The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances

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COMMENTS

The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances

Christopher S. Yoo*

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Cities throughout the nation are plagued by the growth of criminal street gangs.\(^1\) To combat this growth, state and local governments have enacted a wide variety of legislation increasing criminal sanctions for gang behavior.\(^2\) In addition, state and local governments have


turned with increasing frequency to civil remedies to augment their criminal law enforcement efforts.3

Gangs pose a particularly acute problem in California.4 Reports of gang violence are increasing, and gang-related homicides are at an all-time high in the Los Angeles area.5 Despite the enactment of new criminal sanctions to combat gangs6 and the use of existing law enforcement techniques at their constitutional limits,7 these efforts have

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, § 856 (West Supp. 1994), subjecting street gangs to statutes designed to curb organized crime, e.g., Tex. Penal Code Ann. §§ 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).


5 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.


7 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,
not quelled the increase in gang-related crime. Consequently, California has been particularly innovative in using civil remedies to control gang activity.

One such innovation is taking place in the cities of Los Angeles, Burbank, San Jose, Westminster, Oakland, and Norwalk, where city attorneys have asked courts to declare certain street gangs or gang members public nuisances and to enter injunctions to abate them. City officials and community members report that these injunctions have been extremely effective in reducing gang activity. Because of their success and the universal availability of public nuisances, civil remedies have been particularly innovative in using civil remedies to control gang activity.8


9 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).


16 Other states have enacted statutes specifically authorizing street gangs to be enjoined as public nuisances. E.g., 740 ILL. COMP. STAT. § 147/35 (Smith-Hurd Supp. 1994); TEX. CIV. PRAC. & REM. CODE ANN. § 125.022 (West 1994).

sance doctrine, other municipalities facing burgeoning gang problems are considering pursuing similar injunctions.18

However, these antigang injunctions raise difficult constitutional questions.19 For instance, since court orders can prohibit otherwise legal conduct, they operate as personal criminal codes that may infringe upon defendants' substantive constitutional rights.20 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.21

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.22 Part II

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19 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.


21 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 non-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
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.23 Applying California’s general nui-
sance statutes, 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.  

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. 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.” Consequently, Judge Deering limited the scope of the injunction to acts already illegal under California law.  

Even in this limited form, the injunction reportedly was effective in curbing gang-related crime. 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. Residents also noted a marked reduction in crime throughout the neighborhood in which the injunction was effective. Since the City Attorney felt that the preliminary injunction had solved the

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24 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 § 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.” § 3480. The proper way to abate a nuisance is with an injunction. § 3491. City Attorneys are authorized to bring actions to abate public nuisances. CAL. CIV. PROC. CODE § 731 (West 1980).


28 The preliminary injunction prohibited only trespassing, defacing property, blocking public ways, urinating or defecating in public, littering, and “annoy[ing], harass[ing], intimida[ting], 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.

29 See Harris, supra note 18.

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

31 See Harris, supra note 18; Westside Gang Crime Off, supra note 17.
problems at which it was aimed, he made no motion to make the injunction permanent, and it lapsed after one year.\textsuperscript{32}

Despite the success of the \textit{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: \textit{People ex rel. Fletcher v. Acosta},\textsuperscript{33} \textit{People v. Blythe Street Gang},\textsuperscript{34} \textit{People ex rel. City Attorney v. Acuna},\textsuperscript{35} \textit{People ex rel. Jones v. Amaaya},\textsuperscript{36} \textit{People ex rel. City Attorney v. Avalos},\textsuperscript{37} \textit{People v. “B” Street Boys},\textsuperscript{38} and \textit{City of Norwalk v. Orange Street Locos}.\textsuperscript{39}

Courts granted the requested injunctions in \textit{Acosta},\textsuperscript{40} \textit{Blythe Street},\textsuperscript{41} \textit{Acuna},\textsuperscript{42} \textit{Avalos},\textsuperscript{43} and \textit{Orange Street Locos}.\textsuperscript{44} Only in Blythe

\textsuperscript{32} See Zamora, supra note 6.


\textsuperscript{34} Complaint for Preliminary and Permanent Injunction to Abate Public Nuisance, People v. Blythe St. Gang, No. LC 020855 (Cal. Super. Ct. Los Angeles County filed Feb. 22, 1993).


\textsuperscript{38} 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).

\textsuperscript{39} 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).

\textsuperscript{40} People ex rel. Fletcher v. Acosta, No. EC 010205 (Cal. Super. Ct. Los Angeles County filed Nov. 2, 1992) (order granting preliminary injunction); see also Boga, supra note 20, at 480-81. Reportedly, the \textit{Acosta} injunction has not been seriously challenged in court. See Zamora, supra note 6.

\textsuperscript{41} People v. Blythe St. Gang, No. LC 020855 (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 \textit{Blythe Street} injunction).


\textsuperscript{43} 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.

\textsuperscript{44} 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; \textit{City Wins an Injunction Against Violent Gang}, \textit{The RECORD} (Los Angeles), Aug. 26, 1994, at A17 [hereinafter City Wins
Street did the court accompany its order granting the antigang injunction with an opinion analyzing the legal issues.\textsuperscript{45} 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.\textsuperscript{46} At least two people have been convicted and another two arrested for violating the Blythe Street injunction,\textsuperscript{47} and at least one person has been convicted and two others arrested under the Acuna injunction.\textsuperscript{48} Significantly, in all of these cases the court expanded the permissible scope of antigang injunctions beyond the limits established in \textit{Playboy Gangster Crips} and included provisions specifically rejected by Judge Deering.\textsuperscript{49}


\textsuperscript{46} 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.

\textsuperscript{47} See Thom Mrozek, \textit{Unusual Anti-Gang Injunction Leads to Conviction of Man for Having Pager}, \textit{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, \textit{Gang Suspect Gets 45-Day Jail Term}, \textit{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, \textit{Two Face Charges Under Blythe Street Gang Crackdown}, \textit{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, \textit{Man Charged Again Under Blythe Street Court Order}, \textit{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, \textit{Man Arrested Again Under Ban on Gangs}, \textit{L.A. Times}, Mar. 25, 1994, at B3 (Valley ed.) (reporting that Gonzalez has been charged with violating injunction for third and fourth times).

\textsuperscript{48} See Mary A. Ostrom, \textit{Gang-Control Action OK'd}, \textit{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).

\textsuperscript{49} For example, the courts in \textit{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.3. 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 \textit{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
In contrast, the Amaya and "B" Street Boys courts declined to issue preliminary injunctions against the alleged gang members. 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, 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." Notably, the rejected injunction terms were almost identical to those granted in other cases.

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
terms found in California antigang injunctions that raise particular constitutional problems.54

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.55 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,”56 and the Orange Street Locos injunction employed similar language.57

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54 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 § 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 (Okl. 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.


57 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”).
A clause banning all association with any other gang member was rejected in *Playboy Gangster Crips*.58

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,”59 while the Avalos injunction enjoined defendants from “[d]emanding entry into another person’s residence at any time of the day or night.”60

3. Restrictions on Gang Clothing and Hand Signs.—Although several cities requested a ban on gang attire and hand signs in their initial complaints,61 only the Avalos and Acuna injunctions in San Jose ultimately included this type of provision.62 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.63 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.64

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58 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, § 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).


61 Compare Complainant 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).


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

64 People *ex rel.* City Attorney v. Avalos, No. CV 729089, slip op. at 5 (Cal. Super. Ct. Santa Clara County Mar. 30, 1994) (order granting preliminary injunction); People *ex rel.* City Atto-
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 non-emergency situations; climbing trees, walls, or fences; and passing through tunnels or holes in walls and fences.65

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.66 Furthermore, the Orange Street Locos and Blythe Street injunctions instituted curfews that applied to adults as well.67 The City of Los Angeles also requested a similar curfew in Playboy Gangster Crips, but Judge Deering denied the request.68

65 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) (prohibiting juvenile gang members from being in a public place between midnight and 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). 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).

66 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).

67 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).

68 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.
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, and the *Avalos, Acuna, and Acosta* injunctions banned gang members from "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering" residents. The *Orange Street Locos* injunction restrained defendants and gang members from "harassing, intimidating, . . . or otherwise threatening the peace or safety of any person." Similarly, the *Blythe Street* injunction ordered gang members not to "annoy, harass, intimidate, threaten, [or] challenge . . . any person."

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. 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, sec-

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73 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. Obviouly a legislature cannot authorize courts to infringe on protected freedoms via injunctions any more than it can effect those rights directly through legislation. *Chreh*, *supra* note 20, at 1406 n.434.
tion 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. The Court has referred to freedom of association in two distinct senses: expressive association and intimate association. 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. 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. In the seminal case of NAACP v. Alabama ex rel. Patterson, the Court for the first time protected the "freedom to engage in association for the advancement of beliefs." The freedom of expressive association was reiterated in Griswold v. Connecticut, which noted that “freedom of association [is] a periph-

75 E.g., Roberts, 468 U.S. at 617; Stanglin, 490 U.S. at 24.
76 E.g., Claiborne Hardware, 458 U.S. at 918-20, 924-26.
77 See, e.g., Stanglin, 490 U.S. at 24.
79 Id. at 460.
80 381 U.S. 479 (1965).
eral First Amendment right."81 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.”82 Consequently, courts in the past have interpreted the freedom of expressive association expansively, including a wide variety of organizations within its boundaries,83 including prison gangs.84

More recently, the Court has taken a more restrictive view of the kind of associative activity that can be considered expressive.85 As the Court stated in New York State Club Ass’n v. City of New York,86 “[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.”87 More pointedly, in City of Dallas v. Stanglin,88 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.89 In so holding, the Court limited the breadth of expressive association rights, refusing to recognize a generalized right of “social association.”90 The Court recognized that other courts had often found a right to social associa-

81 Id. at 483.
82 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.”).
83 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); Aladin’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), 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).
87 Id. at 12 (quoting NAACP v. Alabama ex rel. Patterson, 347 U.S. 449, 460 (1958)).
89 Id. at 25 (quoting Board of Directors of Rotary Int’l v. Rotary Club, 481 U.S. 537, 548 (1987)).
90 Id.
tion because of the expansive language in Griswold,91 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.”92 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.93

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.94 Therefore, as in Stanglin, absent indications that gangs undertake First Amendment activities, courts are unlikely to find gangs to be expressive associations.95

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

91 See supra notes 81-82 and accompanying text.
92 Stanglin, 490 U.S. at 25.
94 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, 1992, at 1 (reporting that Chicago gang summit stressed political empowerment); J. Lyon, 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 (Chicago gang 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.).
95 See Boga, supra note 20, at 495-99. But see id. at 499-502 (arguing for a broader First Amendment right to peaceable assembly).
illegal aims, and associations engaging in both legal and illegal activities may still be regulated to the extent that they engage in illegal activities. The mere existence of some First Amendment activity within an association is insufficient to bring all of its activities within the First Amendment. 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. In Roberts v. United States Jaycees, the Court held that enforcing a state law against sex discrimination did not unconstitutionally violate the club members’ right to freedom of association. Conceding that the club does participate in expressive activity, 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. 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.”

Similarly, in Madsen v. Women’s Health Center, Inc., 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.” 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. 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

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100 Id. at 625.
101 Id. at 626.
102 Id. at 623-27.
103 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).
104 114 S. Ct. 2516 (1994).
105 Id. at 2525.
106 Id. at 2526-30.
by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights.\textsuperscript{107}

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 \textit{Roberts} and some of the injunction provisions in \textit{Madsen}, antigang injunctions serve significant, if not compelling, government interests by abating the threat to public health and safety caused by public nuisances.\textsuperscript{108} Moreover, as in \textit{Roberts} and \textit{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.\textsuperscript{109} Therefore, even if courts find that gangs are expressive associations, courts may still issue injunctions if they are sufficiently tailored.

2. \textit{Freedom of Intimate Association}.—It is also unlikely that gangs will be protected by the freedom of intimate association,\textsuperscript{110} 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.”\textsuperscript{111} Determining whether a given association falls within these parameters has proven to be a difficult task. As the Supreme Court noted in \textit{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

\begin{footnotesize}
\begin{itemize}
\item[107] Id. at 2530.
\item[108] 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).
\item[109] \textit{Roberts}, 468 U.S. at 627; \textit{see also Madsen}, 114 S. Ct. at 2524 n.2, 2530.
\end{itemize}
\end{footnotesize}
from the most intimate to the most attenuated of personal attachments."

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." 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."

Viewing antigang injunctions with those considerations in mind, criminal street gangs, like the clubs in *Rotary*, clearly do not constitute intimate associations. Like Rotary Clubs, the gangs involved in these particular cases are relatively large, ranging in size from thirty-eight to four hundred fifty members. Moreover, as in *Rotary*, the fact that gangs engage in constant recruitment activity and open their activities to nonmembers belies any claim that street gangs

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112 *Rotary*, 481 U.S. at 545 (quoting *Roberts*, 468 U.S. at 620) (alteration to quotation in original).
113 Id. at 546 (quoting *Roberts*, 468 U.S. at 620).
114 Id. at 546-47.
115 Boga, supra note 20, at 495-99.
117 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").
118 Reiner, supra note 1, at 41-44 (noting that nonmembers are allowed to participate in gang activities).
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. As the Court held in *New York State Club Ass'n v. City of New York,* "it 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." 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, associations with both legal and illegal goals present a different case. 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.

*NAACP v. Claiborne Hardware Co.* is illustrative. In *Claiborne Hardware,* black citizens were boycotting white merchants to

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119 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).


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

124 *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); *Elffbrandt v. Russell,* 384 U.S. 11 (1966); see also 16A AM. JUR. 2D Constitutional Law § 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).

protest perceived racial injustice. The merchants sought and were granted an injunction against 146 individuals to prevent them from continuing their boycott. 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.

The Court dissolved this injunction because it constituted civil liability on the basis of associational activity. 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.” 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.

The Court proceeded to quote Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.: “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.” 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.

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.

126 Id. at 889, 908.
127 Id. at 889.
128 Id. at 897.
129 Id. at 920.
130 Id. at 918-19.
131 Id. at 920 (quotations and footnote omitted).
132 312 U.S. 287 (1941).
133 Claiborne Hardware, 458 U.S. at 924 (quoting Milk Wagon Drivers, 312 U.S. at 293).
134 Id. at 924-26.
The record of *People ex rel. City Attorney v. Acuna* 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.

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. 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'.)"

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. Gang experts agree that there are different levels of participation in gangs, and a

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136 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.
137 *In re Lincoln J.* (People v. Lincoln J.), 272 Cal. Rptr. 852, 855-56 (Cal. 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).
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. 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, 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. The fact that nonmembers often experiment with gang clothing and inactive gang members still bear gang tattoos makes basing an injunction on such indicia problematic. Furthermore, the Supreme Court held in Claiborne Hardware 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. 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. 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.

Angeles County has noted that its database includes a large number of inactive gang members. 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.

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141 Burrell, supra note 1, at 750 & n.48; Boga, supra note 20, at 485-89.
142 See Claiborne Hardware, 458 U.S. at 920 & n.55.
143 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).
144 Burrell, supra note 1, at 41.
145 Burrell, supra note 1, at 755 n.65.
147 Id. at 924-26.
148 See id.
149 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 Rein, 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.
The risk of guilt by association is particularly acute in those cases where gangs are enjoined as unincorporated associations. 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. 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.

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, 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 contains a definition of gang membership that includes both active participation and intent requirements which, as courts

150. See supra note 49.
151. 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).
152. 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.
153. Robert A. Destro, Gangs and Civil Rights, in GANGS, supra note 1, at 277, 280; Burrell, supra note 1, at 748-50; Harowitz, supra note 140, at 43.
155. 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," § 186.22(a), where a "pattern of criminal gang activity" is defined as the commission, attempt, or solicitation of seven specified offenses, § 186.22(e). Other states have adopted similar definitions. See, e.g., GA. CODE ANN. § 16-15-3 (1992); IOWA.
have held, avoids guilt-by-association problems. Cities pursuing antigang injunctions can similarly avoid guilt-by-association concerns by incorporating these standards and only enjoining persons whose conduct satisfies these definitions.

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. 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.

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." The Supreme Court has encapsulated the freedoms of speech and the press into the term "freedom of expression." 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. This analysis reveals that since demanding entry constitutes speech representing a clear and present
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. The standard of review for restrictions of pure speech turns on whether the restriction is content-based or content-neutral. Content-based restrictions must be "narrowly drawn to serve a compelling state interest" in order to be found constitutional. Content-neutral restrictions are subjected to less rigorous standards. 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.

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163 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.

164 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. Sup. 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.

165 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 § 12-2, at 790-92, § 12-8, at 832-33, 836-37 (2d ed. 1988).

166 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.

167 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...
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. Words that pose a clear and present danger constitute one category of unprotected speech. 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. 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.

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. 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. However, the Court has generally allowed the government greater latitude in restricting expressive conduct than it has in restricting the written or spoken word. As the Court stated

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166 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).


172 See supra part II.B.2.

173 See supra notes 163-67 and accompanying text.

in *United States v. O'Brien*, "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." Similarly, the Court reasoned in *City of Dallas v. Stanglin*:

"[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.

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*. 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.” 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. If related to the suppression of speech, the regulation will be subjected to the same scrutiny as pure speech. If unrelated to the suppression of speech, the less stringent standard announced in *United States v. O'Brien* applies.

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176 Id. at 376.
178 Id. at 25.
180 *Spence*, 418 U.S. at 410-11.
181 *Johnson*, 491 U.S. at 403.
182 Id. For a description of the level of scrutiny for pure speech, see supra notes 163-67 and accompanying text.
184 *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, 1515-18 (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.
It is unclear whether the wearing of symbolic attire such as gang insignia should be analyzed as pure speech or expressive conduct.\(^{185}\) In the pre-Spence case of Tinker v. Des Moines Independent Community School District,\(^{186}\) for example, three public school students were suspended for wearing black armbands to protest American involvement in Vietnam.\(^{187}\) Noting that "the wearing of armbands in the circumstances of this case" was "closely akin to 'pure speech,'"\(^{188}\) the Court invalidated the school's policy of banning such armbands as an unjustified infringement upon free speech.\(^{189}\) Consequently, some courts have reasoned that the right to control one's appearance is protected by the First Amendment.\(^{190}\) However, other courts have disagreed, holding that one's personal appearance is not sufficiently expressive to receive First Amendment protection.\(^{191}\) The Supreme Court has declined to resolve the split in authority, denying certiorari in numerous cases that presented the issue.\(^{192}\)

\(^{185}\) See Tribe, supra note 166, § 12-8, at 825-32 (noting the indeterminacy of the speech/conduct distinction).

\(^{186}\) 393 U.S. 503 (1969).

\(^{187}\) Id. at 504.

\(^{188}\) Id. at 505.

\(^{189}\) 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, 396 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); Baxton 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).


\(^{190}\) See, e.g., Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971). See generally W.E. Shiepley, 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).

\(^{192}\) See Ingram & Dompfl, 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 Hollapple v.
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.\textsuperscript{193} Moreover, in \textit{Cohen v. California},\textsuperscript{194} the Court held that arresting a person for wearing a message on his clothing constituted a content-based restriction and was invalid.\textsuperscript{195} Since injunction provisions prohibiting gang attire and hand signs similarly penalize the wearing of messages, like the statute in \textit{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.\textsuperscript{196}

It is unlikely that courts will find that gang insignia and hand signs fall into one of the categories of unprotected speech.\textsuperscript{197} First, gang insignia and hand signs probably do not constitute fighting words.\textsuperscript{198} Fighting words are words of slight moral value which “by

\begin{footnotes}
\footnotetext[193]{Woods, 500 F.2d 49 (7th Cir.) (per curiam), \textit{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. \textit{Royster v. Board of Educ.}, 365 N.E.2d 889, 891 (Ohio Ct. App. 1977); cf. \textit{Pagan 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); \textit{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).


\footnotetext[194]{See supra note 167 and accompanying text.}

\footnotetext[195]{403 U.S. 15 (1971).}

\footnotetext[196]{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 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. \textit{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).

\footnotetext[197]{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.}

\footnotetext[198]{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 \textit{Feiner v. New York}, 340 U.S. 315 (1951), and commentators have begun to question its vitality, see, e.g., \textit{Murphy, supra note 22, at 1351.}

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their very utterance inflict injury or tend to incite an immediate breach of the peace.\textsuperscript{199} To be fighting words, it is not enough that they make listeners angry; they must actually incite others to violence,\textsuperscript{200} 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.\textsuperscript{201} Although gang attire and hand signs do at times provoke violence,\textsuperscript{202} 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.\textsuperscript{203} 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;\textsuperscript{204} in addition, the lawless action advocated must be more than a generalized threat of future action.\textsuperscript{205} Since gang members wear gang clothing and use hand signs primarily to indicate affiliation and not to incite violence,\textsuperscript{206} and the clothing and hand signs are at worst a generalized threat of action rather than a specific incitement to commit violence,\textsuperscript{207} they should not be regarded as speech that represents

\textsuperscript{199} Chaplin Sky, 315 U.S. at 572.
\textsuperscript{200} 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).
\textsuperscript{201} 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).
\textsuperscript{202} See Burke, supra note 1, at 519; Murphy, supra note 22, at 1332 & n.193.
\textsuperscript{203} 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 non-gang members often wear gang attire. See Ritter, 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.
\textsuperscript{204} See supra note 170 and accompanying text.
\textsuperscript{205} See supra note 171 and accompanying text.
\textsuperscript{206} See supra notes 139-41 and accompanying text.
\textsuperscript{207} 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.
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, because gang clothing and hand signs probably send a particularized message of affiliation likely to be understood by people observing them. 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, the Court considered whether a statute prohibiting flag burning was related to the suppression of speech. 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. 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.

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

208 See supra notes 179-80 and accompanying text.
209 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).
211 Id. at 407-09.
212 Id. at 408.
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, injunction provisions restricting the wearing of gang clothing and the use of hand signs should be found to violate the First Amendment.

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. While the Court has held that the right to travel includes both interstate and international travel, the Court has declined to determine whether this right extends to intrastate travel, and the circuits have split over the issue.

Even if the right to travel includes the right to intrastate travel, like most constitutional rights, it is subject to reasonable limitation. Accordingly, courts have upheld temporary curfews and other restric-

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214 See supra notes 197-207 and accompanying text.
215 But see Charles Mount, Judge Upholds Ban on Gang Insignia, Chi. Triun., 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).
216 394 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).
217 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).
218 Memorial Hosp., 415 U.S. at 255-56.
219 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 Madin, 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.").
tions on movement during times of emergency. Conversely, a restriction that, in light of the asserted governmental interests, unreasonably infringes upon an individual’s freedom of movement is not justified.

In Lutz v. City of York, the Third Circuit considered the constitutionality of an ordinance outlawing “cruising.” The court first concluded that the right to travel does encompass the right to travel intrastate, basing the right in substantive due process. 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. 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.

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. The injunctions, like the ordinance in Lutz, are also limited in geographic scope. And

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221 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).

222 Korematsu v. United States, 323 U.S. 214, 225-26 (1944) (Roberts, J., dissenting); People v. Cofincola, 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 366 (finding probation term that prohibited being in a designated area anytime day or night too harsh and oppressive).

223 899 F.2d 255 (3d Cir. 1990).

224 Id. at 256.

225 Id. at 268.

226 Id. at 269; see also supra note 166.

227 Lutz, 899 F.2d at 270.

228 See supra note 108 and accompanying text.
lastly, since the injunctions only impose a limited curfew and prohibit climbing trees, standing on rooftops, passing through walls, and other limited activities, 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.

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. This Part will first analyze

\[229\text{ See supra part II.B.4.}\]

\[230\text{ The } Lutz \text{ court's application of time-place-manner doctrine to the right to travel is novel. However, even if courts do not follow the } Lutz \text{ court's application of this doctrine, they will likely fashion a similar test of a restriction's reasonableness and will likely uphold the regulation. See } supra \text{ notes 98-107 and accompanying text.}\]

\[231\text{ Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction at 24-27, People ex rel. Jones v. Amaya, No. 713223 (Cal. Super. Ct. Orange County filed Aug. 19, 1993); Supplemental Brief of Amicus Curiae ACLU in Opposition to Request for Preliminary Injunction at 4-5, 7-8, People v. Blythe St. Gang, No. LC 020525 (Cal. Super. Ct. Los Angeles County filed Mar. 26, 1993); Memorandum of Points and Authorities of Amicus Curiae ACLU in Opposition to Motion for Preliminary Injunction at 18-22, Blythe St. Gang (No. LC 020525) (filed Mar. 10, 1993); Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 39-49, People ex rel. City Attorney v. Acuna, No. 729322 (Cal. Super. Ct. Santa Clara County filed May 28, 1993); see } supra \text{ notes 46, 52 and accompanying text.}\]
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, 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. 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. 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. To survive a vagueness challenge, a restriction must be sufficiently definite that a person of ordinary intelligence can understand its scope. The Avila 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.


233 Commentators have argued that what constitutes gang regalia can 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 MARY. 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 Avila 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.

234 Lanzerza 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.

235 See supra parts III.B.1-2, III.C; see also United States v. Salerno, 481 U.S. 739, 745 (1987) (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).
stand what is prohibited.\footnote{Ko/lender, 461 U.S. at 357-61; \textit{Lanzetta}, 306 U.S. at 453.} The restriction must also provide criteria specific enough to discourage arbitrary enforcement.\footnote{Ko/lender, 461 U.S. at 360-61; Papachristou \textit{v. City of Jacksonville}, 405 U.S. 156, 170-71 (1972).} These terms need not be defined with mathematical precision; reasonable certainty is sufficient to satisfy the mandates of due process.\footnote{See \textit{Roth v. United States}, 354 U.S. 476, 491 (1957).}

Historically, antigang measures have been particularly vulnerable to vagueness attacks on both notice and arbitrary enforcement grounds. In \textit{Lanzetta v. New Jersey},\footnote{\textit{Lanzetta}, 306 U.S. at 451 (1939).} 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.\footnote{Id. at 452.} The Court held that the phrase “consisting of two or more persons” was insufficient to define the term “gang.”\footnote{Id. at 453-55. The Court also expressed serious doubts about the constitutionality of the expression “known to be a member” on vagueness grounds. \textit{Id.} at 458. \textit{But see} \textit{Madsen v. Women’s Health Ctr., Inc.}, 114 S. Ct. 2516, 2530 (1994) (holding enjoining those acting “in concert” with named defendants not vague).} 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.\footnote{\textit{Lanzetta}, 306 U.S. at 453-58.}

The absence of a definition of gang membership also raises problems of arbitrary enforcement.\footnote{See \textit{Madsen}, 114 S. Ct. at 2524 (citing the special risk of discriminatory application posed by injunctions); see also \textit{supra} notes 134-52 and accompanying text.} As noted earlier, law enforcement officials and scholars have been unable to formulate uniform criteria for determining gang membership.\footnote{\textit{See supra} notes 1, 153 and accompanying text.} 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.\footnote{The risk of arbitrary enforcement increases in those cases where the gang was enjoined as an unincorporated association rather than as individually named defendants. \textit{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. \textit{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.}

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 exam-
ple, 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” 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. 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. First, as in *Acosta*, the *Acuna* injunction should limit its prohibition of associational activity to other named defendants. 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 susceptible 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. As noted earlier, the Cal-

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247 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).

248 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).

249 *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.

250 *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
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California Street Terrorism Enforcement and Prevention (STEP) Act includes a definition of gang membership\textsuperscript{251} that courts have held is not unconstitutionally vague.\textsuperscript{252} 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.\textsuperscript{253} If so, the Court must then evaluate whether the injunction is vulnerable to selective enforcement.\textsuperscript{254} Given that associational activity among gang members is neither sufficiently expressive nor intimate enough to receive constitutional protection,\textsuperscript{255} 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.\textsuperscript{256} 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.\textsuperscript{257} 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 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. \textit{Id.}

\textsuperscript{251} \textsc{Cal. Penal Code} § 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.


\textsuperscript{254} \textit{Hill}, 482 U.S. at 465-66; \textit{Thornhill} v. \textit{Alabama}, 310 U.S. 88, 95-98 (1940).

\textsuperscript{255} \textit{See supra} part III.A.1-2.

\textsuperscript{256} \textit{See supra} notes 94-109 and accompanying text.

\textsuperscript{257} \textit{See supra} notes 248-52 and accompanying text.
both vagueness and overbreadth grounds.258 In Coates v. City of Cincinnati,259 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.”260 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.261 Therefore, it held that the ordinance was void for vagueness.262 Injunctions that have used terms such as “annoy” without any further explanation raise vagueness problems similar to those raised in Coates.263 Therefore, antigang injunctions that employ such terms without further definition264 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 requirement265 or more specific definitions of “harass” and “annoy.”266 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 con-

258 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).
260 Id. at 611.
261 Id. at 614 & n.4.
262 Id. at 614.
263 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.
264 See supra part II.B.5.

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The lack of clarifying standards renders these prohibitions quite susceptible to selective enforcement. However, the overbreadth concerns can be addressed in much the same way as the vagueness concerns were addressed 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.

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. 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.

Among civil remedies, injunctions place particularly severe pressure on defendants' procedural rights. 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,
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.\(^{274}\)

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,\(^{275}\) giving judges the freedom to proscribe otherwise legal acts and create personal criminal codes.\(^{276}\) When the breadth of these statutes is combined with the extreme deference accorded by reviewing courts to the issuance of public nuisance injunctions,\(^{277}\) a judge’s power to fashion such remedies is immense.\(^{278}\)

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.\(^{279}\) 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.\(^{280}\) 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 unconstitutu-


\(^{275}\) See, e.g., CAL. CIV. CODE §§ 3479, 3480. For full text of these statutes, see supra note 24.

\(^{276}\) Cheh, supra note 20, at 1406, 1407.

\(^{277}\) 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).

\(^{278}\) 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.

\(^{279}\) 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 an law enforcement tool. See supra note 157.

\(^{280}\) 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).
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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 and Lassiter v. Department of Social Services, 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. The fundamental question becomes what is the proper means for drawing this distinction, and the Court has used both formal and functional tests.

281 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.

282 See id. at 1394-95.

283 See id. at 1394-95.


285 Id. at 333-34.


288 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.

289 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
to determine whether a sanction is criminal or civil\textsuperscript{290} and thus whether a defendant should or should not receive the full range of constitutional criminal procedural protections.

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.\textsuperscript{292} 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.\textsuperscript{293} 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.\textsuperscript{294} Given nuisance doctrine's historical and statutory basis in civil law\textsuperscript{295} and the fact that nuisance actions do not involve the procedures or the remedies traditionally associated with the criminal law,\textsuperscript{296} 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.\textsuperscript{297} 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

\textsuperscript{290} 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).

\textsuperscript{291} 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.

\textsuperscript{292} E.g., Mitchell, 303 U.S. at 399.

\textsuperscript{293} 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).

\textsuperscript{294} 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).

\textsuperscript{295} See, e.g., supra note 24.

\textsuperscript{296} 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.

\textsuperscript{297} 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.
of proportionality to be expected under the compensation-oriented civil paradigm. Consequently, the Court has been forced to characterize particularly harsh sanctions as government reimbursements or liquidated damages to explain the apparent disproportionality and to justify calling them civil.

This has led many commentators to prefer a functional test similar to the one advanced in *Boyd v. United States*, 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. 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. However, subsequent decisions of the Court have severely

298 See Clark, supra note 289, at 469-75; Mann, supra note 271, at 1823-30; Piety, supra note 289, at 958.
299 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).
301 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.
303 *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).
304 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.
limited Boyd\textsuperscript{305} and have used the functional approach very infrequently.\textsuperscript{306}

Both the critics and the supporters of the Court's tendency toward formalism saw the Court's 1989 decision of United States v. Halper\textsuperscript{307} as a possible return to functional tests.\textsuperscript{308} 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.\textsuperscript{309} The government subsequently instituted a civil action against him in which he was fined more than $130,000.\textsuperscript{310} Respondent moved to dismiss on the basis of double jeopardy.\textsuperscript{311} 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.\textsuperscript{312} 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.\textsuperscript{313} 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.\textsuperscript{314}

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,\textsuperscript{315} commentators viewed the Court's return to a functional analysis in determining whether a

\textsuperscript{305} 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).

\textsuperscript{306} 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.

\textsuperscript{307} 490 U.S. 435 (1989).

\textsuperscript{308} See Cheh, supra note 20, at 1375-76; Mann, supra note 271, at 1842-43.

\textsuperscript{309} Halper, 490 U.S. at 437.

\textsuperscript{310} Id. at 438.

\textsuperscript{311} Id.

\textsuperscript{312} Id. at 446.

\textsuperscript{313} Id.

\textsuperscript{314} Id. at 448.

\textsuperscript{315} 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.
constitutitional procedural protection applied in a civil case as a potential jurisprudential breakthrough. Although the Court had never formally repudiated the functional approach it followed in Boyd, its disuse raised serious questions as to its vitality. In Halper, commentators saw renewed potential for functional analysis to justify a much broader extension of criminal procedural protections to civil cases, although such a consequence was far from mandated.

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. In Austin, the Court addressed whether the Eighth Amendment's Excessive Fines Clause applied to civil forfeiture where the government was the moving party. 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. 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.

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, in stark contrast to the functional reasoning of Halper. 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.

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316 Cheh, supra note 20, at 1375-76; Mann, supra note 271, at 1842-43; Kasten, supra note 293, at 226-43.
317 See Mann, supra note 271, at 1842.
318 Cheh, supra note 20, at 1375-76; Mann, supra note 271, at 1842-43; Kasten, supra note 293, at 226-43.
319 Cheh, supra note 20, at 1377-79.
320 Id. at 2801 (1993).
321 Id. at 2803.
322 Id. at 2803.
323 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.
324 Austin, 113 S. Ct. at 2803.
325 Halper, 490 U.S. at 448.
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.” 326 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. 327 The three-part balancing test laid out in Mathews v. Eldridge 328 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. 329

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. 330 Such a hearing helps ensure fairness for the individual

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327 Mathews, 424 U.S. at 333-34.
329 Id. at 335.
and serves to protect citizens from arbitrary government encroachment.\textsuperscript{331}

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.”\textsuperscript{332} In \textit{United States v. James Daniel Good Real Property},\textsuperscript{333} the federal government seized the respondent’s home and the land on which it stood in an \textit{ex parte} proceeding.\textsuperscript{334} 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.\textsuperscript{335}

The Court applied the \textit{Mathews} test in evaluating the sufficiency of the \textit{ex parte} proceeding.\textsuperscript{336} It concluded that the first \textit{Mathews} factor—the private interest affected by the official action—favored the respondent.\textsuperscript{337} In so holding, the Court analogized \textit{Good} to its decision in \textit{Fuentes v. Shevin}\textsuperscript{338} where it held that the loss of kitchen appliances and household furniture was significant enough to warrant a deprivation hearing.\textsuperscript{339} The \textit{Good} Court concluded that the respondent’s interests in his home far exceeded those in \textit{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 \textit{Mathews} balance.”\textsuperscript{340}

The \textit{Good} Court also concluded that the second \textit{Mathews} factor favored the respondent because the \textit{ex parte} seizure created an unacceptable risk of error.\textsuperscript{341} The Court reasoned that “[t]he purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking.”\textsuperscript{342} 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,

\textsuperscript{331} \textit{Good}, 114 S. Ct. at 500-01.
\textsuperscript{332} \textit{Id.} at 501 (quotations omitted); \textit{see also Fuentes}, 407 U.S. at 82; \textit{Boddie v. Connecticut}, 401 U.S. 371, 379 (1971).
\textsuperscript{333} 114 S. Ct. 492 (1993) (5-4 decision).
\textsuperscript{334} \textit{Id.} at 497.
\textsuperscript{335} \textit{Id.}
\textsuperscript{336} \textit{Id.} at 501.
\textsuperscript{337} \textit{Id.}
\textsuperscript{338} 407 U.S. 67 (1972).
\textsuperscript{339} \textit{Id.} at 70-71 (cited in \textit{Good}, 114 S. Ct. at 501).
\textsuperscript{340} \textit{Good}, 114 S. Ct. at 501.
\textsuperscript{341} \textit{Id.}
\textsuperscript{342} \textit{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.” \textit{Id.} at 504 (quoting \textit{Joint Anti-Fascist Refugee Comm. v. McGrath}, 341 U.S. 123, 170-72 (1951) (Frankfurter, J. concurring)).
“would not cure the temporary deprivation that an earlier hearing might have prevented.”  

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. 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. In so holding, the Court distinguished Calero-Toledo v. Pearson Yacht Leasing Co., in which it upheld the ex parte seizure of a yacht. 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.

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, 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. 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.

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. Moreover, as noted earlier, law enforcement’s frequent use of legally insufficient evidence in gang cases

343 Id. at 502 (quoting Connecticut v. Doehr, 501 U.S. 1, 15 (1991)).
344 Id.
345 Id. at 502-04.
347 Id. at 679.
348 Good, 114 S. Ct. at 502-03.
349 See Cheh, supra note 20, at 1395.
351 See supra note 340 and accompanying text.
352 See supra notes 330-31, 342 and accompanying text.

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indicates that injunctions against alleged gang members run particularly high risks of error. The ability of court orders to act as “private penal codes” makes the consequences of erroneous determination particularly onerous. 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.

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, such as the possibility of property disappearing or imminent danger. 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. 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. 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.

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353 See supra part III.A.3.
354 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.
355 Good, 114 S. Ct. at 502.
356 Id.
358 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).
359 Id. at 1405.
360 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.
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.361

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.362 In Lassiter, the Court evaluated the petitioner’s right to appointed counsel in a hearing to terminate her parental rights.363 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.364 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.365 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.366

The Court then applied the Mathews factors to determine whether counsel should be appointed in the petitioner’s case.367 The Court found the petitioner’s interest in her parental relationship with


363 Id. at 20-24.

364 Id. at 26-27.

365 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.


367 Lassiter, 452 U.S. at 31.
her child to be “extremely important.” 368 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. 369 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.” 370

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. 371 In so concluding, the Court focused on the risk-of-error factor, finding it in favor of the government. 372 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. 373

Since Lassiter, many courts have been reluctant to require on constitutional grounds the appointment of counsel in civil cases. 374 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. 375 First, as in the case of ex parte proceedings, gang members can assert a colora-

368 Id. at 27, 31.
369 Id. at 27-28, 31.
370 Id. at 30.
371 Id. at 33.
372 Id. at 32-33.
373 Id.
374 See, e.g., Clutterbuck v. Clutterbuck, 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. § 35-21-103(e) (Michie Supp. 1993) (providing for appointment of counsel in civil protection orders against domestic violence).
375 See supra notes 349-60 and accompanying text.
ble private interest in their liberty,\textsuperscript{376} although this interest is arguably weaker than the private interest in parental rights asserted in \textit{Lassiter}.

Furthermore, the governmental interests in antigang injunctions may be marginally weaker than the governmental interests in \textit{Lassiter}, weighing in favor of the appointment of counsel. Although the state's interest in administrative economy is the same as in \textit{Lassiter}, its interest in an accurate decision is arguably weaker. Unlike in \textit{Lassiter}, where the state bore a special burden to protect the welfare of the child,\textsuperscript{377} 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 \textit{Mathews} factor—the risk of erroneous deprivation faced by alleged gang members. Unlike the parental termination actions in \textit{Lassiter}, antigang injunctions present difficult problems of proof, the sufficiency of which a gang member is unlikely to be able to challenge without counsel.\textsuperscript{378} Moreover, unlike in \textit{Lassiter}, the predicate activities alleged often constitute grounds for criminal charges.\textsuperscript{379} The risk of erroneous deprivation of liberty is further heightened in injunction cases by the collateral bar rule.\textsuperscript{380} And finally, the issues raised in this Comment and the different treatment of identical court orders in different cases\textsuperscript{381} demonstrate that, unlike in \textit{Lassiter}, antigang injunctions do present "troublesome points of law, procedural or substantive."\textsuperscript{382}

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

\textbf{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

\begin{itemize}
\item \textsuperscript{376} See supra notes 337-40, 349-51 and accompanying text.
\item \textsuperscript{377} \textit{Lassiter}, 452 U.S. at 27.
\item \textsuperscript{378} See supra part III.A.3.
\item \textsuperscript{379} Id. at 32.
\item \textsuperscript{380} See supra notes 279-80, 353 and accompanying text.
\item \textsuperscript{381} See supra notes 46, 49, 51-53 and accompanying text.
\item \textsuperscript{382} \textit{Lassiter}, 452 U.S. at 32-33.
\end{itemize}
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.