No Way Out: An Analysis of Exit Processes for Gang Injunctions

Lindsay Crawford†

INTRODUCTION

In the past thirty years, gang membership and gang-related violence have proliferated across the nation as gangs in urban and rural areas fight for territorial control and market dominance.1 Today, the U.S. Department of Justice estimates that there are more than 800,000 gang members and 30,000 gangs in the United States.2 No state is more affected by gang violence than California, which contains more than one-third of all gang members in the United States and attributes more than twenty five percent of all its homicides to gang activity.3

Recognizing that traditional law enforcement techniques alone were insufficient to address the growing problem, leading public officials and residents began to seek new, innovative solutions to slow the spread of gang violence in the 1980s. In greater Los Angeles, home to more than half of all gang members in California, and where more than half of all homicides are

gang-related, the City Attorney turned to the civil justice system for help, and sought California's first gang injunction in 1987. The state government was not far behind, and the legislature officially authorized the use of civil injunctions to control gang violence in 1998.

The negative reaction was strong and swift. In general, gang injunctions restrict the activities of named gang members in a variety ways, often by prohibiting gang members from associating with one another, wearing gang-related clothing, or from appearing in specified places and conducting certain activities. As a result, civil liberties organizations, most prominently the American Civil Liberties Union (ACLU), were quick to point out that gang injunctions implicate a variety of constitutional concerns, from the First Amendment right of freedom of association to the Fifth and Fourteenth Amendment rights to due process. However, in the landmark case of People ex rel. Gallo v. Acuna, the California Supreme Court upheld the use of civil gang injunctions against a variety of constitutional challenges. The decision spurred the further proliferation of injunctions in cities across California, and helped solidify the use of injunctions as a tool for law enforcement in their efforts to reduce gang violence. For its part, while the United States Supreme Court has never squarely addressed the constitutionality of civil gang injunctions, it struck down an anti-loitering ordinance as void for vagueness in its one and only case addressing the constitutionality of anti-gang legislation.

While scholars have questioned the constitutionality of gang injunctions, few scholars have explored the implications for individuals named in injunctions. Likewise, academics have yet to publish a study on the problem of exit from gang injunctions. However, the problem of gang injunctions garnered popular attention in 2006, after anecdotal evidence emerged from Los Angeles that described negative consequences for gang members named in long-lived gang injunctions. In response, community members and local leaders inquired further, asking whether former gang members had any success removing their names from injunctions. The answer was startling: in the entire history of the Los Angeles experience with civil gang injunctions, no gang member had ever successfully removed his or her name from an injunction.

News of this problem evoked public outcry. While enjoined gang members had always been able to petition the court for removal, this official process had not actually facilitated exit for gang members trying to find a way out of gang life. In response, in April 2007, the Los Angeles City Attorney unveiled the state’s first unofficial \(^{10}\) exit process, which allows former gang members to petition the City Attorney directly for removal rather than going to court. The San Francisco Public Defender followed suit, proposing a more ambitious and independent exit process in December 2007. The San Francisco City Attorney balked at the proposal, however, and it was not until March 2008 that the two offices reached agreement and San Francisco adopted an exit procedure. To date, despite the growing number of California cities that have obtained gang injunctions, only San Francisco and Los Angeles offer an unofficial way out.

This Comment argues that cities using gang injunctions have a constitutional and moral imperative to create a clearly defined and legally valid exit process to help inactive gang members remove their names from gang injunctions. Part I of this paper describes the current gang crisis and the proliferation of gang injunctions as a tool of law enforcement across California. Part II describes the constitutional concerns implicated by the use of gang injunctions, underlining the importance of creating an exit process. Part III discusses the practical consequences for gang members of being named in injunctions, particularly those who are not active or have never been active in a gang. Part IV considers two different models of unofficial exit processes, using Los Angeles and San Francisco as examples, as a basis for discussion of constitutional and statutory limitations on the creation of local, unofficial exit processes. The paper concludes with a discussion of the implications of these limitations for on the design of exit processes in the future.

I

GANG VIOLENCE AND POLITICAL RESPONSE: THE RISE OF THE CIVIL GANG INJUNCTION

Gang violence is one of the most serious and intractable problems facing urban communities across California. The California Department of Justice estimates that there are approximately 300,000 gang members living in California.\(^{11}\) Over the last twenty-five years, the number of gang members in

---

10. Throughout this comment, I use the word “unofficial” to describe the expedited, administrative exit processes proposed or created by local officials in California cities. I use the word “unofficial” to distinguish administrative exit processes from the “official” exit procedure of court petition that has been and continues to be available to gang members named in injunctions. Gang members are free at any time to make a motion to the court requesting removal. The exit processes discussed in this paper are expedited procedures by which gang members may have their names removed from gang injunctions without having to go to court directly—an “official” process that has proven universally ineffective at helping gang members vindicate their rights.

the United States increased more than fivefold, leading to increased violence and other illegal activity. From 1976 to 2005, the number of gang-related homicides increased eightfold nationwide.\textsuperscript{12} Despite substantial reductions in crime rates across the nation during the 1990s, the number of gang-related homicides did not decrease. For instance, in Los Angeles, the number of total homicides decreased by 45 percent, but there was no concomitant decrease in gang-related homicides.\textsuperscript{13}

The gang problem is not new. Gang violence has plagued Los Angeles in particular since the 1960s, when the Crips and the Bloods formed and became instant rivals.\textsuperscript{14} However, it was not until the 1980s that gang violence truly surged. The problem was most acute in California’s largest city: in 1989, of an estimated 120,636 gang members reported by cities surveyed nationwide, an estimated 70,000 lived in Los Angeles.\textsuperscript{15} As gang violence exploded, public concern intensified.

It was not until gang violence began to affect the affluent that the problem attracted widespread attention. In 1988, the murder of 27-year-old Karen Toshima in a gang shoot-out in a trendy shopping area adjacent to the University of California, Los Angeles, brought the issue to the forefront.\textsuperscript{16} As \textit{Time} Magazine reported, “[n]ewspapers and television headlined the story for days. Police patrols in Westwood tripled, and the [Los Angeles Police Department] assigned a 30-member antigang unit to capture Toshima’s killer.”\textsuperscript{17}

By the time of Toshima’s death, there was widespread public perception that the gang problem had proven impervious to traditional crime-solving techniques.\textsuperscript{18} To thwart law enforcement efforts, gang members operated strategically, committing crimes when police officers were not present and coercing potential witnesses by instructing them to turn a blind eye to gang activities.\textsuperscript{19} As gang violence grew, gangs began to present a unique and intractable problem requiring new, innovative solutions. In response, public officials turned to the civil justice system for help.

\textsuperscript{12} Fox & Zawitz, \textit{supra} note 1, at 66.
Civil gang injunctions are court-issued restraining orders that prohibit named gang members from participating in a variety of specified activities. Common injunction provisions include restricting the ability of gang members to engage in otherwise lawful activities, such as associating with other gang members, demanding entry into another person's residence, wearing certain types or colors of clothing, making certain hand gestures, conducting activities designed to identify and flee from law enforcement, traveling or loitering in public after certain hours (i.e., curfews), and annoying or harassing residents.\(^{20}\) Often, injunctions also prohibit activity that is already illegal, such as dealing or taking drugs, trespassing, or drinking in public.\(^{21}\) From a law enforcement perspective, injunctions prohibiting behavior that is otherwise unlawful are useful because they allow violators to be held in contempt of court, which can result in a sentence of up to six months of jail time in California.\(^{22}\) In addition, because police officers can use injunctions to curtail otherwise lawful activity, injunctions are one of the few tools available to help stop violence before it starts.\(^{23}\)

In 1987, the Los Angeles City Attorney, James Hahn (later mayor of Los Angeles) sought California's first gang injunction against a gang called the Playboy Gangster Crips.\(^{24}\) The injunction included specific and general prohibitions against lawbreaking, but also enjoined a variety of nuisance behaviors, including blocking sidewalks and roads; possessing markers, paint, or communications equipment; and approaching cars.\(^{25}\) After the American Civil Liberties Union stepped in and challenged the injunction on behalf of members of the Crips, the trial court issued a severely limited injunction in which the court refused to enjoin activities that were not otherwise unlawful. The court also limited the reach of the injunction to those gang members who were specifically named and had been given notice.\(^{26}\) Finally, the court found that indigent gang members had a right to counsel in injunction proceedings.\(^{27}\)

While the City Attorney's Office claimed victory, it did not seek another significant gang injunction for five years, discouraged by the limitations that

---

22. See id.
27. Id.
the court had placed on this new law enforcement tool.\(^2\)

In the early 1990s, California cities again attempted to use injunctions to curtail gang activity.\(^2\) From 1992 to 1994, various City Attorneys in California sought seven gang injunctions.\(^3\) The City Attorney for the City of San Jose sought the most significant of these gang injunctions, which was eventually upheld by the California Supreme Court in *People ex rel. Gallo v. Acuna* (hereinafter *Acuna*).\(^4\)

**A. Withstanding Legal Challenge in Acuna**

*Acuna* was the culmination of what is thus far the most notable legal challenge to a civil gang injunction in California. Five named gang members challenged the preliminary injunction issued against members of the Varrio Sureo Treces (VST) gang in the four-block “Rocksprings” neighborhood of San Jose, California. After hearing extensive evidence of the persistent violence and fear that plagued Rocksprings, the superior court entered a preliminary injunction.\(^5\) The injunction prohibited a wide range of activities in the four-block neighborhood, ranging from fighting and trespassing to littering and possession of pagers.\(^6\) On interlocutory appeal, the California Court of Appeal upheld only those parts of the injunction that proscribed independently criminal conduct, and concluded that other provisions in the injunction violated the First and Fifth Amendments to the U.S. Constitution as unconstitutionally vague or overbroad.\(^7\) The City of San Jose appealed two of the provisions found void by the Court of Appeal, and the California Supreme Court reversed.\(^8\)

The Court described Rocksprings as an “urban war zone.”\(^9\) Relying on forty eight declarations submitted by the City in support of the injunction, the court found that residents of Rocksprings were “prisoners in their own homes,” that “[v]iolence and threat of violence [were] constant,” and that “[v]erbal harassment, physical intimidation, threats of retaliation, and retaliation [were] the likely fate of anyone who complain[ed] of the gang’s illegal activities . . . .”\(^10\) The court also held that the specified provisions of the injunction neither violated associational freedoms of gang members, nor were they

---

29. Id.
32. The gang was also known as the Varrio Sureo Town, or Varrio Sureo Locos gang. Id. at 601.
33. Id.
34. Id. at 624 (Mosk, J., dissenting).
35. Id. at 602 (majority opinion).
36. Id.
37. Id. at 601.
38. Id. at 601-02.
overbroad; and therefore the specified provisions did not violate the defendant’s First Amendment rights.\footnote{39} Further, the Court found that the provisions were not “void for vagueness” under the Fifth Amendment.\footnote{40}

\section*{B. State Legislative Action—the STEP Act}

Following the \textit{Acuna} decision, the California legislature expanded the availability of gang injunctions and other anti-gang law enforcement tools by enacting the California Street Terrorism Enforcement and Prevention (STEP) Act in 1988.\footnote{41} In the opening lines of the Act, the legislature noted that the “State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods.”\footnote{42} The legislature further justified the Act by finding that gangs present a “clear and present danger to public order and safety and are not constitutionally protected.”\footnote{43}

The core provisions of the STEP Act create new substantive crimes and provide for the use of civil injunctions to curtail gang activity.\footnote{44} Both the criminal and civil aspects of STEP have proven controversial. The Act’s criminal provisions make it a felony to participate knowingly in a street gang or willingly promote, further, or assist a gang in committing a felony.\footnote{45} In addition to its criminal provisions, the STEP Act also provides specifically for the issuance of civil injunctions to curtail gang activity through use of California’s public nuisance laws.\footnote{46} Critics have attacked these provisions for punishing individuals for mere association with gang members in violation of the First Amendment and for being overly broad in defining “criminal street gang.”\footnote{47}

\begin{footnotesize}
\footnote{39. \textit{Id.} at 608-11.}
\footnote{40. \textit{Id.} at 612.}
\footnote{41. \text{STEP Act, Cal. Penal Code} §§ 186.20-186.33 (West 1999 & Supp. 2008).}
\footnote{42. \text{Cal. Penal Code} § 186.21 (West 1999).}
\footnote{43. \textit{Id.}}
\footnote{44. \text{Cal. Penal Code} § 186.22(a) (Supp. 2008).}
\footnote{45. \textit{Id.}}
\footnote{46. \textit{Id.} California’s public nuisance law provides the following: “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 . . . public park, square, street, or highway, is a nuisance. Cal. Civ. Code § 3479 (West 1997). “A public nuisance is one which 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.” § 3480.}
Proposition 21, which enacted the Gang Violence and Juvenile Crime Prevention Act, further strengthened the criminal provisions of the STEP Act in 2000. The Proposition added an offense of gang conspiracy to the California Penal Code, required gang offenders to register with local law enforcement, and expanded punishment for gang-related offenses. The most dramatic of these expansions made individuals convicted of gang offenses eligible for the death penalty. Proposition 21 also increased prosecutors’ ability to charge juveniles as adults, and broadened the applicability of anti-gang laws to juveniles. Finally, Proposition 21 raised additional constitutional and civil liberties concerns for California’s minority youth, the group most impacted by the further criminalization of gang activity.

C. Effectiveness of Gang Injunctions at Reducing Crime

Following the STEP Act, cities across California, from San Diego to Sacramento, sought gang injunctions as part of their law enforcement and anti-gang strategies. With the proliferation of gang injunctions as a law-enforcement tool, many have debated the effectiveness of gang injunctions in reducing crime and increasing community members’ sense of safety. Although some gang injunctions currently in effect in Los Angeles have been in place for fifteen years, few studies have evaluated how effective injunctions have been at combating gang violence, and the few existing studies have reached conflicting conclusions. One can speculate that the lack of examination and consensus is due to the difficulty of studying gang violence and community response.

In 2004, a Los Angeles County Civil Grand Jury released the most positive report on gang injunctions to date. The report proclaims:

Seldom do outcomes of public initiatives produce results of this clarity. The independent analysis of data conducted as part of this study do[es] not simply suggest that lower crime rates are somehow related to CGIs [Civil Gang Injunctions], or that CGIs might be
influential with respect to crime rates. These data indicate that CGIs do in fact cause a reduction in [crime].

In conjunction with the grand jury’s report, the Los Angeles Police Department issued statistics showing that overall gang-related crime had declined by 13 percent since 2001, and by as much as 53 percent within the Safety Zones designated in the injunctions. Two independent academic studies have found less substantial, but still positive, results. In a study of Los Angeles County from 1993 to 1998, Jeffrey Grogger found that violent crime decreased in the year after injunctions by 5 to 10 percent, and found no evidence that injunctions increased crime in neighboring areas not under the injunction. In 2005, Cheryl Maxson, Karen Hennigan, and David Sloane studied the effects of the Verdugo Flats injunction in San Bernardino, California, and concluded that the injunctions resulted in less gang presence in the area and reduced fear of intimidation and confrontation with gang members among residents, as compared to a control area.

However, studies of the effects of gang injunctions have not been universally positive. In 1997, Cheryl Maxson and Theresa Allen studied the results of a gang injunction in Inglewood, California, and concluded that there was little indication that the injunction had any positive effects. The ACLU released the most negative report on the effectiveness of gang injunctions that same year. Reviewing the effects of an injunction issued to address a crime-ridden neighborhood in the San Fernando Valley, the report determined that the Blythe Street Gang Injunction failed to achieve its stated objective—namely, reducing violent crime and drug trafficking in the area and bringing about an immediate increase in community safety. Instead, immediately after the injunction went into effect, violent crime increased in the area covered by the injunction. Further, the ACLU found that violent crime and drug trafficking also increased in areas adjacent to the injunction area. From this evidence, the report concluded that the injunction had, directly or indirectly, raised crime in adjacent areas far larger than the area affected by the injunction. On the basis

54. Id. at 214.
56. Jeffrey Grogger, The Effects of the Civil Gang Injunctions on Reported Violent Crime: Evidence from Los Angeles County, 45 J.L. & Econ. 69, 89 (2002); Maxson et al., supra note 52, at 591-99.
57. Grogger, supra note 56, at 89.
58. Maxson et al., supra note 52, at 591-99.
59. Id. (citing CHERYL L. MAXSON & THERESA L. ALLEN, UNIV. OF S. CAL., AN EVALUATION OF THE CITY OF INGLEWOOD’S YOUTH FIREARMS VIOLENCE INITIATIVE (1997)).
61. Id. at 44.
62. Id.
63. Id.
of these results, the ACLU issued a scathing report, concluding that gang injunctions are "based on a series of false premises that have engendered a series of ultimately false promises."\textsuperscript{64}

The uncertainty surrounding the effectiveness of gang injunctions provides one compelling reason for cities to provide an exit process. If injunctions may be ineffective at controlling crime when used against active gang members, at least in some situations, inactive gang members should certainly not suffer the consequences of being named in an injunction that does not have an overall positive effect. Constitutional concerns with gang injunctions discussed in Part II provide another justification for exit processes.

II

CONSTITUTIONAL CONCERNS IMPLICATED BY GANG INJUNCTIONS: THE COMMENTATORS WEIGH IN

While gang injunctions have received the blessing of California's highest court, and enjoy seemingly widespread public support, they have also received heavy criticism for implicating a wide range of constitutional concerns. Advocates for civil anti-gang remedies defend injunctions on the grounds that they present a novel approach to combating gang violence, particularly in deterring criminal activity and allowing law enforcement to stop, question, and disperse congregating gang members prior to the commission of crimes.\textsuperscript{65} However, many commentators, academics, and civil liberties organizations have taken a dimmer view of the constitutionality of gang injunctions. Perhaps the best-known statement of concern is that of Justice Mosk, who opened his dissent in \textit{Acuna} by invoking history's great defenders of individual liberties:

Montesquieu, Locke, and Madison will turn over in their graves when they learn they are cited in an opinion that does not enhance liberty but deprives a number of simple rights to a group of Latino youth you have not been convicted of a crime. Mindful of the admonition of another great 18th century political philosopher, Benjamin Franklin, that '[t]hey that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety,' [I dissent].\textsuperscript{66}

Constitutional and civil liberties concerns are most significant for those enjoined individuals who are no longer active in a gang or who were incorrectly included in a gang injunction in the first place, making the need for an exit process particularly compelling. While the California Supreme Court upheld two contested provisions of the San Jose gang injunction in \textit{Acuna}, it seems likely that challenges to gang injunctions on constitutional grounds will continue to arise. In addition, it is by no means clear that courts will continue to

\textsuperscript{64} Id.

\textsuperscript{65} See, e.g., OFFICE OF THE L.A. CITY ATT'Y, \textit{supra} note 19, at 4-5.

\textsuperscript{66} People ex rel. Gallo v. Acuna, 929 P.2d 596, 623 (Cal. 1997).
find gang injunctions constitutional in all forms. Finally, the constitutional arguments below arguably raise a political and moral mandate for cities with injunctions to create exit processes.

Since Acuna, many commentators have discussed the constitutionality of gang injunctions. Constitutional challenges have ranged from vagueness and overbreadth, to freedom of association and expression, to procedural due process and equal protection. This Part will explore the range of constitutional concerns that gang injunctions raise, emphasizing the liberty interest at stake for enjoined individuals.

A. Vagueness and Overbreadth

Gang injunctions are most often challenged as vague and overbroad. Under the Fifth Amendment vagueness doctrine, the underlying concern is the due process right to adequate notice. The doctrine requires that a statute be sufficiently specific such that a person of common intelligence is able to understand the statute and its application. Vagueness doctrine also requires that a statute provide minimum standards to guide law enforcement. Under the overbreadth doctrine, the underlying concern is that a statute will compromise the First Amendment rights of persons not before the court. The injunction provisions most often contested on these grounds are those that limit enjoined gang members’ ability to associate with other gang members, and those that prohibit gang members from annoying or harassing residents. I will consider each in turn.

Provisions limiting gang members’ ability to associate with other gang members raise both vagueness and overbreadth concerns. With respect to vagueness, one common concern is that injunctions fail adequately to specify the persons with whom gang members are prohibited from associating. The

67. After all, the Court of Appeals struck down 15 of the 24 provisions of the injunction in Acuna, some of which it found unenforceable as vague or overbroad under the First and Fifth Amendments. Id. at 602. The City of San Jose appealed only two of the provisions to the Supreme Court, which were then upheld. Id.
68. Walston, supra note 18, at 54.
70. Acuna, 929 P.2d at 611 (citing Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).
74. Yoo, supra note 20, at 248.
75. Id.
76. See, e.g., People ex rel. Gallo v. Acuna, 929 P.2d 596, 613 (Cal. 1997) (citing the Court of Appeal’s holding that the injunction provision against associating with another gang member was impermissibly vague because a defendant could engage in one of the prohibited activities with someone known to the police but not to him to be a another gang member).
injunction in *Acuna* provides a relevant example. In the *Acuna* injunction, paragraph (a) enjoined "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public with any other defendant herein, or with any other known ‘VST’ . . . or ‘VSL’ . . . member." This was one of the two provisions that caused disagreement between the majority in *Acuna* and the sole dissenter, Justice Mosk, who concluded that the provision was impermissibly vague. The injunction prohibited associating with any “known” VST or VSL member, but did not specify “known by whom?” Justice Mosk worried that this interpretive ambiguity made the provision susceptible to arbitrary enforcement, and argued in his dissent that the provision should be struck from the injunction. The majority disagreed, holding that the language in question implied knowledge on the part of the gang member that the person with which he was associating was a gang member, and therefore that the provision was not impermissibly vague. The majority also held that only those individuals who were named parties could be subject to the decree of the trial court, and therefore there was no risk of infringing on the First Amendment rights of those not before the court. Like the majority in *Acuna*, commentators have expressed far less concern about the overbreadth of gang injunctions than they have about vagueness problems.

Commentators have also expressed concern about injunction provisions restricting gang members from annoying or harassing residents. In the past, the United States Supreme Court has held that a city ordinance that used the term “annoy” to define a new criminal offense was void for vagueness. However, in *Acuna*, the injunction at issue enjoined “[i]n any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to ‘Rocksprings’ . . .” Justice Mosk concluded that the portion of the injunction that read “[i]n any manner confronting, . . . annoying, . . . challenging, [or] provoking . . . other[s]” encompassed too much legal, ordinary activity and was too vague to “withstand due process challenge[s].” Therefore, he concluded it should be stricken from the injunction. Again, the majority disagreed, holding that the provision was not unconstitutionally vague when read in the context of the City’s declarations detailing specific types of terrorizing behavior in the

77. *Id.* at 629 (Mosk, J., dissenting).
78. *Id.*
79. *Id.* at 613 (majority opinion).
80. *Id.* at 610.
81. See, e.g., Yoo, *supra* note 20, at 251.
82. *Id.* at 251-53. See also M. Katherine Boychuck, Comment, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 Nw. U. L. Rev. 769, 784 (1994) (noting that the terms “harass” and “annoy” present vagueness problems).
84. *Acuna*, 929 P.2d at 624 n.3 (Mosk, J., dissenting) (describing paragraph (k) of the injunction).
85. *Id.* at 630-31.
GANG INJUNCTION EXIT PROCESSES

The United States Supreme Court has weighed in on the constitutionality of modern anti-gang legislation only once. In *Chicago v. Morales*, the Court held that Chicago's anti-loitering ordinance was void for vagueness. However, the opinion provides little guidance on the constitutionality of civil gang injunctions. The Court relied on the vagueness doctrine as applied to criminal laws, under which an ordinance: (1) may fail to give notice such that ordinary people can understand its meaning, or (2) may authorize or encourage arbitrary and discriminatory enforcement to be held unconstitutionally vague.

The Court relied exclusively on the second prong to invalidate the ordinance, holding that two provisions of the law were unconstitutionally vague: the definition of "loitering" (i.e. "to remain in any one place with no apparent purpose") and a provision that empowered police to arrest two or more persons who refused to disperse if an officer had a "reasonable belief" that at least one person in the group was a gang member. The Court found that the provisions provided insufficient standards and problematically vested absolute power in law enforcement. However, in her concurrence, Justice O'Connor attempted to foreclose the applicability of *Morales* to civil gang injunctions by emphasizing the "narrow scope" of the Court's holding, and distinguishing the ordinance from laws requiring loiterers have a harmful purpose or those targeting only gang members.

**B. Freedoms of Association and Expression**

In addition to concerns about vagueness and overbreadth, many commentators have argued that gang injunctions burden gang members' First Amendment rights. Gang injunctions implicate three First Amendment rights—freedom of association, freedom from guilt by association, and freedom of speech and expression. I will consider each in turn.

The most significant First Amendment concern is that injunctions deprive gang members of their right to freedom of association by prohibiting them from congregating peacefully in the streets. However, the United States Supreme Court has held that the First Amendment protects only "expressive" association—the right of groups to organize for the purpose of engaging in activities protected by the First Amendment (i.e., speech, assembly, petition, and exercise of religion)—and "intimate" association (i.e., the right to enter

---

86. *Id.*
89. *Id.* at 56 (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).
90. *Id.* at 65-66 (O'Connor, J., concurring).
91. *Id.*
92. *Id.* at 62-63; see also *id.* at 67 (O'Connor, J., concurring).
into and maintain certain intimate human relationships.\textsuperscript{94} Gang association does not fit neatly into a protected category since "freedom of association . . . does not extend to joining with others for the purpose of depriving third parties of their lawful rights."\textsuperscript{95} Therefore, freedom of association critiques amount largely to criticisms of the modern First Amendment doctrine rather than to arguments that the doctrine extends constitutional protection to gang members.\textsuperscript{96} For example, one commentator argues that gangs should be viewed as informal fraternal societies instead of purely criminal entities, but admits that even when social functions are accounted for, social association does not enjoy constitutional protection.\textsuperscript{97}

Civil gang injunctions also may violate non-gang members' First Amendment protection against "guilt by association" by raising the risk that persons merely associating with gang members will fall under the ambit of a gang injunction as "suspected" gang members. While gang members do not have a right to associate purely for illegal or illicit purposes, the United States Supreme Court has held that the members of an association may not be held liable for the illegal acts of that association unless they actively participated in them with specific intent to further illegal aims.\textsuperscript{98} Gangs present a particularly problematic case, since gang members collectively participate in both legal and illegal activities. The risk is apparent in \textit{Acuna}, where the San Jose City Attorney looked to the following factors in deciding whether a particular person was a gang member: whether the person had admitted being a member of a gang, had a tattoo, wore gang clothing, used gang hand signs, was named as a gang member by at least two other members of a gang or by a reliable informant, and/or had been observed associating with gang members two or more times.\textsuperscript{99} As one commentator noted, these factors provide little protection against guilt by association, because they often rely on unreliable (and often


\textsuperscript{95} \textit{Madsen v. Women's Health Ctr., Inc.} 512 U.S. 753, 776 (1994). In \textit{Acuna}, the California Supreme Court held that the injunction provisions at issue did not violate defendants' First Amendment rights, including their right to freedom of association. People ex rel. Gallo v. Acuna, 929 P.2d 596, 608-09 (Cal. 1997). The Court noted that the United States Supreme Court has recognized a limited right of association that does not include a general right of social association. \textit{Id.} at 608. The court concluded that the "street gang's conduct in Rocksprings . . . fail[ed] to qualify as either of the two protected forms of association." \textit{Id.}

\textsuperscript{96} See \textit{Boda}, supra note 93, at 495-99.

\textsuperscript{97} \textit{Id.} at 498.

\textsuperscript{98} \textit{See NAACP v. Claiborne Hardware Co.}, 458 U.S. 886, 918-20 (1982); \textit{see also} \textit{Yoo, supra} note 20, at 232 & n.124 (listing cases in which the Supreme Court has rejected the concept of guilt by association).

\textsuperscript{99} \textit{Yoo, supra} note 20, at 234 (citing Defendant's 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)).
strategic) statements by gang members about their own participation in a gang or that of their fellow gang members.\textsuperscript{100} Even if a particular gang member admits to, or is implicated in, gang membership, there is no assurance that such participation rises to the level necessary to support legal liability,\textsuperscript{101} especially because gangs typically have several levels of membership that range from gang leaders to peripheral members to a "wannabe" class.\textsuperscript{102} The problem is even more acute when injunctions are sought against gangs as unincorporated associations, rather than against named defendants.\textsuperscript{103}

Finally, the imposition and enforcement of gang injunctions pose a risk to gang members' right to freedom of expression, including the right to free speech. The most obvious examples are common injunction restrictions on the use of gang clothing and hand signs.\textsuperscript{104} While acknowledging that the United States Supreme Court has given the government greater latitude to regulate expressive conduct than in regulating pure speech, one critic has argued that the limits on wearing of gang clothing and using gang hand signs are content-based restrictions and should be held unconstitutional.\textsuperscript{105} He argues that the conduct satisfies both prongs of the test articulated in \textit{Spence v. Washington}, under which a court asks (1) whether "an intent to convey a particularized message was present" and evaluates (2) whether "the likelihood was great that the message would be understood by those who viewed it."\textsuperscript{106} He argues further that the clothing and hand signs do not fall into designated categories of unprotected speech—fighting words or words that present a clear and present danger—since they do not invariably incite others to immediate violence or

\begin{itemize}
  \item \textsuperscript{100} \textit{Id.} at 234.
  \item \textsuperscript{101} \textit{Id.}
  \item \textsuperscript{102} Gary Stewart, \textit{Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions}, 107 \textit{YALE L.J.} 2249, 2275 (describing levels of gang membership).
  \item \textsuperscript{103} Yoo, \textit{supra} note 20, at 236. One scholar defends gang injunctions on the grounds that all gang members share one key characteristic—"knowingly promoting the territorial street crimes of the gang itself." Walston, \textit{supra} note 18, at 66. However, one wonders whether a "wannabe" class of young teens hanging around with older friends who are active gang members and replicating their activity—i.e. by wearing similar colors, and carrying pagers—are knowingly promoting anything. It seems likely that some or all of these hypothetical youth are just trying to fit in, as their status characterization suggests, and might plausibly be unaware of the specific street crimes in which other members of the gang engage, but are in danger of being named in an injunction even by their own admission of being a "member" of the gang. This is even more likely if peripheral members and wannabes are put on the street in visible roles because they are less likely to be known to the cops or have criminal records, and have to prove themselves to move up the ladder.
  \item \textsuperscript{104} These restrictions are common in gang injunctions. For one of many examples, see People v. Nortefio, No. CGC 07-464492 (Cal. Super. Ct. S.F. County Oct. 12, 2007) (order granting preliminary injunction), available at http://www.sfgov.org/site/uploadedfiles/cityattorney/MISSION-ORDER.PDF. For other easily accessible examples from San Francisco County, see \textit{OFFICE OF THE CITY ATT'Y, CIVIL GANG INJUNCTIONS IN SAN FRANCISCO}, http://www.sfgov.org/site/cityattorney_page.asp?id=67356 (last visited on Aug. 30, 2008).
  \item \textsuperscript{105} Yoo, \textit{supra} note 20, 239-46.
  \item \textsuperscript{106} \textit{Id.} at 240-42 (quoting \textit{Spence v. Washington}, 418 U.S. 405, 410-11 (1974)).
\end{itemize}
constitute an immediate breach of the peace. The response to this argument has been that gang clothing and hand gestures do not include expressive content and are therefore beyond the scope of First Amendment protection.

C. Procedural Due Process

Another key constitutional concern about the rise in gang injunctions is that they violate gang members’ procedural due process rights, protected under the Fifth and Fourteenth Amendments. Although injunctions are civil proceedings, a gang member who violates the injunction is held in criminal contempt and can be subject to fines or jail time. Therefore, some critics are concerned that gang injunctions impose criminal liability without providing the due process protections available to criminal defendants. In particular, critics fear that injunctions inappropriately take advantage of both the lower level of procedural protections (no right to counsel) and the lower burden of proof in civil actions. One commentator has noted that, in Mathews v. Eldridge, the United States Supreme Court held that due process requires procedural protections even in civil cases. While he admits that gang injunctions do not meet the criteria for invoking criminal procedural protections, since the Court continues to rely on formalistic civil/criminal distinctions, he argues that two cases—United States v. James Daniel Good Real Property and Lassiter v. Department of Social Services—provide persuasive support for providing alleged gang members with a contested hearing and appointed counsel (if indigent) before a court imposes an injunction.

The risks of due process violations are often exacerbated by the characteristics of the gang members themselves. Frequently, gang members are indigent, and fail to appear at the hearing to explain why they should not be named in the injunction. Injunction hearings are designed to afford gang members notice and an opportunity to be heard—and courts have enforced

107. Id. at 242-43 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
108. Walston, supra note 18, at 67-68.
110. Yoo, supra note 20, at 253-66.
111. See Iraheta v. Superior Court of L.A. County, 70 Cal. App. 4th 1500 (1999) (holding that indigent defendants have no right to counsel in injunction proceedings).
112. Howarth, supra note 25, at 733.
113. Yoo, supra note 20, at 255 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).
114. 510 U.S. 43 (1993) (applying the three Mathews v. Eldridge factors and holding that due process requires notice and a hearing prior to the federal government’s seizure of a citizen’s real property).
115. 452 U.S. 18 (1981) (holding that petitioner was entitled to appointed counsel in a hearing to terminate her parental rights and discussing the risk of erroneous deprivation as the second Mathews v. Eldridge factor).
117. Walston, supra note 18, at 73.
these rights.\textsuperscript{118} As a result, some observers have argued that the fact that gang members often fail to appear at hearings does not render them ex parte or implicate due process concerns.\textsuperscript{119}

In addition, as cities become more creative—and more severe—in the punishments they impose on gang members for violations of civil injunctions, the risks of due process violations will grow. For example, the town of Cicero, Illinois, passed an ordinance in 1999 that provides for civil banishment of gang members as punishment for engaging in gang-related activity that presents a “clear and present danger to the public order and safety.”\textsuperscript{120} After applying the Supreme Court’s tests for determining whether a proceeding is civil or criminal in nature, one commentator concludes that this exile of gang members should be considered a criminal penalty.\textsuperscript{121} Among the multiple factors that point to the extreme nature of the sanction, she argues that banishment is far more serious than most civil penalties and has historically been regarded as criminal punishment.\textsuperscript{122} In addition, when a substantial right is implicated—for example, the termination of parental rights—the Supreme Court has found a right to counsel in civil proceedings.\textsuperscript{123}

As cities impose more and more serious punishments for violations of gang injunctions (or in other civil contexts), they will be more likely to deprive defendants of substantial or fundamental rights. Accordingly, the need for municipalities and courts to use caution in seeking or subjecting gang members to injunctions without proper procedural safeguards will become more pressing. However, as of yet, courts have declined to find that injunctions pose a substantial threat to gang members’ liberty, and have rejected the contention that gang members should receive court-appointed counsel in injunction proceedings.\textsuperscript{124}

\begin{itemize}
  \item \textsuperscript{118} See, e.g., Press Release, Office of the Yolo County Dist. Att’y, Amended Civil Injunction Sought Against Broderick Boys Criminal Street Gang (July 31, 2007), available at http://www.yoloda.org/PressReleases/Broderick%20-%20Amended%20Complaint.pdf (noting that the California Appellate Court had dismissed the original injunction because of the lack of notice to members of the lawsuit).
  \item \textsuperscript{119} Walston, supra note 18, at 73.
  \item \textsuperscript{120} Stephanie Smith, Comment, Civil Banishment of Gang members: Circumventing Criminal Due Process Requirements?, 67 U. CHI. L. REV. 1461, 1466 (2000) (citing Gang Free Zones Ordinance § 25-300(a)(C)).
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} Id. at 1470-73. For the Supreme Court’s tests, see Hudson v. United States, 522 U.S. 93 (1997) (reaffirming the \textit{Ward} rule and holding that the seven factors named in \textit{Mendoza-Martinez} are useful in determining whether a civil penalty should be considered a criminal penalty); United States v. Ward, 448 U.S. 242 (1980) (outlining a two-part test to determine whether an action is civil or criminal); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (stating a seven-factor test for determining whether a penalty is criminal or civil).
  \item \textsuperscript{123} See Lassiter v. Dept. of Soc. Servs., 452 U.S. 18, 31-32 (1981) (finding a right to counsel in a proceeding terminating fundamental rights); see also Vitek v. Jones, 445 U.S. 480, 500 (1980) (upholding a right to counsel for involuntary commitment to a psychiatric institution).
  \item \textsuperscript{124} See Iraheta v. Superior Court of L.A. County, 70 Cal. App. 4th 1500, 1500 (1999).
\end{itemize}
D. Equal Protection

While the most prevalent constitutional concerns with gang injunctions are presented above, another concern merits brief mention. At least one commentator has suggested that there may be equal protection concerns with gang injunctions. Gang injunctions, on their face, allow for punishment of named gang members for otherwise legal activity, such as congregating in the street or wearing certain colors. While gang members are not a protected class, the argument goes, racial prejudice can influence the identification of gang members by law enforcement.

E. Conclusions and Implications

The lack of judicial recognition of these constitutional implications of gang injunctions should heighten the concern about the fate of those enjoined. So too should the reality of the way in which the injunctions are issued. While every gang member against whom an injunction is sought has a right to appear before the court and be heard before the injunction is issued, many injunctions are issued in the absence of some or all of the named gang members. The absence of the alleged gang members is due in part to the failure of some courts to enforce rigorously the requirement of notice to individuals against whom an injunction is sought. For example, in West Sacramento, when Yolo County prosecutors sought an injunction against the Broderick Boys gang, they served notice on only one alleged member of the gang, Billy Wolfington, who did not live in West Sacramento and did not appear in court. The ACLU promptly filed a lawsuit challenging the lack of notice to the broader gang membership, but the trial court dismissed the case, because the four defendants denied membership in the gang; since the injunction only enjoined gang members, the court reasoned that defendants did not have standing to challenge it. However, a state appeals court found that defendants had standing without admitting gang membership because they were “aggrieved” by the injunction. The court then granted defendants’ motion to set aside the

126. Id. at 296-97.
127. Id. at 298-300.
128. See Cosmo Garvin, West Sac’s Catch-22, Newsreview.com, Dec. 21, 2005, http://www.streetgangs.com/injunctions/topics/120105sac.html (noting that not a single gang member appeared in court on behalf of the Broderick Boys in West Sacramento who were enjoined in 2004). But see Office of the Yolo County Dist. Att’y, supra note 118 (noting that while a lower court had issued the Broderick Boys injunction in February 2005 with notice to only one alleged gang member, the Court of Appeals had dismissed the injunction in part because of the “process used to notify the gang”).
129. Garvin, supra note 128.
130. Id.
132. Id. at 66-67.
injunction. Despite these constitutional problems, gang injunctions continue to gain popularity as a law enforcement tool. While public outcry has induced some cities to impose limits on seeking and enforcing gang injunctions within their boundaries, and some opinions have narrowed the reach of these injunctions to those who are not gang members, in general courts have failed to restrict meaningfully the use of injunctions. Accordingly, these problems will grow, especially given the longevity of gang injunctions, which rarely, if ever, have expiration dates. Some gang injunctions currently in place in Los Angeles have been in existence for almost fifteen years. As a result, community leaders and public officials have begun to inquire into the practical consequences for gang members of being named in gang injunctions, especially for those attempting to transition out of gang life. Part III considers those consequences, which further underscore the need for an exit process.

III
PRACTICAL CONSEQUENCES OF GANG INJUNCTIONS FOR ENJOINED GANG MEMBERS: BLOCKING THE WAY OUT

The constitutional concerns implicated by gang injunctions are enough for many to condemn their use outright as a crime-fighting tool. Most, if not all, of the critiques of gang injunctions in the academic literature, and from civil rights groups, have focused on fighting the issuance of gang injunctions in the first instance. However, the constitutional concerns enumerated above are magnified by the practical consequences for gang members named in injunctions—some of whom may not be associated with a gang at all, and the difficulty that former gang members experience in removing their names from injunctions.

The consequences of being named in a gang injunction can be severe, both for those gang members who have tried (or are trying) to exit gang life and for those who were erroneously named in the gang injunction in the first place. For those attempting to transition out of a gang, the consequences of gang injunctions are especially problematic when they make it more difficult to participate in productive activity—particularly work or school—that would help them stay out of trouble for the long term. Injunctions show up on
employment background checks, so former gang members can have trouble getting a job. Employment background checks, so former gang members can have trouble getting a job. 

Young people under injunctions may also have difficulty traveling to work or school, or even participating in school sports or activities, since they are not allowed to be in the presence of other enjoined individuals and former fellow gang members; this includes, for example, riding in the same bus or car. 

The problem is not limited to young people. Some of the current Los Angeles gang injunctions have been in place for more than a decade, and they continue to include people who have not been active in gangs for years.

The consequences are particularly problematic when individuals have erroneously been listed as gang members. For example, one Los Angeles community leader reported knowing a young man with an undergraduate degree from California State University, Los Angeles, pursuing a Master's degree at the University of Southern California, who was charged with violating an old gang injunction. The student denies ever being a member of gang, but he grew up in a gang-ridden neighborhood, in which mistakes about gang membership are more likely to occur.

The severity of these consequences would seem to create strong incentives for individuals wrongly named in injunctions, or those who are no longer members of the targeted gang, to seek removal of their names from the injunctions. It is unclear how many have tried. However, despite these incentives, no individual has ever been officially removed from a gang injunction in Los Angeles.

IV
AN 'UNOFFICIAL' WAY OUT: EXIT PROCESSES IN LOS ANGELES AND SAN FRANCISCO AND IMPLICATIONS FOR OTHER CALIFORNIA CITIES

Individuals named in gang injunctions have, theoretically, always had a way out. Enjoined gang members have the right to make a motion directly to the court seeking removal from a gang injunction. However, the lack of successful motions within Los Angeles highlights the inadequacy of the process provided by the formal civil justice system.

While there has been no comprehensive study on why gang members have been unsuccessful in removing their names from injunctions, or even how many have tried, one can speculate as to the reasons for their lack of success.

138. Id.
139. Id.
140. Id. (quoting Los Angeles Police Chief William Bratton).
141. Id.
142. Id.
143. McGreevy & Banks, supra note 9.
144. See, e.g., S.F. CITY ATTORNEY'S OFFICE, PETITION FOR REMOVAL FROM GANG INJUNCTION 1, available at http://www.sfgov.org/site/uploadedfiles/cityattorney/OPTOUT-PETITION.PDF (stating that petitioners can file a motion in San Francisco Superior Court and bypass the City Attorney's administrative process).
First, gang members, as well as non-members who are likely to be erroneously included in the injunctions, are often young and uneducated, and many face heightened language barriers. They may be unaware or incapable of understanding and exercising their right to petition the court for removal, or they may be intimidated by the process. In addition, since defendants have no right to counsel in gang injunction proceedings, indigent gang members often have no access to the assistance of an attorney to help them understand or exercise their right. Whatever the reasons, as evidenced by the Los Angeles experience, people named in injunctions have no practical way out.

Of course, gang members have a constitutional right to notice and a hearing before the injunctions are issued. However, as discussed briefly above, many individuals fail to appear, either because they are not given notice or choose not to come. Also, California law permits prosecutors to seek gang injunctions against unnamed members of the gang—John Does—which raises further risks of lack of notice. Therefore, given the substantial barriers that prevent individuals from effectively using the courts to seek removal, unofficial exit processes are likely to be the most effective way to provide those named in gang injunctions with a way out.

Both Los Angeles and San Francisco recently adopted unofficial exit processes. This Part compares the Los Angeles process, which is managed by the City Attorney's Office, with the process that the San Francisco Public Defender proposed, which would have placed decision-making power in independent councils. While the San Francisco proposal had the advantage of removing discretion over the exit process from the office charged with enforcing the injunctions, it was rejected because of, among other things, legal obstacles raised by the San Francisco City Attorney. (San Francisco eventually enacted a process modeled after Los Angeles). Applying the City Attorney's


146. See Iraheta v. Superior Court of L.A. County, 70 Cal. App. 4th 1500, 1500 (1999). However, many public defenders offices will provide assistance to gang members who are arrested for engaging in prohibited activities or charged with misdemeanor contempt of court. See S.F. Public Defender, supra note 21 (providing answers to common questions about gang injunctions and a telephone number for legal assistance); see also S.F. CITY ATTORNEY'S OFFICE, supra note 144, at 2 (stating that petitioners may obtain opt-out assistance from the Lawyer's Committee for Civil Rights, which will help identify community organization and service providers that will assist in supporting the petition).

147. See, e.g., Garvin, supra note 128 (citing the failure of any gang members to appear at the West Sacramento Broderick Boys gang injunction hearing).

148. See OFFICE OF THE L.A. CITY ATT'Y, supra note 19, at 5-6. However, note that establishing an injunction violation requires the government to prove that an individual was a gang member at the time the violation occurred. Id. at 6 (citing Berger v. Superior Court, 175 Cal. 719, 721 (1917); People v. Saffell, 74 Cal. App. 2d Supp. 967, 979 (1946)).
critique to both the Los Angeles process and the San Francisco proposal sheds light on three legal and constitutional concerns about gang injunction exit processes more generally. Lessons from this analysis can help other localities craft their own options to give people named in the injunctions a way out.

A. The Los Angeles Solution

The problem of exit from gang injunctions gained publicity only recently. In January 2006, Los Angeles Councilwoman Janice Hahn, of the gang-ridden 15th District, created the Watts Gang Task Force following a month of intense violence in Watts during which eighteen shootings and seven deaths occurred.149 The meetings are ongoing, and bring together community members, city officials, and the L.A.P.D. to discuss gang-related violence and solutions.150 It was during one of these weekly meetings that Councilwoman Hahn first heard about the practical problems with the exit process associated with gang injunctions.151 She brought her concerns to the media in March 2006,152 at which time pressure began to mount for the Los Angeles City Attorney and law enforcement community to respond.153

The concern about the exit process was part of a larger movement among community members and activists to reform the gang injunction process.154 In May 2006, community members brought a range of concerns about the use of gang injunctions to the Los Angeles City Council.155 Public pressure continued to grow until April 2007, when Los Angeles City Attorney Rocky Delgadillo announced new guidelines for the city’s gang injunction procedures.156 In the months following, the City Council set new goals for the gang injunction process, and held a series of hearings to address the variety of concerns that had been expressed by community members, activists, and local officials.157

The City Attorney presented the new gang exit process to the City Council

150. Id.
151. Id.
152. McGreevy & Banks, supra note 9.
154. Id.
155. Id.
156. Id. For example, the City Attorney agreed not to prosecute individuals for violations of gang injunctions unless they have been personally served with the injunction. L.A. CITY ATTORNEY’S OFFICE, supra note 135, at 1. Under California law, personal service is not required to bind all members of the gang, and gang injunctions can cover unnamed members of the enjoined gang. See People v. Poe, 236 Cal. App. 2d Supp. 928, 939-40 (1964).
at a special policy meeting on gang violence and youth development.  

The heart of the exit process is the “Petition For Removal From Gang Injunction” for “use by persons living in the City of Los Angeles who have been served with a Gang Injunction and who want the opportunity to demonstrate that they should not be restrained by the Gang Injunction because they no longer are, or they never were, a gang member.” Importantly, the exit process does not require the individual to file papers with a court or appear before a judge. The petitioner only must complete the form Petition, available in a large, bold link at the top of the City Attorney’s website, and return it to the City Attorney’s Office. The petition itself requires relatively simple information, including contact information, education and employment history, confirmation and explanation of the fact that the petitioner is not now a member of a gang and will not in the future act to promote or assist gang activities, a list of people who can “support your petition,” and a signature. A senior attorney within the City Attorney’s Office who is not otherwise involved with the enforcement of gang injunctions then reviews the petitions. While only a court may remove a gang member from an injunction, and a court is not bound by the City Attorney’s decisions regarding an individual gang member, the City Attorney’s Office has agreed that it will stipulate to the court that it has no objection to the removal of those individuals’ names whose petitions are approved. Therefore, in all practicality, gang members with successful petitions will have their names removed from the injunctions.

B. The San Francisco Public Defender’s Proposal

While the exit process launched by the Los Angeles City Attorney has been lauded by many as a success, activists and officials in other California jurisdictions that employ gang injunctions as a crime-fighting tool have pushed for an exit procedure that is independent of the discretion of the City Attorney. Specifically, in December 2007, San Francisco Public Defender Jeff Adachi proposed comprehensive legislation that would have created an exit

158. Id.
159. L.A. CITY ATTORNEY’S OFFICE, supra note 135, at 1.
161. L.A. CITY ATTORNEY’S OFFICE, supra note 135, at 7. Specifically, the petitioner must be able to confirm that he or she 1) no longer is, or never was, “a member of the gang named in the Gang Injunction;” 2) is “not now acting, and . . . will not in the future act, to promote, further, or assist any of the activities prohibited by the Gang Injunction on behalf of the gang named in the Gang Injunction;” and 3) is “not a member of any other criminal street gang.” Id. at 1.
162. Id. at 1-2 (describing the petition review process).
163. See, e.g., S.F. CITY ATTORNEY’S OFFICE, supra note 144, at 1.
process using extra-judicial, independent review councils to which gang members named in injunctions could petition for removal.\textsuperscript{165} While ultimately unsuccessful, the proposal was a pointed alternative to those leaving these decisions to the discretion of government lawyers.\textsuperscript{166} This Part considers the Public Defender’s proposal and the critical response of the City Attorney.

During 2007, San Francisco City Attorney Dennis Herrera greatly expanded San Francisco’s use of civil injunctions as a gang violence control technique, obtaining injunctions against five criminal street gangs “that [had] long plagued three of San Francisco’s most violence-prone neighborhoods.”\textsuperscript{167} About ten days prior to a default judgment hearing on the latest of these injunctions, the Public Defender wrote a letter to the City Attorney, co-signed by the ACLU of Northern California and the Lawyer’s Committee for Civil Rights, requesting that the City Attorney create a “Clear and Accessible Exit Process for Individuals Subject to the Terms of San Francisco Gang Injunctions.”\textsuperscript{168} The City Attorney’s Office did not respond publicly, and the court issued the injunction on December 18, 2007.\textsuperscript{169}

On December 19, 2007, the Public Defender’s office gave proposed legislation to members of the San Francisco Board of Supervisors.\textsuperscript{170} The legislation proposed the creation of a series of extra-judicial “Gang Injunction Review Councils,” one for each court-ordered safety zone that would meet to review petitions of gang members and decide whether to remove permanently enjoined gang members from injunctions.\textsuperscript{171} The Review Councils would conduct their hearings in secret, and records of the proceedings would not be available to the public.\textsuperscript{172} Each ten-member Council would have three members appointed by the Mayor and seven members appointed by the Board of Supervisors.\textsuperscript{173} However, both the Mayor and the Board would be limited in whom they could appoint—the legislation would limit the pool of potential members to persons serving on City boards and committees responsible for youth development and intervention, and those persons who represent

\begin{itemize}
\item \textsuperscript{165} News Release, City Att’y Dennis Herrera, Herrera Criticizes Adachi Proposal to Prioritize Gangs Over Victims, Vulnerable for City Services (Jan. 2, 2008), available at http://www.sfgov.org/site/uploadedfiles/cityattorney/ADACHI-LEGISLATION.PDF.
\item \textsuperscript{166} See Office of the Public Defender, supra note 164.
\item \textsuperscript{167} OFFICE OF THE CITY ATT’Y, supra note 104.
\item \textsuperscript{168} Letter from Jeff Adachi, S.F. Public Defender, to Dennis J. Herrera, S.F. City Att’y (Dec. 7, 2007), available at http://www.aclunc.org/docs/News_Room/Ltr_to_City_Att’y_(Dec 7, ’07).pdf.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id.
\end{itemize}
community service organizations that contract with the City to provide outreach and related services.\footnote{174}

City Attorney Herrera responded to Adachi’s exit process proposal with a scathing critique.\footnote{175} In a memorandum to the Board of Supervisors, Herrera cited three legal problems with adopting the proposed legislation: (1) that it would violate the separation of powers clause in the California Constitution by granting judicial powers to an extra-judicial body, (2) that it would violate the Brown Act and Public Records Act by providing that “review councils” meet in closed session and that meeting records not be made available to the public, and (3) that it would conflict with the power granted to the City Attorney to initiate and prosecute actions in the name of the people of the State of California to enjoin nuisances.\footnote{176} Mr. Herrera’s critique of the proposal provides a basis for a three-part analysis of the legality of alternative exit processes in California cities discussed in Part IV.C below.

\textit{C. The Legal Analysis}

This Part will consider each of the three legal obstacles to potential exit processes in turn, referring back to the unsuccessful San Francisco proposal and the Los Angeles process as examples. Part IV.D discusses the implications of the legal analysis and suggests options for other cities that are considering gang injunction exit processes.

\textit{1. Separation of Powers}

The separation of powers problem is a constitutional concern. Article VI, Section I of the California Constitution states that “[t]he judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts . . .”.\footnote{177} California courts have interpreted Article VI to prohibit a state or local legislature from granting judicial powers to government agencies (except as expressly permitted by Article IX—so-called “constitutional agencies”).\footnote{178} The California Code of Civil Procedure, section 525, clarifies that “[a]n injunction . . . may be granted by the court . . . and when granted by a judge, it

\footnote{174} \textit{Id.}

\footnote{175} Herrerra, \textit{supra} note 165. Note that some of Herrera’s criticism were overtly political—for example, in the news release, he argues that the legislation restricts membership of the Review Councils to “certain non-profit interest groups, some of which have represented the most vocal and fervent core of political opposition to gang injunctions in San Francisco. The councils . . . offer no parallel membership requirements for victims of gang violence, their families, or their advocates.” However, the bulk of his criticism is legal, identifying potential constitutional, state, and local legal conflicts with the legislation. \textit{Id.}

\footnote{176} \textit{Id.}

\footnote{177} \textsc{Cal. Const.} art. VI, § 1.

\footnote{178} \textsc{Cal. Const.} art. IX.

may be enforced as an order of the court." Therefore, modification of an injunction constitutes the exercise of judicial power.

The Los Angeles process does not present a separation of powers problem. After reviewing a petition, if approved, the City Attorney stipulates to the court that it has no objection to the removal of the petitioner's name from the injunction. Therefore, the court retains final authority over the modification of the injunction order, making the process fully consistent with the California Constitution. In contrast, the San Francisco proposal vests a judicial power (namely the power to remove individuals from a court-ordered injunction) in an extra-judicial agency (independent review council), and therefore violates Article VI.

2. Public Meetings and Record Laws

The second legal obstacle is that of the public meeting and record laws, specifically the Brown Act and the Public Records Act. The Los Angeles process creates a review process within the City Attorney's Office, and does not create any agencies or other outside review bodies that would constitute "legislative bodies" under the Brown Act. Therefore, the legislation would also not violate the Public Records Act, which requires records of meetings of legislative bodies to be subject to public disclosure, unless they fall under a specific exception. In contrast, if imposed by the city legislature, the San Francisco proposal would likely violate the Brown Act. First, the proposed review councils would constitute "legislative bodies." Therefore, they would be required to hold open, public meetings. Second, while the proposal does not specify whether the hearing would be open to the public, it does contemplate that the council would "meet in private" following the hearing to discuss whether the petitioner had proved his/her case by clear and convincing evidence. Therefore, the closed-door meetings of the review councils would likely violate the Brown Act, since there is no provision exempting the councils

180. CAL. CIV. PROC. CODE § 525 (West 1997).
181. Herrera, supra note 165, at 3.
183. Herrera, supra note 165, at 3.
186. CAL. GOV'T CODE § 6253(a) (West 1997) ("Public records are open to inspection at all times . . . and every person has a right to inspect any public record . . . .").
187. CAL. GOV'T CODE § 54952(b) (Supp. 2008) (defining "legislative body" to include "[a] commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body.").
188. CAL. GOV'T CODE § 54953 (Supp. 2008) ("All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency . . . .").
from the public meeting requirement. The San Francisco proposal would also likely violate the Public Records Act, since the proposal provides that records and votes of the review councils would be confidential, and there is no specific exception in the Act for this type of record.

3. Delegation of Power

The third legal obstacle to potential exit processes is state law delegation of power to city attorneys. Gang activities may be enjoined under both state public nuisance laws and state unfair competition laws. Civil actions to abate public nuisances may be brought only by the district attorney or city attorney of the town, city, or county where the nuisance exists. Similarly, actions to abate unfair competition may be brought only by the city attorney. Under California case law, when a city attorney brings an action to abate a public nuisance or unfair competition in the name of the people of the State of California, he or she "is acting as an agent of the State and therefore is subject to the State's exclusive control." Since the review procedure in the Los Angeles process vests power solely in the City Attorney's Office to decide what petitions to review and approve, the process does not conflict with state law. However, under the San Francisco proposal, the City Attorney must: (1) decide within thirty days after receiving a petition by a gang member during an ongoing injunction lawsuit whether to proceed with seeking an injunction against the petition, and (2) review every enjoined gang member's case every three years and automatically remove those gang members that are not found to be "active" by clear and convincing evidence. Only the state legislature may limit or redefine the power of the city attorney to bring civil actions abating public nuisances and unfair competition. Therefore, the provisions of the legislation that curtail the city attorney's power would likely violate state law. It would also be an invalid exercise of the local legislature's police power because the legislation would conflict with the state's general law giving

---

190. Herrera, supra note 165, at 3.
191. CAL. GOV'T CODE § 6253(a) ("Public records are open to inspection at all times . . . and every person has a right to inspect any public record . . . ").
194. CAL. CIV. PROC. CODE § 731 (Supp. 2008).
195. CAL. BUS. & PROF. CODE § 17206(a) (Supp. 2008).
196. Herrera, supra note 165, at 4-5 (citing Coulter v. Pool 187 Cal. 181, 187 (1921) (holding that a public officer is a public agent and performs his duties for solely for the political unit for which he is acting); Sacramento v. Simmons, 66 Cal. App. 18, 24-25 (1924) (holding that when state statute designates local registrars of vital statistics, they are state officers performing state functions and are under the exclusive jurisdiction of the state); Boss v. Lewis, 33 Cal. App. 792, 794 (1917) (holding that a city clerk, when acting as a local registrar of vital statistics as specified by state law, is a state officer)).
198. See Herrera, supra note 165.
city attorneys the exclusive authority to bring these specific civil actions. 199

D. Implications of the Los Angeles and San Francisco Exit Processes

The experiences of Los Angeles and San Francisco in designing gang injunctions have much to teach other California cities that will address this issue. This Part argues that, to be legally adequate, exit procedures initiated at the local level must be conducted at the general discretion of the city attorney. In addition, a court must retain the actual authority to remove individuals named in gang injunctions. It is clear that retaining discretion in the hands of government attorneys has problems—the analogy of the fox guarding the henhouse comes to mind. It is also clear that going to court is slow and expensive and that enjoined individuals have thus far had limited success using the court system successfully to remove their names, regardless of the merits of their claims. 200 However, Part IV.D will argue that these limitations are necessary to ensure compliance with the California Constitution and state law if localities are to create unofficial exit processes at all. This Part considers each limitation in turn and discusses the implications for cities designing exit processes. One key implication is that exit process proposals that create independent review boards—or fail to retain discretion in the city attorney’s office—will face certain obstacles under the California constitution and state law, exemplified by the exit process ultimately adopted in San Francisco. Finally, this Part considers the potential for a statewide solution to the exit process problem.

1. Retaining Discretion

A viable exit procedure must retain the city attorney’s office discretion about how and whether to accept petitions for review and removal, and by what standards to approve such petitions. As discussed in Part IV.C above, under California law, only the state legislature has the authority to modify the power of a city attorney to bring and maintain civil actions. 201 Therefore, local legislative bodies cannot force city attorneys to accept petitions from enjoined gang members, review petitions in a timely fashion, or conduct regular reviews of named gang members. By extension, a court would likely find that local legislatures do not have the power to create independent review boards that can make such decisions in place of the city attorney’s office and mandate that those enjoined persons approved by the review council be considered or approved for removal by the city attorney. As such, the power to create and

199. See Cal. Const. art. XI, § 7 (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”).
200. See Gilonna, supra note 16.
201. See Herrera, supra note 165, at 5 (citing Coulter, 187 Cal. at 187; Simmons, 66 Cal. App. at 24-25; Boss, 33 Cal. App. at 794).
implement a petition and review process (separate from the courts themselves), must remain exclusively with the city attorney's office. However, California law does not limit the authority of a city attorney's office to agree to implement an alternative dispute review process.

A comparison of the Los Angeles exit process with the San Francisco proposal is instructive. The Los Angeles exit process responds to this limit on local legislative control by retaining all discretion in the acceptance and review of petitions in the City Attorney's Office. Under the review process, a senior attorney in the Office who is unconnected to the prosecution of gang injunctions reviews all petitions for removal. The Office has final authority as to whether to accept or decline petitions. In contrast, San Francisco Public Defender's proposal not only gave authority to accept and review petitions to independent review councils, but also imposed burdens upon the City Attorney's Office: first, forcing the Office to review and respond to certain petitions within 30 days, and second, to review all petitions regularly and either find that the petitioner is currently "active" in a gang, or recommend removal of the petitioner to the court. The San Francisco proposal almost certainly violates California law. Therefore, had the Board of Supervisors passed the legislation, a court would likely have struck it down.

While local legislatures cannot curtail the power of city attorneys to seek civil gang injunctions or to approve or deny exit requests, it is important to note that the city attorney can agree to alternative review processes. For example, the city attorney could consent to follow, or at least consider, the recommendations of a legislatively-created independent review council or agency in deciding which exit petitions to approve. Alternatively, the city attorney could appoint an outside panel to review petitions. Such processes might prove productive and successful, keeping final control in the hands of the city attorney but providing some assurance of outside input. The key limitation, under state law, is that local legislatures cannot mandate that the city attorney create such procedures. Ultimately, the unofficial exit process must be subject to the city attorney's discretion.

2. Court Authority

Viable exit procedures must also allow a court to have final authority to remove an enjoined individual from an injunction. Article IV of the California

203. Id.
204. S.F. Public Defender's Office, supra note 170.
205. Several problems might emerge with such a process: 1) To establish the process in the first place, the city attorney would have to agree to unofficially curtail the office's power, which is perhaps unlikely, and 2) The temptation for the city attorney's office to break the agreement and deviate from the agency's recommendation would be great, since the office would still retain official final authority and freedom of action.
Constitution vests judicial power in the courts. California courts have held that a local or state legislature may not grant judicial power to government agencies, like independent review boards. Under the California Code of Civil Procedure, modification of an injunction requires a judicial act: an order of a court. Therefore, under the California Constitution, a court must retain the final authority to remove enjoined gang members from injunctions, and any exit process must expressly retain this authority for the court. Neither a city attorney nor an independent review board or agency can constitutionally act in the court's place.

In Los Angeles, although the City Attorney's Office reviews and approves the submitted petitions, the final authority to remove an enjoined gang member remains with the court. When the City Attorney's Office approves removal, it will stipulate to the court that it has no objection to the removal of the named individual, the assumption being that such recommendations will almost certainly result in removal. In comparison, the San Francisco Public Defender's proposal would have empowered independent review councils to grant removal from the gang injunctions. Such a legislative grant of judicial authority is almost certainly unconstitutional in California. Therefore, however cities choose to design their exit processes, they must give a court final authority to approve removal.

3. Use of an Independent Review Council

Each of the limitations described above has implications for the use of an independent review procedure as part of an exit process. Independent review councils cannot constitutionally serve as adjudicative tribunals for the purpose of authorizing removal of enjoined gang members. Under state law, the councils' role must be limited to an advisory one. Therefore, such councils cannot circumvent the discretion of the city attorney in recommending removal by the court. Review councils also cannot force the hand of the city attorney in deciding whether to review or accept removal petitions, regularly review enjoined gang members for proof of "active" status, or otherwise limit the city attorney's options. It seems clear that the city attorney's office must play the central role in any extra-judicial or "unofficial" exit process.

206. CAL. CONST. art. VI.
208. CAL. CIV. PROC. CODE § 525 (West 1997).
209. L.A. CITY ATTORNEY'S OFFICE, supra note 135.
211. S.F. Public Defender's Office, supra note 170.
212. See CAL. CONST. art. VI.
On the other hand, as discussed above, there is nothing that would prevent legislatively-created review councils or agencies from soliciting petitions from enjoined gang members requesting removal, reviewing such petitions through a hearing process or otherwise, and then providing recommendations to the city attorney’s office. Indeed, assuming the city attorney’s office is willing to cooperate (which may become politically expedient or even necessary), such review councils could play an important role in an exit process, perhaps by building community participation to achieve buy-in into the process. Such councils could be of special assistance in those communities in which there is heightened distrust of the police and those communities most affected by the gang injunctions.\textsuperscript{213}

To underscore the point that city attorneys may voluntarily limit their discretion, one need only look to the exit process ultimately adopted by the San Francisco City Attorney in March 2008. In San Francisco, enjoined individuals may submit petitions to the City Attorney’s Office.\textsuperscript{214} Attorneys in the office review the petition and provide a written response accepting or denying the petition within thirty days.\textsuperscript{215} The petition itself asks for a variety of straightforward personal information, most importantly gang status, employment history, education information, and corroborating references.\textsuperscript{216} If approved, the City Attorney will represent to the court, in writing, that the City Attorney has no objection to the individual’s request for removal.\textsuperscript{217} Therefore, the process retains discretion in the City Attorney’s Office and is consistent with state law. Notably, however, in announcing the exit process, the San Francisco City Attorney agreed to review each gang injunction every three years to determine if the injunction should continue to be in effect and if any individual should be removed.\textsuperscript{218} This commitment indicates the ability of city attorneys across the State to curtail their own power, and may foreshadow future cooperation between government lawyers and civil rights activists to create fair opt-out procedures that still comply with state law.

One advantage of maintaining the exit process within the city attorney’s office is that the process would remain confidential. In Los Angeles, the Petition for Removal makes clear that all information provided on the petition, or in response to subsequent requests by the office, will be kept confidential to

\textsuperscript{214} S.F. City Attorney's Office, supra note 144.
\textsuperscript{215} Id. at 1.
\textsuperscript{216} Id. at 4-7.
\textsuperscript{217} Office of City Atty' Dennis Herrera, supra note 210. In deciding whether or not to approve petitions, the City Attorney announced he would consider the totality of the circumstances, including most importantly whether the individual is an active member of gang, but also including: gainful employment, educational pursuits, removal of gang tattoos, ceasing to wear gang colors, ceasing to spend time with known gang members, and pursuing other activities that demonstrate a desire not to engage in gang-related activities. Id.
\textsuperscript{218} Id.
the fullest extent permitted by law. The same is true of the recent San Francisco Petition. Under the Brown Act and the Public Records Act, the hearings and records of an independent review council would have to be open to the public, which threaten to discourage enjoined gang members from petitioning for removal, perhaps by subjecting them to a backlash from the gangs they seek to disavow. While there are surely other forms of independent review that would not implicate the public meetings and records laws and would therefore protect the confidentiality of petitioners—for example, the appointment of a single outside person to review applications—any form of independent commission, committee, board, or agency would be subject to these laws.

4. Prospects for a State Legislative Solution

It is important to note that the limits on local legislative actions do not all apply to the state legislature. With the exception of the Constitutional limitation, the restrictions discussed only apply to local governments. This leaves open the possibility that the state legislature could lawfully mandate an exit process for gang injunctions. Most importantly, while local legislatures cannot curtail the power of city attorneys to bring public nuisance and unfair competition injunctions, the state legislature can do so, as the source of the authority in the first instance. Of course, the state legislature does not have the power to violate the California Constitution; even an exit process authorized or mandated by state law would have to retain the power of the courts officially to modify the injunctions.

While a state solution is possible, it is by no means likely. The state legislature has continually strengthened and expanded anti-gang laws, and has authorized a variety of tools to aid local law enforcement in fighting gang-related crime, including the civil gang injunction. It seems unlikely that the legislature would authorize any measure that removes discretion from city attorneys, who are perceived by the public and lawmakers alike to be at the front lines of the war on gang violence. To the extent there has been a backlash against the use of gang injunctions, it appears to have been highly concentrated within civil rights groups and those communities most impacted by injunctions; there is little evidence of widespread disapproval of gang

220. S.F. CITY ATTORNEY'S OFFICE, supra note 144, at 2.
221. For example, the state legislature vested the exclusive power of the city attorney to bring public nuisance abatement actions in the California Code of Civil Procedure, and therefore could modify that authority. See CAL. CIV. PROC. CODE § 731 (Supp. 2008).
222. For example, see the STEP Act, in which the State legislature explicitly authorized the use of civil injunctions against gangs, among other anti-gang remedies. See CAL. PENAL CODE §§ 186.20-186.33 (West 1999 & Supp. 2008).
223. Even the ACLU acknowledges the positive public perception of gang injunctions. See ACLU FOUND. OF S. CAL., supra note 60, at 3-4.
injunctions that would spur state legislative action to create an unofficial exit process. Therefore, for the moment, it will be incumbent on local governments to respond to the constitutional and political concerns implicated by gang injunctions by creating exit processes that fall within legal and constitutional limits.\footnote{It is perhaps interesting that the two California cities in which the city attorney has been responsive to public concern about gang injunction exit processes are Los Angeles and San Francisco; both cities that have elected City Attorneys. Clearly, a comprehensive study of the responsiveness of elected and appointed city attorneys is a subject for another paper. However, one can speculate that standing for election might limit the freedom of the city attorney to ignore community calls to reform the gang injunction process, but also limit his or her willingness to be flexible in the solution, depending on the need to appeal to law-and-order voters.}

**CONCLUSION**

Today, there are approximately forty gang injunctions in place in California cities.\footnote{S.F. Public Defender, supra note 21.} All indications are that the use of gang injunctions as a crime-fighting tool will continue to grow. As injunctions proliferate and endure, the need for unofficial exit processes will become more acute, especially as enjoined gang members age and become less active, or attempt to transition out of gang life. The constitutional concerns associated with injunctions are certainly more pressing when considered in the context of inactive gang members, and people who were never associated with gangs in the first place. And, as in Los Angeles and San Francisco, exit processes may also become a political imperative in the affected communities.

This Comment has argued that, despite the appeal of exit processes that remove discretion from the city attorney's office and vest it in independent agencies or review boards, these processes would likely violate state law. In addition, any process that circumvents the judicial power of the courts by granting final authority to remove individuals from injunctions to outside review boards would constitute a violation of the California Constitution. Therefore, while both constitutional and political concerns mandate the creation of an unofficial exit process in cities using gang injunctions, city attorneys must retain discretion to review and approve petitions and courts must retain the power to officially order removal. While such processes offer little protection against the unchecked discretion of the government, they do offer a simple and expedited way out. One can only hope that city attorneys will exercise such discretion judiciously.