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Prisoner Classification and Gang Activity

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❖ Introduction

Gang activity is a major problem for prisons and jails. It threatens the safety of prisoners, correctional officers, and visitors. It undermines security measures, and often results in organized efforts to import contraband, to engage in extortion, and to sexually exploit weaker prisoners.

While there are many aspects to this problem, a major method of trying to address it is the proper classification of prisoners, taking gang affiliations and activities into account when determining risk and assigning security levels – at times segregating them from other prisoners, including rival gangs – and imposing a variety of restrictions intended to make it harder for them to function.

This article takes a brief look at how the courts have addressed this issue in the context of prisoner classification. At the end is a listing of relevant resources and references.

❖ Classifying Gang Members

As with any important task that needs to be done right, there needs to be both procedures and standards for classifying prisoners, including designating those who are active gang members. At the same time, it is important to emphasize that this is one area where a good

amount of discretion needs to be exercised, and in which the level of proof needed to designate someone as a member of a security threat group or gang member is relatively low. Though attempts have been made, there is not a national consensus within the law enforcement and corrections community on criteria for designating gang membership. Courts have repeatedly acknowledged that.

Additionally, it is clear that while prisoners do have rights, including freedom of speech, expression, and association, there is absolutely no “right” to be an active gang member or to engage in gang activity. Classification of prisoners describes their “risk” (violence, contraband, escape) and “need” (medical, mental health, protective custody) to determine a security category, such as maximum versus minimum security (for “risk”), and a custodial category, such as general population versus segregation (for “need”),

❖ Michigan’s Security Threat Group

In [*Harbin-Bey v. Rutter*](#), #04-1458, 420 F.3d 571 (6th Cir. 2005), a federal appeals court ruled that designating a prisoner as a member of a “Security Threat Group” on the basis of gang activity without a prior hearing did not violate his rights. A Michigan prisoner filed a federal civil rights lawsuit against several officials of the Michigan Department of Corrections. He claimed that his designation as a member of a “Security Threat Group” (STG) without a hearing violated his constitutional rights. The trial court dismissed this claim and also granted summary judgment on a claim that the prison’s Security Threat Group Coordinator retaliated against him, and the appeals court upheld that result.

The plaintiff is a Moorish-American Muslim, allegedly affiliated with a gang known as the “Vice Lords.” He began writing letters to family members and to other inmates regarding the prison’s STG policy directive, complaining that it infringed on prisoners’ constitutional rights and on their ability to obtain parole, and indicated that he was considering taking legal action against the Security Threat Group Coordinator. These letters also allegedly contained “veiled references” to the Vice Lords gang, using terms like “golden sun” and “black moon,” which are allegedly gang symbols, and the phrase “la via va va,” which is allegedly Vice Lord code for “all is well.”

When the Security Threat Group Coordinator intercepted one of these letters he issued a “Notice of Intent to Conduct an Administrative Hearing, (NOI)” and also ordered the prisoner to refrain from any further correspondence involving STG matters. The prisoner claimed that the references in his letters were “religious” and therefore should not be considered violations of the STG policy. The prisoner was subsequently notified that he

had been designated an STG leader, and he protested that this designation without a hearing violated his due process rights.

He was subsequently denied receipt of a magazine which allegedly contained pictures of gang signs, and received another NOI from the Security Threat Group Coordinator informing him that he was being classified as an “STG II” because he had sent his grandfather a photograph of himself in which he displayed a gang tattoo on his arm. He again objected to this designation without a hearing.

His subsequent lawsuit asserted claims that the officials’ conduct in applying and enforcing the prison’s STG policies against him violated his constitutional rights to equal protection, due process of law, access to the courts, freedom from censorship of his mail and publications, freedom of religion, and freedom from retaliation.

The prisoner dropped his freedom of religion claim on appeal, and the appeals court rejected all of his other claims.

The appeals court found that the Department of Correction’s policy directive on the classification of inmates as STG members was rationally related to a legitimate state interest of maintaining order in the prison.

Identifying, reclassifying, and separating prisoners who are members of groups that engage in planning or committing unlawful acts or acts of misconduct “targets a core threat to the safety of both prison inmates and officials.”

The policy states that the following factors may be considered in designating a group as an STG:

- (1) history and purpose of the group,
- (2) organizational structure of the group,
- (3) propensity for violence or specific violent acts or intended acts that can be reasonably attributed to the group,
- (4) illegal or prohibited acts that can be attributed to the group,
- (5) demographics of the group,
- (6) existence of any written materials related to the group,
- (7) specific illegal acts that can be associated with the group, and
- (8) any other relevant information.

None of these factors, the court found, is “discriminatory.”

While it may be true that “homosexual predators” and “escape risks” in the state’s prison system receive a hearing before being designated as such, that did not mean that prisoners classified as STG members were necessarily entitled to the same procedural protections, “because the STG policy directive is not aimed at a suspect class, nor does it invade a fundamental right.”

Because the state was not obligated to provide such hearings, the fact that it offers one for some prison classifications, but not for others “is of no federal constitutional consequence,” the court ruled, “so long as the choice is not an arbitrary one.” In this case, the court reasoned, threats to prison security “presumably demand more immediate attention than the threats presented by the other categories mentioned” by the plaintiff.

Rejecting the prisoner’s claim of denial of access to the courts, the appeals court noted that the prisoner could file a grievance contesting the STG designation, and once he exhausted the prison’s internal grievance process, he could present his claim in federal court. Therefore, the failure to conduct a hearing before designating him a member of an STG did not deny him all avenues to challenge the designation.

The appeals court also found no violation of the First Amendment in the withholding of material sent through the mails containing gang symbols, and no evidence that the actions taken against the prisoner were in retaliation of his announced intentions to take legal action against the STG Coordinator.

❖ Quantum of Evidence

What evidence is generally needed to designate someone a gang member? In [*Castro v. Terhune*](#), #11-16837, 712 F.3d 1304 (9th Cir. 2013), a California prisoner challenged his validation as an associate of the Mexican Mafia prison gang, claiming that the regulation under which this was carried out was void for vagueness. A federal appeals court rejected this claim, finding that the regulation was sufficiently particular in spelling out what types of conduct could result in validation. The record showed that the validation was supported by “some evidence,” which was a sufficient legal standard.

❖ Due Process

Security concerns may properly limit the type of due process that is offered. [*In re Fernandez*](#), #C070016, 212 Cal. App. 4th 1199, 151 Cal. Rptr. 3d 571, 2013 Cal. App. Lexis 31, is a case in which two California prisoners claimed that authorities violated their rights by validating them as active gang associates. In the case of both prisoners, the decisions were based on three sources of information, a minimum number mandated by

state regulations, and included gang rosters and other gang documents as well as a debriefing report by another prisoner involved in gang activity.

As to one prisoner, there was adequate evidence of his gang involvement. As to the other prisoner, however, the debriefing report lacked specifics about his involvement in any gang-related conduct or acts. The court also ruled that due process was required before validating a prisoner as an active gang associate, because the decision had an impact on a prisoners' housing and credits, but the lack of any procedure for the prisoners to call witnesses and the limited disclosure of confidential information did not violate due process because concerns about institutional safety justified using less demanding procedural protections.

Courts have generally given a great amount of deference to prison officials in this area. California prison regulations provided that classifying a prisoner as a gang member could have the consequence of him being housed in a security housing unit. An intermediate appeals court granted a petitioner habeas relief from being designated a gang member, as it disagreed with the department's interpretation of the regulation at issue.

The California Supreme Court overturned that ruling, finding that the appeals court had failed to appropriately defer to the corrections department's interpretation of its own regulations. The department interpreted the regulation as not requiring proof of two-way interaction between the prisoner and another inmate already deemed a gang affiliate. The department's policy of classifying some inmates as gang affiliates based on their own unilateral actions was not clearly unreasonable. *In re Cabrera*, #S19728, 55 Cal. 4th 683, 287 P.3d 72, 148 Cal. Rptr. 3d 500, 2012 Cal. Lexis 9985.

Similarly, In *Hurns v. Mississippi Department of Corrections*, #2002-CP-01895, 878 So. 2nd 223 (Miss. App. 2004), a Mississippi prisoner failed to show that the state Department of Corrections acted in an arbitrary and capricious manner in reclassifying his custody status. Prisoners do not have a property or liberty interest, under either the U.S. Constitution or Mississippi state law, in a particular custodial classification or housing assignment. Further, the prisoner himself admitted that he had received an administrative hearing, that an investigation was conducted, and that relevant evidence was presented at the hearing concerning his alleged activities as a leader of a gang called the "Gangster Disciples" prior to the change in his classification.

A department's own rules and policies may require more than what courts might otherwise mandate. *In Matter of Singh v. Okada*, #403573/07, 2007 N.Y. Misc. Lexis 6880 (Supreme Court, N.Y. County), the New York Department of Corrections was found to have acted in an "arbitrary and capricious manner" in failing to provide an inmate with a written statement of why he was denied the right to call witnesses at a hearing to determine

whether he should be placed in “close custody” on the basis of his alleged gang influence and ability to “orchestrate” violence.

The DOC’s own regulations required such a statement and there was nothing in the hearing record to indicate why the prisoner’s request to call witnesses was denied. The court ordered a new hearing.

❖ Failure to Classify

Failure to classify and separate dangerous gang members can sometimes lead to civil liability. In [*Miller v. Shelby County, Tenn.*](#), 93 F. Supp. 2d 892 (W.D. Tenn. 2000), a county was held liable for \$40,000 for injuries to a prisoner in protective custody who was attacked by two gang member pre-trial detainees in a common recreation area. The court ruled that a policy allowing prisoners with different security levels to take recreation together was deliberate indifference in light of knowledge of specific threats to plaintiff prisoner.

- **Note:** One special problem is the role of race in prison gangs, many of which divide up along racial lines, or even among different nationalities within major racial groups. Race is generally not to be used as a factor in giving prisoners housing assignments, leading to segregation. For a more detailed discussion of this, see [Racial Classifications and Inmate Housing Assignments](#), 2010 (1) AELE Mo. L. J. 301. This also highlights the issues associated with the co-mingling of various “risk” levels (maximum, medium and minimum) in segregation areas, such as protective custody referenced above.
- This article was prepared with the assistance of [Donald Leach](#), Corrections Litigation Consultant.

❖ Resources

The following are some useful resources related to the subject of this article.

- “[Dangerous Convictions: An Introduction to Extremist Activities in Prisons](#),” by the [Anti-Defamation League \(ADL\)](#) (July 2002).
- Federal Bureau of Prisons Program Statement P5100.08. [Inmate Security Designation and Custody Classification](#).
- FBI Information page, [Violent Gangs](#).
- [Gangs Or Us](#).
- [National Gang Center](#)
- [Prisoner Classification](#). AELE Case Summaries.

- [Prison Gang](#). Wikipedia article.
- Prison Gangs: [Basic information](#) about six major nationwide prison gangs – Neta, Aryan Brotherhood, Black Guerrilla Family, Mexican Mafia, La Nuestra Familia, and Texas Syndicate – prepared by the [Florida Department of Corrections](#).
- [Prison Gangs](#). U.S. Department of Justice.
- [Prison Gangs in the United States](#). Wikipedia article.
- [Publications](#), National Gang Center. Lists many links to anti-gang research and publications.

❖ **Prior Relevant Monthly Law Journal Articles**

- [Use of Injunctions Against Gang Activity – Part One: Basis of and Advantage of Injunctive Relief](#), 2009 (10) AELE Mo. L. J. 101.
- [Use of Injunctions Against Gang Activity – Part Two: Constitutional Challenges](#), 2009 (11) AELE Mo. L. J. 101.
- [Use of Injunctions Against Gang Activity – Part Three: and Procedural Issues](#), 2009 (12) AELE Mo. L. J. 101.
- [Racial Classifications and Inmate Housing Assignments](#), 2010 (1) AELE Mo. L. J. 301.

❖ **References:** (*Chronological*)

1. “[Prison Gangs, Norms, and Organizations](#),” by David Skarbek. 82 (1) Journal of Economic Behavior & Organization 702-71 (2012).
2. “[Governance and Prison Gangs](#),” by David Skarbek, American Political Science Review (November 2011).
3. “[Public Enemy Number 1: California’s Growing Racist Gang](#),” (2007) by the Anti-Defamation League (ADL).
4. “[Career Criminals, Security Threat Groups, and Prison Gangs](#),” by David M. Allender and Frank Marcell, 72 FBI Law Enforcement Bulletin, No. 6, pgs. 8-12 (June 2003).
5. “[An Overview of the Challenge of Prison Gangs](#),” by Mark S. Fleisher and Scott H. Decker (2001).
6. IACP Training Key #438, Prison Gangs.

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