful "to loiter in or near any thoroughfare, place open to the public, or near any public or private place in a manner and under circumstances manifesting the purpose to engage in drug-related activity"); *State v. VJW*, 680 P.2d 1068, 1070 (Wash. Ct. App. 1984) (upholding a Seattle "prostitution loitering" ordinance); and *City of Akron v. Holley*, 557 N.E.2d 861, 867 (Ohio Mun. Ct. 1989) (upholding a drug-loitering ordinance), with *American Civil Liberties Union v. City of Alexandria*, 747 F. Supp. 324 (E.D. Va. 1990) (invalidating an ordinance similar to Tacoma's); *Wyche v. State*, 619 So. 2d 231 (Fla. 1993) (same); *E.L. v. State*, 619 So. 2d 252, 253 (Fla. 1993) (same); *Johnson v. Carson*, 569 F. Supp. 974, 975 (M.D. Fla. 1983) (striking down a prostitution-loitering ordinance).

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1997). In that case, the court upheld an injunction against gang activity that was found to constitute a public nuisance. In practice, the injunction was in many ways more restrictive than the Chicago ordinance, enjoining dozens of gang members from, among other things, "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant * * * or with any other known" member of the identified gangs. *Id.* at 608. Despite the breadth of the injunction, the California Supreme Court declined to find that the gang members' constitutional rights to associate were implicated. Because the injunction did not infringe on either intimate or private activity or joint political or social advocacy, the court concluded that it simply did not implicate any constitutionally protected interest. *Id.* at 609.

In any event, the Illinois Supreme Court erred in concluding that whatever intrusion there might be into protected "liberty" interests was unreasonable. As the California Supreme Court recognized in *Acuna*, a court must consider not only the rights of gang members, but also the rights of the community:

The state has not only a right to "maintain a decent society," but an obligation to do so. * * * [T]he community's right to security and protection must be reconciled with the individual's right to expressive and associative freedom. Reconciliation begins with the acknowledgment that the interests of the community are not invariably less important than the freedom of individuals. Indeed, the security and protection of the community is the bedrock on which the superstructure of individual liberty rests.

Id. at 603 (citation omitted).

By concentrating solely on the "liberty" interests of people who had refused to "move on" in response to a police order, the Illinois Supreme Court ignored the liberty interests of law-abiding citizens. As the record in this case and numerous scholarly studies demonstrate, permitting groups of gang members to camp out on city streets impedes the very liberties invoked by the court below—to travel, to move freely, and to associate with others. People living in gang-infested neighborhoods who wish to walk along their streets and associate with their neighbors have every right to do so free of threats, whether voiced or silent, and to expect the police to take crime prevention measures to promote their personal safety and the integrity of their homes, businesses, and communities.

In his concurring opinion in *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949), Justice Frankfurter remarked that "[w]ise accommodation between liberty and order always has been, and ever will be, indispensable for a democratic society." The Chicago ordinance provides a good example of just such a "wise accommodation." The ordinance recognizes that individual liberties are hollow without community safety. Although it imposes some restraints on the ability of some individuals to stand on the street for no apparent purpose, those restraints are minimal and more than justified by their potential to greatly expand the liberties enjoyed by law-abiding residents.

As the California Supreme Court observed in *Acuna*, to allow the liberty of the peaceful and industrious residents of a community to "be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense." 929 P.2d at 618. The Chicago ordinance implements the most basic promises of our Constitution—to "insure domestic Tranquility, provide for the

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CONCLUSION

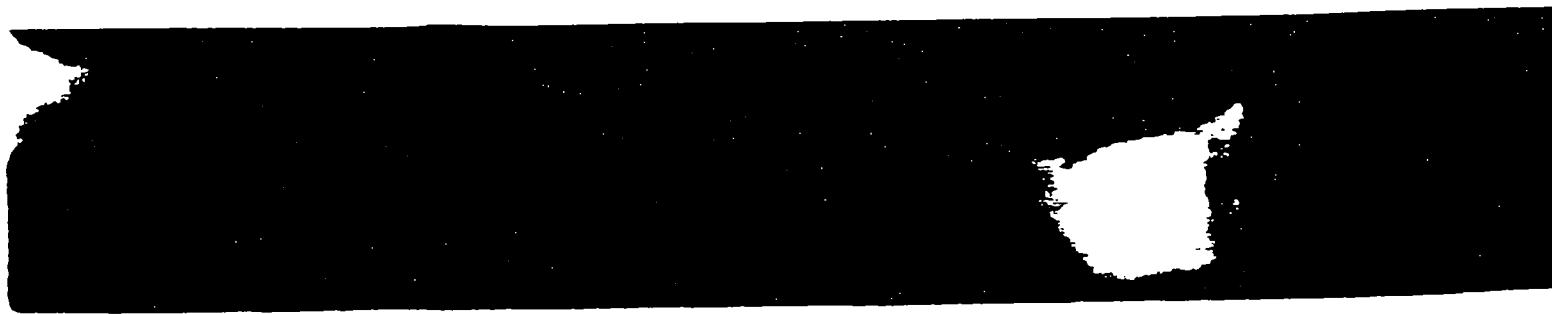
For the reasons outlined above and in the City's Petition, the *amici* urge the Court to grant the City's Petition and to reverse the judgment below.

Respectfully submitted.

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