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**Use of Injunctions Against Gang Activity – Part 2:
Constitutional Challenges**

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Introduction

In [part 1](#) of this series of articles, the legal basis for and practical advantages of using injunctions against gang activities were examined, illustrating how civil injunctive relief can be a powerful weapon in combating the negative impact of gang activities on the daily life of the community in ways that ordinary criminal law enforcement sometimes cannot accomplish.

In this second of three articles, prior constitutional challenges to the validity of such injunctions are briefly examined, including challenges on the basis of the First Amendment right to freedom of association, First Amendment overbreadth (sweeping constitutionally protected activities within the scope of the injunction), and unconstitutional vagueness (making it difficult for those subject to the injunction to know precisely what conduct they are prohibited from engaging in).

This list of potential challenges is by no means exhaustive, and there may also be unique particular challenges available under applicable state law in a specific jurisdiction.

At the conclusion of this article, as in the first article in the series, a number of useful resources and references are listed.

In a third and concluding article in this series, we will briefly examine some practical aspects concerning obtaining and enforcing anti-gang injunctions.

Constitutional Challenges to Anti-Gang Injunctions

In the first article in this series, we focused on California as a jurisdiction where there has been a significant amount of experience with the use of civil injunctions against gang activities. It is also a state in which the courts have addressed some substantive challenges to such injunctions.

In [People ex rel. Gallo v. Acuna](#), #SO46980, 14 Cal 4th 1090, 929 P.2d 596 (1997), cert. denied, [Gonzalez v. Gallo](#), 521 U.S. 1121 (1997), the California Supreme Court upheld, against a number of constitutional challenges, an injunction barring gang members from “standing, sitting, walking, driving, gathering or appearing anywhere in public view” with their fellow gang members, as well as enjoining gang members from “confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons or visitors [to the neighborhood] known to have complained about gang activities.”

In [Acuna](#), a number of purported gang members subject to the terms of the injunction challenged its provisions on a number of constitutional grounds.

The first basis of the challenge was that the provision of the injunction barring gang members from congregating together in public was an invalid infringement of their First Amendment right of association—their supposed right to associate with fellow gang members. The California Supreme Court easily rejected this assertion.

The court noted, first, that while prior decisions of the U.S. Supreme Court have recognized and shielded from government intrusion a limited right of association, it had not recognized a “generalized right of ‘social association’.” In this case in particular, the court found that the First Amendment did not protect the “collective public activities” of the gang members within the four block neighborhood area covered by the injunction, “activities directed in the main at trafficking in illegal drugs and securing control of the community through systematic acts of intimidation and violence.”

The types of associations entitled to First Amendment constitutional protection instead are of two types, the court commented: 1) those having an “intrinsic” or “intimate” value, such as personal affiliations connected with the creation and sustenance of a family, i.e., marriage, the raising and educating of children, cohabitation with relatives, etc., and 2) those “instrumental” to religious and political expression and activity, i.e., groups that

join together to pursue “political, social, economic, educational, religious, and cultural ends.”

The court found it clear that the enjoined gang activity did not qualify as either of these two protected forms of association. The gang did not form to engage in protected speech or religious activity, nor did it qualify as a type of “family,” “intimate,” or “private” life.

Protected First Amendment rights of association do not extend to “joining with others for the purpose of depriving third parties of their lawful rights.”

A second asserted challenge to the provision of the injunction against gang members congregating in public was that it was constitutionally “overbroad” in violation of the First Amendment. This was basically the argument that the terms of the injunction might compromise the recognized First Amendment rights of other persons, not present before the court.

The essence of this kind of challenge is that it does not say that the injunction violates the rights of the gang members present in court, who have been served with the injunction, but rather that it may inhibit the freedom of other persons who, while possibly subject to the terms of the injunction, are not before the court, and whose conduct might be constitutionally protected.

The California Supreme Court noted that the overbreadth doctrine is most often applied in the context of statutes, which apply to all members of the public. An injunction, however, is different from the “broad and abstract commands of a statute, and instead is a product of “a concrete judicial proceeding prompted by particular events,” specifically harmful criminal gang activity that led to a “specific request” for preventive action by the city that sought the injunction.

The injunction was addressed to “identifiable parties” and to “specific circumstances” particularly described, so there can be no “pervasive ‘chill’” on protected activity. Additionally, the injunction did not issue until after the defendants had their “day in court,” and therefore an opportunity to limit its reach beyond unprotected harmful criminal activity.

Indeed, the court pointed out, the only persons subject to the injunction were the named parties to the court action.

“There is accordingly no basis, legal or factual, for the professed concern that protected speech or communicative conduct by anyone *other* than defendants might be endangered by the terms of the trial court’s injunction.”

In Acuna, it should be noted, only individual members of the gang were named as defendants, but California law has subsequently made it clear that the gang itself as an entity may be named as a defendant and that the terms of an injunction can then apply to individual active gang members who were not themselves named as parties. See. [People ex rel. Totten v. Colonia Chiques](#), #B184772, 156 Cal. App. 4th 31 (2007).

The third constitutional challenge that the purported gang members raised—to both the “do not congregate” provision and “do not intimidate those who have complained” provision of the injunction was that they were “void for vagueness” in violation of the Fifth Amendment, and therefore unenforceable. This challenge amounted to asserting that due process of law was violated because the conduct prohibited was so vaguely defined that “men of common intelligence must necessarily guess at its meaning and differ as to its application.” In other words, the gang members argued that the injunction did not provide clear enough notice of what it was that they were forbidden to do.

Rejecting this claim, the court found that the terms of the injunction were not vague when considered in light of the purpose intended and read in that context, and if given a reasonable construction.

The court assumed that the injunction would only be applied to prohibit a gang member from congregating together with others he or she knew to also be gang members, eliminating the possibility that a gang member might violate the terms of the injunction without meaning to.

Similarly, the prohibition on intimidating or harassing those who have complained about gang activity would also be interpreted as requiring that the gang member, in order to violate the injunction, be found to have knowledge of the person’s complaint.

The court also rejected the argument that terms like “confront,” “annoy,” “provoke,” “challenge,” or “harass” were so vague as to not make it clear what conduct was prohibited.

“Finally, the declarations filed by the City in support of preliminary relief leave little doubt as to what kind of conduct the decree seeks to enjoin. One Rocksprings resident recounted an incident in which gang members had threatened to cut out the tongue of her nine-year-old daughter if she talked to the police; she stated that other residents had been threatened as well.”

An intermediate California appeals court below in the Acuna case, it should be noted, did strike down as improper a number of provisions of the anti-gang injunction on which the city did not appeal. While the decision was de-published subsequently, leaving the

California Supreme Court's ruling as the binding precedent in the case, that decision below may still merit reading.

The appeals court decision held that provisions of the injunction that prohibited the use of words or symbols referring to the gang and wearing clothing bearing the gang name violated the First Amendment.

It also found problems with parts of the injunction prohibiting the possession of some objects, such as marbles, crowbars, and ball bearings, all of which have legitimate noncriminal uses, as distinguished from deadly weapons, the possession of which could more clearly be prohibited.

Additionally, a prohibition on making "loud" noises was found fault with on the basis of a lack of definition of "loud." [People ex rel. Gallo v. Acuna](#), #H011802, 47 Cal. App. 4th 641, 40 Cal. Rptr. 2d 589 (6th Dist. 1993).

In subsequent decisions, California courts have clarified that the fact that some of the gang's members may reside in the area in which gang congregating is prohibited, and may also have family members who also belong to the gang does not transform their association into something that is constitutionally protected.

Gang members, including sometimes members of a family from several generations, when engaged in gang activities, can be enjoined from constituting a public nuisance. [In re Englebrecht](#), #D030992, 67 Cal. App. 4th 486 (1998). Also see [People v. Englebrecht](#), #D033527, 88 Cal. App. 4th 1236 (4th Dist. 2001).

While results may plainly vary from jurisdiction to jurisdiction, and also depend on the care with which the language of such injunctions are crafted, it seems probable that courts will uphold such injunctions against constitutional challenge so long as they are clearly targeted at constitutionally unprotected criminal gang activity.

In the concluding article in this series, we will examine some of the problems of procedure and proof, as well as some of the other practical considerations involved in obtaining and enforcing anti-gang injunctions. The concluding article will also address the question of how effective such injunctions have or have not been in addressing the gang problem.

The following are some useful resources and references on the subject of this article. Inclusion on this list does not constitute endorsement of the views expressed in the articles cited.

Resources

- Wikipedia article, [Gang Injunction](#)

- [Gang Injunctions in El Paso, Texas](#). El Paso Police Dept.
- [Property Abatements—The Other Gang Injunction. Project T.O.U.G.H.](#), Los Angeles City Attorney's Office (Sept. 2009).
- [Publications](#), National Gang Center. Lists many links to anti-gang research and publications.

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