

Gang Injunctions Under Heat From Equal Protection: Selective Enforcement As a Way To Defeat Discrimination

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I. Introduction

Gang injunctions are quasi-civil/criminal remedies meant to enjoin alleged gang members from engaging in activities in furtherance of gang objectives. They have been issued primarily in California in the last two decades.¹ On the surface, gang injunctions might seem like a good idea for protecting the welfare of the community from the boisterous activities of alleged gang members.² But a closer look yields an Equal Protection problem: The injunctions prohibit defendants from doing what others can do³ solely based on their arbitrarily conferred gang affiliation status. The situation is more troubling when many of the people labeled as “gang bangers” are poor minorities.

A. Proposal

Gang injunctions should be used sparingly, if at all, because they can easily entail unconstitutional discrimination that can affect entire communities. Gang injunction defendants should be able to claim selective enforcement when they suspect the government attempts to restrict them in a way in which others would not be restrained. While selective prosecution is the type of selective enforcement claim most often invoked in the

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1. Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 138 (2002).

2. See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 614 (Cal. 1997).

3. See Strosnider, *supra* note 1, at 140.

criminal context,⁴ this procedural defense is difficult to mold into a form that befits gang injunction cases. This note proposes an alternative method for defendants to prove selective enforcement in gang injunction cases by pointing to instances in which non-gang members have engaged in the defendants' same conduct, but were not prosecuted with gang injunctions. This note also calls for the adoption of constitutional procedural safeguards, which usually protect criminal defendants, but are strikingly absent in gang injunction cases.

1. *Gang Injunctions Entail Unconstitutional Discrimination*

Gang injunctions should be rarely issued because of their potential for discrimination. Defendants who risk criminal punishment have not committed illegal acts but have merely been accused of gang association.⁵ Prejudice can creep into law enforcement's identification process of gang members.⁶ The negative impact of these injunctions can also leave marks on society as a whole. Defendants and minority communities need a way of combating gang injunctions when their harm overshadows their benefits.

2. *Selective Prosecution Cannot Apply as a Defense Because Gang Injunctions are Quasi-Civil in Nature*

Although a procedural defense is necessary to shield minorities from overbroad gang injunctions, the selective prosecution defense is impossible to apply to gang injunction cases. Under the law governing selective prosecution, as long as prosecutors have probable cause to pursue charges, defendants cannot prevail on claims of selective prosecution.⁷ Prosecutors do not need probable cause in gang injunction cases.⁸ Because the remedy is quasi-civil, gang injunction defendants cannot claim a vital element of selective prosecution—that prosecutors lacked probable cause.⁹

3. *Defendants Should Be Able to Claim Selective Enforcement and Be Protected by Procedural Safeguards That Usually Apply in Criminal Cases*

Rather than claim selective prosecution, defendants should be able to show selective enforcement by arguing that non-gang members have engaged in the same conduct in which they themselves engaged, but were

4. *See id.* at 122-23.

5. *See Acuna*, 929 P.2d at 623 (Mosk, J., dissenting).

6. *See id.*

7. *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

8. *See* Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 434 (1999).

9. *Armstrong*, 517 U.S. at 464.

not prosecuted with gang injunctions. While this method could still allow for nuisance enjoinderment, it would reduce the detriment to the defendants being labeled as “gang members” by rendering the “gang” part of the injunction meaningless. Defendants would be enjoined if they create genuine nuisances, not because they appear to be part of a gang.

In addition, while constitutional guarantees that would apply in criminal cases¹⁰ do not attach to quasi-civil gang injunctions,¹¹ they should attach to protect defendants in these cases.

Part II of this note delineates the contours of the quasi-civil/criminal remedy known as the gang injunction. Part III argues that these remedies infringe on the Equal Protection values enshrined in the U.S. Constitution. Part IV proposes a new breed of selective enforcement claims to replace selective prosecution in this quasi-criminal setting.

II. Background on Gang Injunctions

A. Definition of a Street Gang

There is no generally accepted definition of the gang phenomenon.¹² The California “gang statute” dictates that mere membership in or association with a gang is criminal.¹³ However, a gang is not a criminal street gang under California Penal Code section 186.22 until each element within that section has been proven beyond a reasonable doubt; the statute punishes a person who “actively participates in” or “willfully promotes” the criminal conduct of a gang, or who has committed certain enumerated offenses.”¹⁴ While some street gangs can be violent and engage in criminal activities, the propaganda surrounding them has generated dangers for the innocent. By riding a bike without a taillight or even walking down the street, anyone can be approached by law enforcement and asked if they know anyone in X gang. If he answers in the affirmative, he could be named a defendant in a lawsuit that, if he loses, could mean he would never be able to communicate with his friends or wear blue jeans in his neighborhood without risking arrest.¹⁵

10. See U.S. CONST. amend. VI.

11. See Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2267 (1998).

12. See Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 951 (1993).

13. See CAL. PENAL CODE § 186.22(a) (West 2006).

14. See *id.* at § 186.22.

15. See *Acuna*, 929 P.2d at 623 (Mosk, J., dissenting).

That people associate with each other in gangs does not mean they commit crimes together. Ethnic street gangs are not the same as criminal street gangs, for example. However, even if the elements of California Penal section 186.22 are not proven, state governments can use quasi-civil/criminal injunctions to restrain alleged “gang bangers” from perfectly legal activities.

B. A Unique Breed of Remedy

California, in which various counties have pursued gang injunctions, has already enacted a penal code section making criminal certain gang activities.¹⁶ Gang injunctions act as a net to catch potential defendants who do not fit within those statutes.

Anti-gang injunctions are borne out of a web of provisions from California Civil, Penal, and Civil Procedure Codes.¹⁷ The prosecuting agency typically alleges in the complaint that the gang and its members have occupied and used a certain target area in a manner that constitutes a public nuisance under Civil Code sections 3479 and 3480.¹⁸ Section 3479 defines a nuisance as:

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, 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 property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway¹⁹

A public nuisance is, accordingly, one that “affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.”²⁰ A complaint for injunctive relief may also refer to the California Penal Code’s standard for a public nuisance.²¹ Section 370 requires that the activity to be enjoined “interfere with the comfortable

16. See CAL. PENAL CODE § 186.22.

17. Edson McClellan, Note, *People ex rel. Gallo v. Acuna: Pulling in the Nets on Criminal Street Gangs*, 35 SAN DIEGO L. REV. 343, 350 (1998).

18. *Id.* at 350-51.

19. CAL. CIV. CODE § 3479 (West 2006).

20. *Id.* at § 3480.

21. McClellan, *supra* note 17, at 351.

enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons.”²²

Once the prosecution makes a successful showing that the gang’s activity constitutes a public nuisance, Civil Code section 3494 authorizes “any public body or officer” to abate the nuisance.²³ Civil Code section 3491 defines the statutory remedies for a public nuisance in California as indictment or information, civil action, or abatement.²⁴ Based on this section, courts impose the injunction.²⁵ If a defendant violates the injunction, the prosecution can file criminal misdemeanor charges under Penal Code section 372.²⁶ Penal Code section 372 states that any person who maintains or commits any public nuisance is guilty of a misdemeanor.²⁷ Each violation is a separate offense, and may provide strong evidence that he is creating a public nuisance.²⁸ Rather than bring a misdemeanor charge under section 372, the prosecution will more than likely prosecute the defendant for contempt of court.²⁹ Hence, criminal consequences are a great possibility for any named defendant on the losing side of a gang injunction case.

C. Courts Have Been More Receptive to Challenges to the Constitutionality of Discriminatory Statutes Than to the Constitutionality of Discriminatory Injunctions

1. Acuna Upholds the Constitutionality of a Gang Injunction

In Lompoc County, the Supreme Court of California in *People ex rel. Gallo v. Acuna* found constitutional two provisions of a preliminary injunction.³⁰ One provision forbade thirty-eight defendants from “standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant or with any other known . . . member’ of the gang.”³¹ Another forbade members from challenging, threatening,

22. CAL. PENAL CODE § 370 (West 2006).

23. CAL. CIV. CODE § 3494 (West 2006); McClellan, *supra* note 17, at 353.

24. CAL. CIV. CODE § 3491 (West 2006).

25. McClellan, *supra* note 17, at 353.

26. *Id.*

27. CAL. PENAL CODE § 372 (West 2006).

28. McClellan, *supra* note 17, at 353.

29. *Id.*

30. *Acuna*, 929 P.2d at 614.

31. Strosnider, *supra* note 1, at 140 (quoting *Acuna*, 929 P.2d at 608).

assaulting, or battering any patrons, residents, or visitors to the city of Rocksprings known to have complained about the alleged gangs.³²

The California Supreme Court decided that the defendants' right to association in a gang was not entitled to protection under the United States Constitution's First Amendment because the gang was not formed for the purpose of engaging in protected speech or religious activities.³³ The California Supreme Court concluded the provisions did not violate a gang member's First Amendment right to associate and were not so overbroad as to violate the defendant's Fifth Amendment right to Due Process with respect to notice.³⁴ In its view, the conduct enjoined met the statutory definition of a public nuisance.³⁵

The defendants argued that under *NAACP v. Claiborne Hardware Co.* they couldn't be bound unless it was proven that each of them possessed intent to further an unlawful end embraced by the group.³⁶ But the Court distinguished *NAACP* by finding that gangs maintain an "urban war zone."³⁷ The Court found controlling precedent in *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, in which an injunction was issued against a union because of its violence.³⁸ The *Acuna* Court stated that under *Milk Wagon*, organizations and members can be enjoined without having a specific intent to further an unlawful aim.³⁹ It is possible that these are old cases and the Supreme Court has become somewhat more enlightened since the 1950s.

Some of the gang activities enjoined in this case—such as snorting cocaine laid out in neat lines on the hoods of residents' cars and using residents' garages as urinals⁴⁰—formed a reasonable basis for assuming that the gang was a nuisance. However, there was no need to enjoin "standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant or with any other known . . . member' of the gang."⁴¹ When the government seeks to enjoin less boisterous

32. *Id.*

33. *See id.*

34. Bergen Herd, Note, *Injunctions as a Tool to Fight Gang-Related Problems in California After People Ex Rel Gallo v. Acuna: A Suitable Solution?*, 28 GOLDEN GATE U. L. REV. 629, 650-51 (1998).

35. *Id.* at 652.

36. *Acuna*, 929 P.2d at 616 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982)).

37. *Id.* at 617; *see also* McClellan, *supra* note 17, at 370-71.

38. *Acuna*, 929 P.2d at 617.

39. *Id.* at 617-18.

40. *See Acuna*, 929 P.2d at 601.

41. *See Strosnider, supra* note 1, at 140 (quoting *Acuna*, 929 P.2d at 608).

defendants, courts should be restrained from jumping to issue injunctions on but social settings where large numbers of minorities gather, not “urban war zone[s].”

2. *Morales Invalidated an Unconstitutionally Vague Anti-Gang Ordinance*

Two years after *Acuna*, the United States Supreme Court, in *City of Chicago v. Morales*, struck down a loitering ordinance prohibiting gang affiliation.⁴² An ordinance differs from an injunction in that it is easier to challenge because an injunction (a civil remedy) is seen as less restrictive.⁴³

Morales limited the scope of state power and protected minorities from the vague overreaching power of an anti-gang ordinance.⁴⁴ The Court found that the challenged ordinance failed to comply with the Constitution by not meeting the fair notice requirement because it was too vague and provided too much police discretion.⁴⁵ The ordinance allowed police to arrest any group of two or more people who remained in a public place “‘with no apparent purpose’ if the police ‘reasonably believe[d]’ the group included a gang member and if the loiterers failed to disperse.”⁴⁶ Because the ordinance invested police officers with absolute discretion to determine which activities constituted loitering, the ordinance failed to meet constitutional standards for definiteness and clarity.⁴⁷

Morales demonstrates that the Supreme Court takes discriminatory law enforcement seriously.⁴⁸ The case also illustrates that the second prong of the vagueness doctrine, dealing with arbitrary and discriminatory enforcement, has come to serve as a de facto Equal Protection guarantee when public statutes implicate race.⁴⁹ The doctrine checks police and law-making bodies on legislation that primarily affects minorities.⁵⁰ The invocation of Equal Protection in cases involving gang ordinance statutes strongly suggests that the Clause can also apply in gang injunction actions.

42. *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999).

43. Strosnider, *supra* note 1, at 120.

44. *See Morales*, 527 U.S. at 64.

45. *Id.* at 50-51.

46. Strosnider, *supra* note 1, at 102.

47. *See Morales*, 527 U.S. at 63-64.

48. Strosnider, *supra* note 1, at 120.

49. *See id.* at 113.

50. *Id.*

D. The Process of Selecting Gang Injunction Defendants Introduces a Problem

The *Morales* Court held that the loitering ordinance was unconstitutionally vague because it gave police discretion in deciding who violated the statute.⁵¹ Although gang injunctions list the specific conduct and persons to be enjoined, they also provide law enforcement with discretion to pick the defendants before the case is filed. To be documented as a gang member, an individual need only be seen in a target area and either (1) admit gang membership, or (2) be identified as gang member.⁵² A person is “identified” if she meets two or more of the of the following prerequisites: (a) wore clothing or tattoos indicating gang affiliation or used gang hand signs; (b) was named by gang members as a gang member; (c) actively participated in gang crime; (d) was identified by a reliable informant as a gang member; or (e) was observed associating with gang members two or more times.⁵³

Criterion (c) makes gang injunctions unnecessary because if a gang member commits a crime he will be prosecuted for it. If he goes to jail he need not be enjoined. But all of the other criteria for identifying gang members allow law enforcement significant leeway to determine which gang members are to be enjoined from activities that would be legal if performed by others. The process for selecting gang injunction defendants brushes too closely with Equal Protection.

III. Gang Injunctions Under Heat From Equal Protection

“Race . . . is bound up in gang crime in a way that it is not necessarily implicated by other crimes”⁵⁴ It is consistently asserted that “many more minorities than whites are members of street gangs.”⁵⁵ As a result, gang injunctions tend to target masses of a single ethnic minority. The effect is that many members of a minority community will not be able to perform the same activities that people of other ethnicities in that community will, such as “standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant or with any other known . . . member’ of the gang.”⁵⁶ Prejudice can creep into the

51. *Morales*, 527 U.S. at 50-51.

52. See *Acuna*, 929 P.2d at 623 (Mosk, J., dissenting).

53. See *Acuna*, 929 P.2d at 623 (Mosk, J., dissenting).

54. Strosnider, *supra* note 1, at 125.

55. *Id.*

56. See *id.* at 140 (quoting *Acuna*, 929 P.2d at 608).

identification of gang members by law enforcement⁵⁷ and defendants who have not committed illegal act but who have been merely accused of gang association can be at risk for criminal punishment.⁵⁸ The discriminatory effects of gang injunctions can also negatively impact entire segments of the community. When rights are violated in a discriminatory way, Equal Protection becomes an issue.⁵⁹

Defendants should be able to make claims of selective enforcement in response to gang injunction actions, but those claims must be carefully tailored to suit the gang injunction context. While selective prosecution is the ordinary selective enforcement claim made in criminal proceedings, defendants cannot claim that prosecutors lacked probable cause because prosecutors do not need probable cause in gang injunction cases.⁶⁰ Selective prosecution claims should be replaced by another form of selective enforcement that can act as a procedural defense in such proceedings. In addition, constitutional safeguards should also be provided for gang injunction defendants because they are still battling within the realm of criminal law.⁶¹

A. The Equal Protection Problem With Gang Injunctions

Gang injunction actions present an Equal Protection problem. The Equal Protection Clause prohibits states from participating in discriminatory acts. It mandates that “[n]o state shall . . . deny to any person within its *jurisdiction* the equal protection of the *laws*.”⁶² Gang injunction defendants need not commit illegal activities to receive penal punishment, but need only be reputed as gang members.⁶³ As a result, they are treated differently from other potential criminal defendants and are deprived Equal Protection. All that is required for designation as a “gang banger” is identification by law enforcement as such,⁶⁴ unfortunately, the process of identification can be influenced by prejudice. This results in restrictions on the freedom of minorities who may have been arbitrarily identified as “gang bangers.”

57. See *Acuna*, 929 P.2d at 623-24 (Mosk, J., dissenting).

58. See *id.* at 632.

59. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

60. See *Werdegar*, *supra* note 8, at 434.

61. See U.S. CONST. amend. VI.

62. U.S. CONST. amend. XIV, § 1.

63. See *Acuna*, 929 P.2d at 623-24 (Mosk, J., dissenting).

64. See *id.* at 624.

1. *Gang Injunction Defendants Are Punished for Legal Activities*

Proponents of the gang injunction argue that, although defendants need not be convicted of anything in order to have a quasi-civil/criminal injunction imposed on them, the remedy is fair. Before a gang injunction is issued, a court weighs the public's interests against the alleged gang members' constitutional rights to decide whether to enjoin the defendants.⁶⁵ A court must make detailed findings of facts with respect to individuals involved, and the injunction will apply in a specific geographic area in which the defendants reside.⁶⁶ The "court supervises the restrictions that apply, and can lift the injunction if circumstances warrant."⁶⁷

But this argument fails to consider that—even though courts must find that the alleged conduct is worth enjoining—the actions to be enjoined by gang injunction provisions, such as those in *Acuna*,⁶⁸ might *not* give rise to a nuisance if they were committed by non-gang members. "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence."⁶⁹ Gang injunctions discriminate on the basis of the gang member label, which is easy to arbitrarily confer on minorities. In that respect, they are unfair because they do not truly distinguish between those who have, and have not, violated the law.

Race is not supposed to be a factor in the determination of whether a nuisance exists. California Civil Code section 3479 defines a nuisance as follows:

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, 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 property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway⁷⁰

65. Strosnider, *supra* note 1, at 140-41.

66. *Id.* at 142.

67. *Id.*

68. Strosnider, *supra* note 1, at 139-40.

69. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982) (individuals could not be enjoined merely because they 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.).

70. CAL. CIV. CODE § 3479 (West 2006).

In *Acuna*, one of the injunction's provisions prohibited thirty-eight defendants from "standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant or with any other known . . . member' of the gang."⁷¹ Gang injunctions may also prohibit wearing "gang colors."⁷² Such conduct cannot reasonably be construed as, "injurious to health . . . 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 property . . ." under California Civil Code section 3479.⁷³

Wearing certain colors⁷⁴ is not a nuisance because the law of nuisance does not concern aesthetic preferences.⁷⁵ The test of liability for nuisance with regard to personal discomfort is the alleged annoyance on "persons of ordinary sensibilities."⁷⁶ Even a horse farm that emanates noises, smells, insects, etc. onto a plaintiff's land would not pass the test of liability for a nuisance,⁷⁷ even though—unlike the threats and public interaction sought to be restrained in *Acuna*⁷⁸—conditions resulting in the concentration of particular noises, smells, and insects in one area can cause discomfort by endangering people's physical health.

The term "public nuisance" may also include an act or omission that interferes with the health, comfort, and convenience of a community.⁷⁹ While it can be argued that the public interaction of alleged gang members⁸⁰ interferes with public comfort and convenience, it is merely an obstruction of view (people might rather not see them), and aesthetic preferences do not give rise to nuisances.⁸¹ Public interaction with alleged gang members differs from a low-hanging object over a sidewalk, which constitutes a true nuisance that may pose a danger.⁸² Although it can also be argued that alleged gang members pose a danger, this argument fails to consider that whomever is deemed to be a gang member depends on law

71. Strosnider, *supra* note 1, at 140 (quoting *Acuna*, 929 P.2d at 608).

72. See *Acuna*, 929 P.2d at 632 (Mosk, J., dissenting).

73. CAL. CIV. CODE § 3479 (West 2006).

74. See *Acuna*, 929 P.2d at 622 (Chin J., concurring and dissenting).

75. *Carter v. Johnson*, 26 Cal. Rptr. 279, 281 (Ct. App. 1962).

76. *Id.* at 280.

77. *Id.* at 280-81.

78. Strosnider, *supra* note 1, at 140.

79. See *Venuto v. Owens-Corning Fiberglas Corp.*, 99 Cal. Rtr. 350, 355 (Ct. App. 1971).

80. See Strosnider, *supra* note 1, at 140.

81. *Carter*, 26 Cal. Rptr. at 281.

82. *Montgomery v. Nelson*, 295 P. 1034, 1035 (Cal. 1931).

enforcement discretion and biases, rather than the likelihood of their causing harm.

In addition, a nuisance can be based on any act that tends to corrupt public morals or disturb the public welfare.⁸³ Nuisances based on interference with public morals or welfare include billiard rooms,⁸⁴ houses of prostitution,⁸⁵ and gaming establishments that host disorderly conduct.⁸⁶ Unlike these examples, the actions prohibited in *Acuna* (such as public interaction)⁸⁷ are what ordinary people might do on a daily basis, rather than “immoral” activities that may lead to disruption of the peace because of the atmosphere they create.

Because of their alleged gang affiliation, gang injunction defendants are being punished for engaging in activities in which others are allowed to participate. For such an injunction to issue, no defendant need be found guilty of any dangerous or illegal act. All that is required for an accused to be designated as a gang member is identification by an informant as such, or to be seen associating with gang members on two or more occasions.⁸⁸ In this way, the injunction results in unconstitutional discrimination based on arbitrary criteria, and should be challenged on Equal Protection grounds.

2. *Racial Prejudice Can Influence the Identification of Gang Members by Law Enforcement*

It is common for defendants in gang injunction cases to be members of an ethnic minority.⁸⁹ Equal Protection becomes an issue in gang injunction cases because the remedy can be too easily applied in a discriminatory manner. The basis of the decision of whom to prosecute is gang affiliation, and the decision of who to accuse of being a gang affiliate often depends on the subjective, biased assessment of a police officer based on the impermissible factor of the person’s ethnicity.

In *Acuna*, to determine gang “membership,” the court relied on the police department’s manner of documenting gang members.⁹⁰ There, to be a documented gang member, an individual need only be seen in a target area and either (1) admit gang membership, or (2) be identified as a gang

83. *Weis v. Super. Ct.*, 159 P. 464, 465 (Cal. Ct. App. 1916).

84. *See Ex parte Murphy*, 97 P. 199 (Cal. App. Ct. 1908).

85. *See Farmer v. Behmer*, 100 P. 901 (Cal. Ct. App. 1909).

86. *See People v. Lim*, 118 P.2d 4872 (Cal. 1941).

87. *See Strosnider*, *supra* note 1, at 140.

88. *Acuna*, 929 P.2d at 623 (Mosk, J., dissenting).

89. *See Strosnider*, *supra* note 1, at 125.

90. *See Acuna*, 929 P.2d at 622 (Chin, J., concurring and dissenting).

member.⁹¹ A person is “identified” if she met two or more of the of following prerequisites: (a) wore clothing or tattoos indicating gang affiliation or used gang hand signs; (b) was named by members as a member; (c) actively participated in gang crime; (d) was identified by a reliable informant as a gang member; or (e) was observed associating with gang members two or more times.⁹²

In applying the above prerequisites, it is important to remember that, in reality, law enforcement officials’ suspicions of gang affiliation may arise based on suspicious appearance⁹³ and it is possible to assume that people of the same ethnicity who live in the same neighborhood would tend to know each other. Prerequisite (a) suggests that gang colors might signify gang membership, and may lead law enforcement to investigate people of select ethnicities based on something as insignificant as the color of their clothes and nothing else. Prerequisite (e) may cause police to *choose* to field interview people who have spoken to gang members and who have the appearance of being gang members, such as in their ethnicities. Though criteria (b) and (d) depend on hearsay from alleged gang members, they allow law enforcement enough discretion to find alleged gang members by asking general questions about specific persons who look like they might be gang members. For instance, law enforcement might ask Latino man X whether Latino man Y is his friend and improperly find Y to be a gang member if X is a documented gang member and answers in the affirmative.⁹⁴

It is possible to argue that the ethnicity of defendants in gang injunction cases should not matter because they are at fault for associating with certain people and for engaging in particular activities in the first place. But when questioned by law enforcement, innocent answers such as “I hang out with X Rodriguez” or “I like it to kick it on the weekends” may form the basis for police suspicions of gang association or activity.⁹⁵ The discretion given to police in choosing whom to field interview and label a gang member gives rise to Equal Protection problems in the selection of gang injunction defendants.⁹⁶

Even if the police have the time to field interview so many people that the number of interviewees of one ethnicity is not disproportionately larger

91. *Id.* at 623 (Mosk, J., dissenting).

92. *Id.*

93. See Rebecca Allen, *People ex rel. Gallo v. Acuna: (Ab)using California's Nuisance Law to Control Gangs*, 25 W. ST. U. L. REV. 257, 296 (1998).

94. *Acuna*, 929 P.2d at 623 (Mosk, J., dissenting).

95. See *id.*

96. Strosnider, *supra* note 1, at 120.

than that of another ethnic group of interviewees, it may be easier for the prosecution to argue and easier for a court to believe that people sharing the same ethnicity would associate with one another and form a gang. But research reveals that criminal behavior does not form spontaneously at the convergence of friendship and ethnicity.⁹⁷ It is unnecessary and plainly discriminatory to choose to document people of certain select ethnicities as gang members; however, gang injunctions make it inevitable.

3. *The Discriminatory Effects of Gang Injunctions Can Hurt Entire Communities.*

In addition to the arbitrary process of selecting gang injunction defendants, the effect of gang injunctions on minority communities provides another reason to refrain from using these remedies in light of the possibility that they are racially discriminatory and violate the principles embodied in the Equal Protection Clause. Not only do anti-gang injunctions hurt the poor minority youths they target, but they also harm society in general. They place youths in a Catch-22 situation: They encourage youth crime, stigmatize minority communities, neglect to solve, but simply move, crime problems, and open the door to fear-based decision making potentially based on insufficient evidence.

a. **Anti-Gang Initiatives Place Youths in a Catch-22 Situation**

Many youths join gangs out of fear of street violence and to gain protection from it.⁹⁸ *Acuna* places members in a Catch-22 situation by requiring them to choose between their fear of gangs versus their fear of the judicial system.⁹⁹ In some neighborhoods, self-preservation motivates youths to join gangs.¹⁰⁰ Threats from families, local recruiters, rivals, and others move them to seek protection. Members who join should not be punished because of affiliation alone.¹⁰¹ Courts should level responsibility as it is deserved, and mete out punishment to those who have actually been found guilty of committing illegal acts.¹⁰²

A policy toward individual responsibility has the benefit of directing attention away from the gang as a whole, lessening the publicity.¹⁰³

97. Mayer, *supra* note 12, at 959.

98. Allen, *supra* note 93, at 300.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 301.

103. *Id.*

Otherwise, a focus on gangs sends the message that gangs should be feared.¹⁰⁴ This only encourages membership.¹⁰⁵

b. Anti-Gang Injunctions May Encourage Youth Crime

Gangs have been characterized as hierarchical.¹⁰⁶ Levels of standing within gangs may include (1) leaders, who participate in the most violent activities; (2) peripheral members, who are tied to the gang but do not actively participate in its social life; and (3) recruits, whose roles are initially undefined.¹⁰⁷ Outside the gang, there may be “wannabes,” who are not a part of a gang but may nonetheless assert membership.¹⁰⁸ If gangs have dominating influences on disadvantaged communities, and there is a large nonviolent gang member and wannabe population, then anti-gang injunctions are almost certain to trap youths not involved in crime. Casting such a wide net could actually increase their reasons for and ability to engage in more active gang membership.¹⁰⁹ Youths may feel as though they need not heed the rules of a system that has discarded them.¹¹⁰

c. Anti-Gang Injunctions Endanger Disadvantaged Communities

Anti-gang injunctions stigmatize minority communities and contribute to white hegemony.¹¹¹ Because minority youths tend to romanticize gang culture, anti-gang injunctions stamp minority communities with “badges of inferiority,” which may “impinge upon a community’s quality of life and thus symbolize its impending decay.”¹¹²

If civil injunctions are to provide hope of abating violent gang activity, they must target people who show specific intent to further illegal activities.¹¹³ Otherwise, spreading punishment among the vulnerable will exacerbate the gang problem. There is no benefit to a neighborhood when so many of its youths are at high risk of being banished to jail.

104. *Id.*

105. *Id.*

106. Stewart, *supra* note 11, at 2275.

107. *Id.*

108. *Id.*

109. *Id.* at 2276.

110. *Id.* at 2279.

111. Stewart, *supra* note 11, at 2278.

112. *Id.* at 2251.

113. *See id.* at 2278.

d. Anti-Gang Injunctions Have a Banishment Effect by Moving Crime to Other Areas

Proponents of gang injunctions argue that these civil remedies provide an intermediate step between releasing defendants and incarcerating them by severely restricting their freedom while they are in a particular neighborhood so that they are, in effect, banished from the rest of society.¹¹⁴ Supposedly, this “may provide some of the incapacitative benefits of prison without some of the malignant side effects.”¹¹⁵ The counterargument is that this solution simply moves alleged gang members to another neighborhood, which solves nothing and may only be a crude form of social engineering.¹¹⁶ The law should not incorporate methods of dealing with youth crime that simply move the undesirables.

e. Fear-Based Decision Making Results in Punishment Based on Insufficient Evidence

The *Acuna* Court’s sweeping injunction was an overreaction to the fear of gang crime.¹¹⁷ Even when public anxiety rises over issues like gang violence, courts have an obligation to resist temptations to acquiesce to public hysteria.¹¹⁸ The court’s judgment must stand on clear proof rather than imputation of criminal responsibility.¹¹⁹ Everyone’s rights are at stake when courts punish individuals based on insufficient evidence.¹²⁰ Gang injunction defendants need a defense to shield them from fear-based decision making.

B. Selective Prosecution Cannot Apply to Gang Injunctions Because the Government Does Not Need Probable Cause to Pursue Injunctions

The few cases in which Equal Protection claims have been litigated in a criminal context have involved claims of selective prosecution,¹²¹ which is a type of selective enforcement. In *Washington v. Davis*, “the Court held that establishing an equal protection violation requires proof of

114. Andrew D. Leipold, *Targeted Loitering Laws*, 3 U. PA. J. CONST. L. 474, 487-88 (2001).

115. *Id.* at 488.

116. *Id.* at 495-96.

117. Allen, *supra* note 93, at 304-05.

118. *Id.* at 305.

119. Allen, *supra* note 93, at 305.

120. *Id.*

121. Strosnider, *supra* note 1, at 123.

discriminatory purpose and not just racially disparate impact from a policy or law.”¹²²

United States v. Armstrong elaborated on the procedural defense of selective prosecution, which was defined as “an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.”¹²³ “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”¹²⁴ To even obtain discovery on a claim of selective prosecution based on race or ethnicity, the defendant must produce evidence that similarly situated offenders of another race or ethnicity could have been prosecuted but were not.¹²⁵ Even if this high standard were met in a gang injunction case, defendants may never prevail on a claim of selective prosecution because prosecutors in such actions do not need probable cause to prosecute.¹²⁶ While selective enforcement should apply to gang injunctions, selective prosecution should be rejected in this context and another type of procedural defense, with criminal procedural safeguards, should be adopted.

C. Proposal For a New Standard Under Which Gang Injunction Defendants May Challenge Selective Prosecution

1. *Constitutional Guarantees Usually Afforded in Criminal Cases Do Not Attach to Gang Injunctions*

Constitutional safeguards that usually accompany criminal defendants do not exist in gang injunction cases, though criminal consequences may result. Because the right to the appointment of counsel is not invoked when an injunction is sought,¹²⁷ an indigent and uneducated defendant may not stand a chance of defeating an injunction.¹²⁸ Neither does the full panoply of criminal procedural rights (such as the rights to a jury trial, to be

122. 426 U.S. 229, 239 (1976) (standards applicable to equal employment opportunity cases should not have been applied in determining whether a personnel test violated due process clause of the Fifth Amendment; a law is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose).

123. *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

124. *Id.* at 464 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

125. *Id.* at 465.

126. *See Werdegarr*, *supra* note 8, at 434.

127. *Id.*

128. *Id.*

confronted, and to subpoena witnesses) apply to aid gang injunction defendants.¹²⁹

The lack of procedural safeguards in an injunction suit is abated by the fact that injunctions are enforced through criminal contempt proceedings, in which the defendant may access constitutional protections.¹³⁰ But defendants may not be willing to risk arrest and imprisonment for only the chance to challenge an injunction at a jury trial with appointed counsel.¹³¹ Because gang injunction defendants face penal consequences while being deprived of the constitutional procedural guarantees on which other criminal defendants may rely, defendants should be provided with the safeguards normally applicable to criminal proceedings.¹³²

2. *A New Basis for a Selective Enforcement Claim: Applying the Standards for Finding a Nuisance in Civil Cases to Gang Injunction Cases*

Gang injunction defendants are prosecuted for engaging in activities for which others would not be prosecuted, solely because of their alleged gang status. Gang injunction defendants are treated unfairly not only in comparison to non-gang member defendants, but also in comparison to everyone who has not been prosecuted for “standing, sitting, walking, driving, gathering or appearing anywhere in public view” with their friends.¹³³

An alternative would be to allow gang injunction defendants to prove selective enforcement by showing they are being prosecuted for conduct that would not be a public nuisance if committed by non-gang members. A similar framework was suggested by Justice Mosk in his dissent in *Acuna*.¹³⁴ To show the conduct would not normally be considered a nuisance, they should be able to point to evidence that non-gang members have engaged in such activities but were not prosecuted. This framework is fair because it takes into account that gang injunction defendants are treated differently from non-gang members based solely on their alleged gang reputation.

In effect, this framework would mean the death of the gang injunction. Based on the susceptibility of such defendants and the ease with which elements of discrimination may creep into these cases, gang injunctions tread upon Equal Protection values and should be held unconstitutional. A

129. *See id.*; U.S. CONST. amend. VI.

130. Werdegar, *supra* note 8, at 434.

131. *Id.*

132. *See* U.S. CONST. amend. VI.

133. *See* Strosnider, *supra* note 1, at 140 (quoting *Acuna*, P.2d at 608).

134. *See Acuna*, 929 P.2d at 632 (Mosk, J., dissenting).

counterargument is that, without such injunctions, there is no effective means to combat the street gang problem. However, anti-gang initiatives may not address the problem of gang crime in an effective manner. Rather, alternatives to gang injunctions can provide more effective means of crime control without blatantly discriminatory effects.

IV. Alternatives to Gang Injunctions

The legacy of a gang injunction has implications not only for its defendants, but for poor young minorities and society in general. Alternative ways to deal with youth crime are necessary. While groups of youths may commit violent and destructive acts, targeting them as gangs is not the way to stop them. It is uncertain just how effective gang injunctions can be.

The ACLU reported that a Los Angeles injunction failed to achieve its stated objective, which was an immediate reduction in violent crime and drug trafficking and an increase in community safety.¹³⁵ Supporters of the injunction criticize the study, claiming its analysis of violent crime and felony drug arrest rates fails to capture the reduction in otherwise legal behavior, such as harassment of residents, loitering, and vandalism.¹³⁶ While the Los Angeles injunction may not have decreased gang violence, the *Acuna* injunction has been praised for doing so.¹³⁷ In light of conflicting evidence, the utility of gang injunctions in deterring gang-related crime has not been fully proven.

While it is undetermined whether or not gang injunctions actually combat crime, they may have a damaging effect on lower-class minority youths and society by enjoining legal behavior. Because of the problems they raise, other means of reducing gang-related crime may be warranted. One way is to shift the focus from gangs to youths, since gangs tend to be youth oriented. With regard to gang members who have been convicted of crimes, a method of deterring illegal behavior would be to place on them more probation or parole restrictions.

A. Directing Society's Attention from Gangs to Youths

Instead of addressing the problem with gang-based focus, law enforcement could instead focus on youths. Punishment with an emphasis on gangs may cause youths to view themselves as gang members and therefore exacerbate the problem by alienating the young from law

135. Werdegar, *supra* note 8, at 440.

136. *Id.* at 441.

137. Herd, *supra* note 34, at 677.

enforcement.¹³⁸ Because the use of harsher punishment for youngsters is defective, shifting attention from the punishment of young people to the improvement of their environments may prove a more effective method of reducing criminal behavior.

The justice system's drift away from its rehabilitative goals and toward punishment is not the right solution.¹³⁹ An example of the increasing emphasis on punishment can be shown by the three methods used to transfer certain juvenile offenders from juvenile court to adult criminal court.¹⁴⁰ These three methods—judicial waiver, statutory waiver, and prosecutorial waiver¹⁴¹—are not without their problems.

Judicial waiver gives the juvenile court judge discretion to remove the youth from the juvenile court's jurisdiction. The absence of objective criteria as guidelines for making such transfers gives judges unfettered discretion, which can lead to arbitrary decisions.¹⁴² Another way to transfer juveniles to adult court is through statutory waiver, which occurs when the legislature provides by statute that certain offenses are excluded from juvenile court jurisdiction.¹⁴³ However, these statutes are often broadly worded and thus ineffectively target the intended population of violent juvenile offenders.¹⁴⁴ Statutory waiver criteria—such as age, the nature and severity of offense, and the offender's previous history—do not allow for an individualized assessment of amenability to treatment, and thus obstruct the goals of the juvenile justice system.¹⁴⁵ The third method of transferring juveniles to adult court is the prosecutorial waiver, in which the juvenile court and the adult court have concurrent jurisdiction and the prosecutor decides in which court to charge the juvenile.¹⁴⁶ This method has been criticized for giving unchecked discretion to prosecutors and for its abandonment of the original rehabilitative goals of the juvenile justice system.¹⁴⁷

A more effective alternative may be youth programs that can help youth view themselves as people instead of criminals or despised and

138. See Stewart, *supra* note 11, at 2276, 2279.

139. See Amy M. Thorson, Note, *From Parens Patriae to Crime Control: A Comparison of the History and Effectiveness of the Juvenile Justice Systems in the United States and Canada*, 16 ARIZ. J. INT'L & COMP. L. 845, 852-53 (1999).

140. *Id.* at 848, 853.

141. *Id.* at 853.

142. *Id.* at 853-54.

143. *Id.* at 854.

144. *Id.*

145. See Thorson, *supra* note 139, at 854.

146. *Id.* at 855.

147. *Id.*

marginalized members of society. The ultimate goal in gang abatement should be to improve the socioeconomic conditions of inner-city communities.¹⁴⁸ Otherwise, gangs may serve as proxies for extracurricular social organizations that are absent in disadvantaged communities.¹⁴⁹

B. Increased Probation or Parole Restrictions for Convicted Gang Members

Proponents of gang injunctions might argue that lenient treatment will not work because some gang members who commit crimes cannot be rehabilitated. A counterargument is that even if perpetrators of crime are harder to rehabilitate, their criminal behavior can be restricted without gang injunctions. One method of doing so would be increasing probation or parole restrictions for gang members convicted of crime.¹⁵⁰ This would allow judges to impose conditions of probation or parole that limit public association and other activities without violating the Constitution.¹⁵¹ Unlike gang injunctions, these restrictions target only those with proven criminal tendencies and are imposed only after the accused has been tried with procedural safeguards.¹⁵²

While discriminatory enforcement may still exist under this method,¹⁵³ the problem may not be as widespread as in the case of gang injunctions. Because alternatives exist, gang injunctions are an unnecessary law enforcement tool.

V. Conclusion

Gang injunctions violate the Equal Protection rights of affected defendants. Use of a new framework for the selective enforcement claim could be a way to defeat them. While selective prosecution has been a common selective enforcement claim to make in criminal proceedings, it is useless to gang injunction defendants because prosecutors do not need probable cause in these cases.¹⁵⁴ Rather, defendants should be able to show selective enforcement when they are prosecuted for acts that would not constitute a nuisance if committed by non-gang members. In addition, constitutional safeguards should also be provided for gang injunction

148. Stewart, *supra* note 11, at 2278.

149. *Id.* at 2278-79.

150. Werdegarr, *supra* note 8, at 443.

151. *Id.*

152. *Id.* at 443-44.

153. *Id.* at 444.

154. Werdegarr, *supra* note 8, at 443.

defendants because they are still battling within the realm of criminal law.¹⁵⁵

The need for a new framework is based on what makes gang injunctions a unique breed of remedy. Defendants in gang injunction cases have not committed illegal acts or acts that constitute a nuisance, but have merely been accused of gang association.¹⁵⁶ The ease of designating people as gang members opens the door to discriminatory enforcement.¹⁵⁷ Gang injunctions also impose harm on poor minority youths and society at large. The basis for the imposition of such a “remedy” is disproportionate to the effects of the gang injunction, the enforcement of which would amount to a deprivation of the defendants’ Equal Protection rights.

Directing attention away from punishing youths as gangs and toward improving the environments of disadvantaged youngsters is one alternative.¹⁵⁸ Another way to deter gang-related crime is to increase probation or parole restrictions for gang members who have actually been convicted of crimes.¹⁵⁹ The abolition of the gang injunction is necessary to protect vulnerable youths and their communities from egregious societal discrimination.

155. See U.S. CONST. amend. VI.

156. See *Acuna*, 929 P.2d at 623 (Mosk, J., dissenting).

157. See *id.*

158. See Stewart, *supra* note 11, at 2278.

159. Werdegarr, *supra* note 8, at 443.