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The Outer Limits of Gang Injunctions

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NOTES

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I. INTRODUCTION

Almost a decade ago, the California Supreme Court endorsed the use of public nuisance injunctions as a means to control street gangs.[1] Public nuisance injunctions against gangs ("gang injunctions"), which result from civil suits filed by district or city attorneys, prohibit the nuisance conduct within a prescribed geographical area, focusing on the "turf" claimed by the gang.[2] In *People ex rel. Gallo v. Acuna*, the California Supreme Court upheld an injunction against thirty-eight named members of a San Jose gang in a four square block area where none of the gang members lived.[3] The court described the neighborhood as "an occupied territory" and its residents as "prisoners in their own homes."[4] To resolve the public nuisance posed by the gang, the *Acuna* injunction contained a controversial provision prohibiting gang members from publicly associating with each other. The California Supreme Court declared the provision constitutional; such provisions are now common in gang injunctions.[5] Gang injunctions today also frequently limit otherwise legal behavior beyond public association, such as being out after dark, possession of various objects, making gang-related hand signals, and wearing gang

1. People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 605-607 (Cal. 1997).

2. EDWARD L. ALLAN, CIVIL GANG ABATEMENT: THE EFFECTIVENESS AND IMPLICATIONS OF POLICING BY INJUNCTION 77 (2004).

3. 929 P.2d at 601-603.

4. *Id.* at 601.

5. *E.g.*, People v. Varrio Lamparas Primera, No.1148758 at 2-3 (Cal. Super. Ct. Sept. 30, 2005), *available at* http://www.sbcourts.org/general_info/decisions/022706PermInjunctionVLP.pdf [hereinafter "Westside Injunction"] (amended preliminary injunction); People *ex rel.* Totten v. Colonia Chiques, No. CIV 226032 at 2 (Cal. Super. Ct. June 1, 2005), *available at* http://da.countyofventura.org/coch/COCH_Perm%20Inj%206-1-05.PDF [hereinafter "Colonia Chiques Injunction"] (amended judgment for permanent injunction).

colors.[6] Many of the substantive constitutional rights issues raised by *Acuna* have been critiqued by commentators,[7] but numerous gang injunctions have been imposed since *Acuna* was decided.[8] Two distinct developments in gang injunction usage warrant deeper examination than existing scholarship provides.

The geographical areas covered by gang injunctions have expanded since the four square block injunction upheld in *Acuna*.[9] In a 1998 case, *In re Englebrecht*,[10] a California appellate court upheld an injunction covering approximately one square mile that included some gang members' residences.[11] In 2005, Judge Frederick Bysshe of the Ventura County Superior Court entered an injunction in the city of Oxnard, California against the Colonia Chiques gang. The Colonia Chiques injunction covers 6.6 square miles, which constitutes 24% of the city.[12] This injunction's geographic scope significantly limits the liberties of gang members because they must travel farther to escape the injunction's strictures. The growth of areas being enjoined raises questions of proof: what must the government establish in order to secure an injunction, and how should the boundaries of an enjoined area be determined? It also raises questions about the interplay between constitutional protections and traditional equitable limits on

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6. *E.g.*, People v. Englebrecht, 106 Cal. Rptr. 2d 738, 742 n.2 (Cal. Ct. App. 2001) (enjoining public association, drinking alcoholic beverages, possessing weapons including bats and glass bottles, warning others of the approach of police officers, making hand signs to refer to the gang, and minors from being in public between 10 p.m. and sunrise).

7. *E.g.*, Gregory S. Walston, *Taking the Constitution at its Word: A Defense of the Use of Anti-Gang Injunctions*, 54 U. MIAMI L. REV. 47, 49-53 (1999); Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 411-12 (1999); Rebecca Allen, Note, People ex rel. Gallo v. Acuna: *(Ab)using California's Nuisance Law to Control Gangs*, 25 W. ST. U. L. REV. 257, 259-61 (1998); Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2250-52 (1998); *see also* Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 212, 225-266 (1994) (surveying the constitutional issues at stake in gang injunctions generally).

8. Press Release, Office of the Los Angeles City Attorney, City Attorney Rocky Delgadillo Announces Injunction Against Notorious Big Hazard Gang (Aug. 16, 2005), *available at* http://www.lacity.org/atty/attypress/attyattypress6931721_08162005.pdf (noting that in the City of Los Angeles alone, the use of gang injunctions expanded from eight in 2001 to twenty-six in 2005).

9. People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 608 (Cal. 1997).

10. In re Englebrecht (*Englebrecht I*), 79 Cal. Rptr. 2d 89 (Cal. Ct. App. 1998) (litigation over the preliminary injunction). A related case, *People v. Englebrecht*, delved into different issues arising from the permanent injunction, which was substantially the same. People v. Englebrecht (*Englebrecht II*), 106 Cal. Rptr. 2d 738 (Cal Ct. App. 2001). References to the injunction underlying both cases will be "*Englebrecht*."

11. *Englebrecht I*, 79 Cal. Rptr. 2d at 91, 95-96.

12. Fred Alvarez, *Permanent Gang Order Is Urged*, L.A. TIMES, Mar. 3, 2005, at B1.

courts' injunctive powers: how do these constrain the scope of gang injunctions? This Note will first address these questions regarding the expansion of areas being enjoined.

The Colonia Chiques injunction deviated in another way from prior injunctions upheld in California courts: it was issued against the Colonia Chiques as an unincorporated association, rather than naming individual gang members as defendants.[13] Following Judge Bysshe's lead in the Colonia Chiques case, Judge James Iwasko entered an injunction against the Southside and Westside gangs in Lompoc, California as unincorporated associations, without naming individual defendants.[14] In 2006, Judge Vincent O'Neill issued a preliminary injunction against the Southside Chiques gang, an Oxnard rival to the Colonia Chiques, without naming individual defendants.[15] Refusing to name individual defendants is the second new development that this Note will address. Because unnamed defendants receive no notice that the injunctions are being considered, procedural due process concerns become severe when individual defendants are not named. Moreover, gangs themselves are not structured such that a leader speaks for the group and could respond in court.[16]

This Note argues that even if past gang injunctions upheld by California courts did not violate gang members' constitutional rights, these two new trends in the use of public nuisance injunctions as a means of gang control are equitably and constitutionally problematic. These injunctions are problematic because they: (1) expand the geographical scope of injunctions without demanding rigorous proof of nuisance activity and without regard for burdens on gang members' associational rights, and (2) name defendant gangs as unincorporated associations with no named individual defendants. Because there is no appellate case law on gang injunctions in other states, this Note will focus exclusively on California law, along with federal constitutional principles.

Part II of this Note examines the conceptual and doctrinal foundations of public nuisance gang injunctions. Part III analyzes the heightened equitable and constitutional concerns associated with

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13. *Colonia Chiques Injunction*, supra note 5, at 1.

14. *Westside Injunction*, supra note 5 at 1.

15. Raul Hernandez, *Injunction Ordered Against the Southside Chiques Gang*, VENTURA COUNTY STAR, Sept. 19, 2006, at A1.

16. *See* DEBORAH LAMM WEISEL, CONTEMPORARY GANGS: AN ORGANIZATIONAL ANALYSIS 51 (2002) ("[M]ost gangs appear to lack or have a very weak orientation toward achieving goals and . . . appear to lack or have a very loose hierarchical structure, have unstable leadership, few rules and little role specialization.").

injunctions that are broad in geographic scope. Part IV then investigates the separate problem of how suits brought against gangs as unincorporated associations without naming individual defendants abridge unnamed gang members' procedural due process rights. Finally, Part V concludes that the geographic scope of injunctions is an important consideration when weighing their impact on gang members' substantive liberties and that bringing public nuisance suits against gangs as unincorporated associations without naming individual defendants poses insurmountable procedural due process problems requiring abolition of that practice.

II. BACKGROUND INFORMATION

Before analyzing particular equitable and constitutional aspects of gang injunctions, it is important to understand their legal foundation and origins. Section A explores the underpinnings of public nuisance law in California and injunction as a nuisance remedy. Section B examines the law of unincorporated associations in California and the equitable reach of who may be enjoined. Section C then provides background information on the California Supreme Court's substantive constitutional analysis of the prohibition on gang members' public association in *Acuna,* before Section D investigates how appellate courts applied the principles of *Acuna* to the subsequent cases *Englebrecht I* and *II.*

A. The Common Law of Nuisance in California and the Equitable Remedy of Injunction

Nuisance initially arose as a civil action in the equity courts as a way to prevent infringement on the enjoyment of property rights.[17] "Public nuisance" has been defined by statute in California since 1872.[18] According to the California Civil Code, a nuisance is

> [a]nything 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 of 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. . . .[19]

17. People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 603 (Cal. 1997).

18. CAL. CIV. CODE § 3480 (West 1997).

19. *Id.* § 3479. Alternatively, the Penal Code defines a public nuisance as "[a]nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any . . . public park, square, street or

A public nuisance is a nuisance that affects an entire community or neighborhood.[20] The remedies for public nuisance are indictment or information, a civil action, or abatement.[21] A district attorney or city attorney may bring a civil action in the name of the people of the State of California to abate a public nuisance in his jurisdiction.[22] In addition to civil penalties, the California Penal Code considers the maintenance of a public nuisance to be a misdemeanor.[23]

The United States Supreme Court illumined the basic remedial principles of public nuisance law in *In re Debs*,[24] asserting that the ability of courts "to interfere [with public nuisances] by injunction is one recognized from ancient times and by indubitable authority."[25] According to the Supreme Court in *Debs*,

> [t]he difference between a public nuisance and a private nuisance is that one affects the people at large and the other simply the individual. The quality of the wrongs is the same, and the jurisdiction of the courts over them rests upon the same principles and goes to the same extent. . . . The power [of the court] to interfere exists in all cases of nuisance.[26]

Injunctions are equitable in nature, so they generally will not be granted to those who have an adequate remedy at law.[27] The court's ability to enjoin actions as nuisances, however, is not diminished if these actions are also prosecutable crimes in their own right.[28] Indeed, neither is the court's ability to punish the underlying crime diminished just because an injunction has been imposed: "[T]he penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation."[29] A public nuisance injunction itself may be viewed as a quasi-criminal remedy because, although the imposition of the injunction is a civil proceeding, it is enforced through the court's

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highway . . . ." CAL. PENAL CODE § 370 (West 1999). Because gang members often congregate on sidewalks and streets, the obstruction provision of the statute can be a key to finding a gang is a public nuisance. *See infra* text accompanying notes 62 and 72-73.

20. CAL. CIV. CODE § 3480 (West 1997).

21. *Id.* § 3491.

22. CAL. CIV. PROC. CODE § 731 (West 1980); CAL. GOV'T. CODE § 26528 (West 1988).

23. CAL. PENAL CODE § 372 (West 1999).

24. 158 U.S. 564 (1895).

25. *Id.* at 599.

26. *Id.* at 592-93 (punctuation altered for grammatical consistency).

27. *Id.* at 583.

28. *Id.* at 593. "The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights." *Id.* at 593-94.

29. *Id.* at 599-600.

contempt powers.[30] A person is in contempt of court if he willfully disobeys a court order.[31] The court can then impose either civil or criminal penalties.[32] At the time an injunction is considered and instated, no right to appointed counsel for the defendant attaches.[33] Generally, a defendant's right to appointed counsel exists "only where the litigant may lose his physical liberty if he loses the litigation,"[34] which, in the gang injunction context, occurs at a criminal contempt trial for violation of the injunction.

According to *People v. Lim*, the 1941 landmark California public nuisance case, legislatures have the power to define "public nuisance" to include activity not otherwise considered a nuisance at common law or to include activity that offends public policy.[35] The courts, in contrast, cannot by themselves enjoin activities merely contrary to public policy without a statutory prohibition on which to rely.[36] The California Supreme Court in *Lim* was reluctant to allow courts to "broaden the field in which injunctions against criminal activity will be granted."[37]

For a court to issue an injunction against a public nuisance, the petition for relief must allege specific facts demonstrating that the defendant was engaged in nuisance; conclusory statements that a public nuisance exists are insufficient.[38] Despite the *Lim* court's reluctance to unilaterally expand the definition of public nuisance,[39] it liberally construed the general statutory definition to conclude that the complaint at issue alleged facts sufficient to find that a public nuisance potentially existed.[40] It is through such broad construction of

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30. Contempt of court is a misdemeanor under the California Penal Code, punishable by up to one year in jail or $5000 fine, or both. CAL. PENAL CODE § 166(a)(4), (b)(1) (West 1999).

31. *Id.* § 166(a)(4).

32. *Id.* § 166(b)(1).

33. Iraheta v. Superior Court, 83 Cal. Rptr. 2d 471, 481 (Cal. Ct. App. 1999).

34. *Id.* at 476.

35. 118 P.2d 472, 475 (Cal. 1941).

36. *Id.* at 474.

37. *Id.* at 477.

38. In re Debs, 158 U.S. 564, 598 (1895); *Lim*, 118 P.2d at 477.

39. The District Attorney sought to have a gambling establishment, traditionally a public nuisance at common law (but not expressly included in the statutory definition), enjoined. *Lim*, 118 P.2d 472 at 473. The Court refused to decree that all gambling establishments were nuisances but found that the "crowds of disorderly people [attending the gambling house] who disturb the peace and obstruct the traffic may well impair the free enjoyment of life and property," thus fitting the general statutory definition of public nuisance. *Id.* at 477. A key basis for gang injunctions is the tendency of gangs to congregate and obstruct sidewalks. *See infra* text accompanying notes 62 and 72-73.

40. *Id.* at 478. The appeal was from a demurrer, so the question the court addressed was whether sufficient facts were alleged to *potentially* conclude that a public nuisance existed, not

the nuisance statute that California courts have determined that gang activity falls within the statutory definition.[41]

B. Unincorporated Associations and the Limits of Who May Be Enjoined

Historically, unincorporated associations could not sue or be sued in their own name in the absence of an authorizing statute because they were not legally recognized entities.[42] California, however, has such an authorizing statute.[43] The members of unincorporated associations can also be joined as parties to the action.[44] Representation of an unincorporated association in court must comport with the rules governing representation of corporations—specifically, a corporation must appear through an agent because it is a distinct legal entity.[45] Furthermore, a layperson may not represent an unincorporated association because such representation would constitute the unlawful practice of law.[46]

The modern test to determine whether an entity is an unincorporated association asks whether the entity's members (1) share a common purpose, and (2)(a) function under a common name (b) under circumstances where fairness requires that the group be recognized as a legal entity.[47] Fairness requires recognition of the association when people interacting with it allege that their legal rights have been violated.[48] Historically, labor unions, political parties, social clubs, religious organizations, environmental societies, athletic organizations, condominium owners, lodges, stock exchanges, and veterans have all been recognized as unincorporated associations.[49]

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whether there was adequate proof of those facts to conclude whether a nuisance actually existed. *Id.* at 477.

41. *See, e.g.*, People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 601 (Cal. 1997) (describing how gang members "take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar").

42. Jardine v. Superior Court, 2 P.2d 756, 759 (Cal. 1931).

43. CAL. CODE CIV. PROC. § 369.5 (West 2006).

44. *Id.*

45. Clean Air Transp. Sys. v. San Mateo County Transit Dist., 243 Cal. Rptr. 799, 800 (Cal. Ct. App. 1988).

46. *Id.*

47. Barr v. United Methodist Church, 153 Cal. Rptr. 322, 327-28 (Cal. Ct. App. 1979).

48. *Id.* at 328.

49. *Id.* at 327.

Gangs have also been tacitly recognized as unincorporated associations in California.[50] Gangs generally operate under a common name,[51] fulfilling part of the second prong of the test. The remaining part of the second prong is fulfilled when gangs are sued for public nuisance because the government alleges that the public's rights have been violated. Whether gangs fulfill the first prong is less clear, but the typical gang probably does have a common purpose, whether to establish and protect turf, provide a network of social support, or engage in criminal activity.[52]

Although recognition as an unincorporated association means that a gang is a legally distinct entity from its members, case law allows an injunction directed at an unincorporated association to be effective against its members nonetheless.[53] This contrasts with suits for damages, in which liability would be limited to association assets.[54] Orders enjoining the behavior of people through whom the enjoined party might attempt to act traditionally have been upheld, even when the enjoined party was not an unincorporated association.[55] The court's powers to enjoin those who are not party to a given suit are necessarily broad to "prevent the prohibited action by persons acting in concert with or in support of the claim of the enjoined party, who are in fact his aiders and abettors."[56] However, the court's powers do have limits. Injunctions that purport to apply to all persons with actual notice of the injunction—regardless of whether or not those persons are acting in concert with or on behalf of those enjoined—have been struck down as overbroad.[57]

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50. *See* People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 618 (Cal. 1997) ("[T]he City *could* have named the gangs themselves as defendants . . . .") (emphasis in original).

51. Indeed, under the California Street Terrorism and Enforcement and Prevention (STEP) Act, having a common name is a defining characteristic of a gang. CAL. PENAL CODE § 186.22(f) (West 2006).

52. *See* Jerome H. Skolnick et al., *Gang Organization and Migration*, *in* GANGS: THE ORIGINS AND IMPACT OF CONTEMPORARY YOUTH GANGS IN THE UNITED STATES 193, 194-95 (Scott Cummings ed., 1993) (asserting that Southern California gangs stress "values of neighborhood, loyalty, and the equality that one obtains among members of a family"); *see also* California Street Terrorism Enforcement and Prevention Act, CAL. PENAL CODE § 186.22(f) (West 1999) (defining "criminal street gang").

53. Berger v. Superior Court, 167 P. 143, 144 (Cal. 1917).

54. Fazzi v. Peters, 440 P.2d 242, 246 (Cal. 1968) ("As a general rule the judgment in an action . . . bound only the partnership property and was not enforceable against the individual property of partners not joined as individual defendants and served with process as such.").

55. *Berger*, 167 P. at 144. For example, "agents, servants, employees, aiders, abettors, etc., though not parties to the action" have all been included in injunctions. *Id.*

56. *Id.*

57. Planned Parentbood Golden Gate v. Garibaldi, 132 Cal. Rptr. 2d 46, 53-54 (Cal. Ct. App. 2003). "If the person charged with violation [of the injunction] was neither named in the injunction individually or as a member of a class, nor as aiding or abetting a person so included,

C. People ex. rel. Gallo v. Acuna: Gangs Held to be an Enjoinable Public Nuisance

In *People ex rel. Gallo v. Acuna*, the leading case on gang injunctions,[58] the California Supreme Court upheld a public nuisance injunction against thirty-eight named members of a San Jose gang known as VST.[59] The gang as an association was not named as a defendant.[60] Asserting that the neighborhood in question was an "urban war zone," the court described a laundry list of shocking and illegal activity before concluding, "The people of this community are prisoners in their own homes."[61] The injunction governed a four square block area known as Rocksprings, in which gang members congregated—often obstructing the streets—but in which none of the gang members lived.[62] The two challenged provisions of the injunction, paragraphs (a) and (k), included prohibitions on gang members associating publicly[63] and intimidating people in Rocksprings.[64] The California Supreme Court upheld both provisions against several constitutional challenges.[65] Discussion of *Acuna* in this Note will be limited to the provision banning public association.

When the court addressed a freedom of association challenge to paragraph (a) of the injunction, it noted that there is no "generalized

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he cannot be brought within the prohibition merely by being served with a copy of the writ." *Id.* at 52.

58. 929 P.2d 596 (Cal. 1997), *cert. denied sub nom.* Gonzalez v. Gallo, 521 U.S. 1121 (1997). Because the United States Supreme Court declined to hear this case, *Acuna* is the leading authority in the nation on gang injunctions. Furthermore, no other state supreme courts have addressed the issue. Discussion and analysis of *Acuna* will be somewhat simplified, focusing primarily on provisions that prohibit public association.

59. 929 P.2d at 601.

60. *Id.*

61. *Id.* The court narrated particular instances of behavior: "The community has become a staging area for gang-related violence and a dumping ground for the weapons and instrumentalities of crime once the deed is done. Area residents have had their garages used as urinals, their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti." *Id.*

62. *Id.* at 602.

63. *Id.* at 608. Paragraph (a) of the preliminary injunction enjoined the defendants from "standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant . . . or with any other known [VST] member." *Id.*

64. *Id.* at 613. Paragraph (k) of the preliminary injunction enjoined the defendants from "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings' . . . known to have complained about gang activities." *Id.*

65. The Court of Appeal had overturned fifteen of the twenty-four provisions of the injunction on appeal, but the City of San Jose sought review of just two provisions by the California Supreme Court. *Id.* at 602.

right of social association" under the Constitution.[66] Rather, protected associational interests fall into two categories: intimate associations and associational interests that are instrumental to religious and politically expressive activity.[67] Intimate associations are generally "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[68] Instrumental associations are those in which people associate "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends" that are protected by the First Amendment.[69] Refusing to "mechanically apply[] and tick[] off" characteristics of intimate associations, the *Acuna* court concluded that the gang did not qualify for First Amendment protection under this category because it did not "inculcate[] and nourish[] civilization's fundamental values."[70] The court further decided that because the gang members were not engaging in protected politically expressive or religious activity in Rocksprings, they did not deserve instrumental associational protection.[71]

Ultimately, the *Acuna* court held that the gang members' conduct as described in the declarations supporting the injunction (including violent behavior, use of drugs in public, obstruction of sidewalks and streets, and vandalism)[72] met the statutory definition of public nuisance as interpreted by *People v. Lim*.[73] The court further held that the injunction burdened "no more speech than necessary to serve a significant government interest," the constitutional standard of scrutiny announced by the United States Supreme Court in *Madsen v. Women's Health Center, Inc.* for incidental infringements on First Amendment rights.[74] It reasoned that the injunction merely was

66. *Id.* at 608 (citing Dallas v. Stanglin, 490 U.S. 19 (1989) (internal quotations omitted)).

67. *Id.* at 608. "Intimate association" is sometimes referred to as "associational privacy;" "instrumental association" is sometimes known as "associational speech" or "expressive association." This Note will use the terms "intimate" and "instrumental" in order to be consistent with tbe California Supreme Court's denominations in *Acuna*.

68. *Id.* (citing Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984)).

69. *Roberts*, 468 U.S. at 622.

70. *Acuna*, 929 P.2d at 609.

71. *Id.* at 608-09.

72. *Id.* at 601, 614.

73. CAL. CIV. CODE §§ 3479-80 (West 1997); *Acuna*, 929 P.2d at 614; *Lim*, 118 P.2d 472, 475 (Cal. 1941).

74. *Acuna*, 929 P.2d at 614 (citing Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994)). The *Madsen* Court expressly applied the "no more speech than necessary" test only to speech. 512 U.S. at 765. However, the California Supreme Court in *Acuna* applied the test to instrumental association as well. 929 P.2d at 616. It is unclear from *Madsen*'s limited discussion of association whether such an application is appropriate. *See* 512 U.S. at 776 (rejecting a

intended to stop collective conduct by the gang "in a specific and narrowly described neighborhood."[75] The court reasoned correctly, if broadly, that preventing gang members from associating at all prevents them from collectively engaging in nuisance behavior. The need for such an inclusive prohibition will be challenged in Part III.D.

D. The Englebrecht *Cases: Broadening the Scope of Gang Injunctions*

Two related cases arose out of a 1997 gang injunction in Oceanside, California, against members of the Posole gang. The first case, *In re Englebrecht* ("Englebrecht I"), was based on the preliminary injunction. It ruled on challenges to an associational provision, similar to that in the injunction appealed in *Acuna*, and to a provision prohibiting the use of beepers or pagers.[76] The second case, *People v. Englebrecht* ("Englebrecht II"), based on the permanent injunction, decided issues of jury trial rights, standard of proof, familial associational rights, and prohibitions on "throwing" gang signs (making hand signals) and wearing gang-associated clothing.[77] The injunction named twenty-eight individuals, including Englebrecht, and fifty Does.[78] It covered a sixty square block area,[79] or approximately one square mile[80]—significantly larger than the four square block injunction in *Acuna*.[81] This Section will examine how the California Court of Appeal applied the *Acuna* case to the associational interest challenges in *Englebrecht*.[82]

The non-association provision of the *Englebrecht* injunction was virtually identical to the provision upheld by the California Supreme Court in *Acuna*.[83] In *Englebrecht I*, Englebrecht argued that the provision nonetheless should be struck down for two reasons: (1) the injunction covered a significantly larger geographic area than that

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challenge to the injunction grounded on freedom of association as guaranteed by the First Amendment).

75. *Acuna*, 929 P.2d at 615.

76. In re Englebrecht (*Englebrecht I*), 79 Cal. Rptr. 2d 89, 92 n.3 (Cal. Ct. App. 1998).

77. People v. Englebrecht (*Englebrecht II*), 106 Cal. Rptr. 2d 738, 744, 750, 756-58 (Cal. Ct. App. 2001).

78. *Englebrecht I*, 79 Cal. Rptr. 2d at 91.

79. *Id.* at 91 n.1.

80. *Englebrecht II*, 106 Cal. Rptr. 2d at 742.

81. People *ex. rel.* Gallo v. Acuna, 929 P.2d 596, 601 (Cal. 1997).

82. Like this Note's review of *Acuna*, analysis of *Englebrecht* will be limited to the issues most relevant to this Note.

83. The *Englebrecht* provision prohibited defendants, while in the target area, from "[s]tanding, sitting, walking, driving, bicycling, gathering or appearing anywhere in public view with any other defendant herein, or with any other known Posole member . . . ." *Englebrecht I*, 79 Cal. Rptr. 2d at 92 n.3.

in *Acuna*, and (2) some of the enjoined gang members lived in the target area or had relatives who did.[84] The Court of Appeal rejected both arguments, concluding that "[w]hat matters is whether the Target Area in this case burdened no more speech than necessary to serve a significant government interest."[85] The court cited *Acuna*, asserting that its ruling was necessary on *stare decisis* grounds.[86] Englebrecht raised these arguments again, in a slightly different form, in *Englebrecht II*, still to no avail.[87]

With regard to Englebrecht's geographical argument, the *Englebrecht I* court noted that the target area covered only the gang's turf, where it was public nuisance, and that the area was "well defined by distinct boundaries—highways and major streets."[88] The court further pointed out that there was no showing that the target area was larger than necessary to abate the public nuisance,[89] seemingly implying that the defendant bore the burden of proof to show that the area of the injunction exceeded the area of the nuisance.

The *Englebrecht I* court also rejected Englebrecht's argument that the injunction burdened gang members' familial relationships because some gang members lived in the area or had relatives there: "[T]he fact that some Posole gang members live or have relatives who live in the Target Area does not transform their gang activities into 'intimate' or 'intrinsic' associational activities. . . . The familial nexus is not carte blanche for creating a public nuisance."[90]

In *Englebrecht II*, the defendant altered his approach slightly, arguing that because many gang members are related *to each other* and live in the target area, "the injunction's associational restrictions not only forbid gang gatherings but also constitutionally protected family gatherings as well."[91] The appellate panel that heard *Englebrecht II* rejected this reformulation of the argument, asserting that

> [w]hile the injunction may place some burden on family contact in the target area, it by no means has, in our view, a fundamental impact on general family association. [¶] Any attempt to limit the familial associational impact of the injunction would make it a less effective device for dealing with the collective nature of gang activity.[92]

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84. *Id.* at 95.
85. *Id.* (internal citations omitted).
86. *Id.*
87. *Englebrecht II*, 106 Cal. Rptr. 2d at 756-758.
88. *Englebrecht I*, 79 Cal. Rptr. 2d at 95.
89. *Id.*
90. *Id.* at 96.
91. People v. Englebrecht (*Englebrecht II*), 106 Cal. Rptr. 2d 738, 757 (Cal. Ct. App. 2001).
92. *Id.* at 758.

The permanent injunction at issue in *Englebrecht II* differed from the preliminary injunction in *Englebrecht I* in a notable way: it awkwardly exempted from its associational ban "named defendants living in the target area . . . who are father and sons/daughters, mothers/sons/daughters. . . ."[93] Even though this provision strengthened the court's argument regarding the injunction's slight burden on familial association, the court failed to address the exception in its decision. Nevertheless, the court concluded that the injunction did not impermissibly burden Englebrecht's associational rights.[94]

III. THE PROBLEM OF EXPANDED GEOGRAPHIC SCOPE

A. The Two Sets of Limits on Geographic Scope

Equitable principles and the Constitution each independently limit the geographic area on which gang injunctions may be imposed. A larger geographic area covered by an injunction necessarily results in a larger burden on the liberties of gang members because they must travel farther to engage in the enjoined activities lawfully in public. Equitable and constitutional principles also limit the breadth of the conduct prohibited by injunctions, which in turn affects how much injunctions burden those they govern. When no constitutional rights are burdened by injunction provisions, an injunction's outer bounds (in terms of both proscribed conduct and geographic scope) will be determined by equity. However, when constitutional rights are implicated by an injunction, those rights demand protection even in the absence of limiting equitable principles.

Although this Part primarily focuses on the problem of expanded geographic scope, the scope of the activities prohibited by an injunction is important to consider when analyzing an injunction's equitable and constitutional validity. The solution to constitutional or equitable problems aggravated by broad geographic scope might not be found in shrinking the area enjoined, but rather in easing an injunction's strictures on prohibited activities by more narrowly defining those activities. Section B of this Part analyzes issues of proof and the inherent equitable limitations on the scope of injunctions. Section C then examines the underlying constitutional limits that may restrict geographic scope. Finally, Section D suggests how courts

93. *Id.* at 742 n.2.

94. *Id.* at 760.

should examine the problem of geographic scope in terms of these equitable and constitutional limits.

B. Issues of Proof and Equitable Limits on Injunction Scope

A basic principle of equity is that the remedy must be proportional to the right that has been infringed, because remedies are a means of effecting substantive rights.[95] Judges have great flexibility when drafting injunctions, so there is always a risk that injunctions may be drawn too narrowly, thereby under-compensating the plaintiff for her abridged right, or be drawn too broadly, going far beyond the plaintiff's right.[96] When establishing the geographic scope of public nuisance gang injunctions, courts must consider whether the district attorney has adequately proved that the gang is a public nuisance throughout the entire area in which it seeks to enjoin conduct. If an injunction's area is drawn too widely, it should be struck down.

The standard of proof that the government must meet in order to secure an injunction constrains the area covered. The burden is on the government to prove the existence of a nuisance throughout the target area.[97] An injunction can only run to the extent of the nuisance.[98] The California Court of Appeal's decision in *Englebrecht II* requires that the government prove its case by *clear and convincing evidence* when seeking a gang injunction because important rights are implicated.[99] Even though the typical standard of proof in a civil action is a preponderance of the evidence, the court noted that this standard may be raised when "particularly important individual interests or rights are at stake."[100] The standard of proof demanded suggests how much certainty society requires in order to resolve a

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95. DAN B. DOBBS, LAW OF REMEDIES 27 (2d ed. 1993).

96. *Id.* at 115.

97. *See Englebrecht II*, 106 Cal. Rptr. 2d at 752-53 (establishing the burden and standard of proving nuisance).

98. *See generally* DOBBS, *supra* note 95, at 115 ("If remedies should enforce rights, then the tailoring stage should shape the remedy to reflect the rights in question, subject only to practical constraints.").

99. 106 Cal. Rptr. 2d at 752-53. After determining this heightened burden of proof was necessary, the appellate court refused to review questions of evidentiary sufficiency in Englebrecbt's case because he had been released from the strictures of the injunction by the time the appeal was considered. *Id.* at 753 n.7; ALLAN, *supra* note 2, at 253 n.41.

100. *Id.* at 751 (citing In re Marriage of Peters, 61 Cal. Rptr. 2d 493, 495 (Cal. Ct. App. 1997)); e.g., People *ex rel.* Cooper v. Mitchell Bros. Santa Ana Theater, 180 Cal. Rptr. 728, 730 (Cal. Ct. App. 1985) (stating that the standard of proof for obscenity as public nuisance is clear and convincing evidence because of the importance of the rights involved).

particular question of fact.[101] The *Englebrecht II* court concluded that a "clear and convincing" standard for a gang injunction "arises not because the personal activities enjoined are sublime or grand but rather because they are commonplace, and ordinary. While it may be lawful to restrict such activity, it is also extraordinary. The government . . . [must] firmly establish[] the facts making such restrictions necessary."[102]

Equitable constraints on injunctions operate even when there is no constitutionally protected activity at stake. In *Englebrecht I* and *Englebrecht II*, the California Court of Appeal ultimately rejected arguments that the enjoined area was too large, concluding in *Englebrecht II* that the injunction's associational restrictions were "nonfamilial, nonpolitical and nonreligious," and thus not protected in any way by the Constitution.[103] Consider the consequences of taking the *Englebrecht* cases at their word. For the sake of argument, let us accept the premise that the injunction did not abridge constitutionally protected forms of association. If we follow this logic to its extreme, even an injunction covering the entire territory of the United States would not be unconstitutional on associational grounds because no protected associations would be burdened.[104] If a court could be persuaded that a gang created a public nuisance wherever any of its members associated,[105] then gang members effectively could be barred from all public association without a constitutional problem.[106] Only the equitable limitations on the court's power to enjoin nuisances would curtail the geographic scope of the injunction.

Despite the power and flexibility of injunctions,[107] inherent equitable limits on the geographical breadth of an injunction would

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101. *Englebrecht II*, 106 Cal. Rptr. 2d at 750 (citing In re Marriage of Peters, 61 Cal. Rptr. 2d at 495).

102. *Id.* at 753.

103. *Id.* at 757; In re Englebrecht (*Englebrecht I*), 79 Cal. Rptr. 2d 89, 95 (Cal. Ct. App. 1998).

104. Although the injunction would still be subject to suhstantive due process constitutional analysis, it would receive only highly deferential "rational basis" scrutiny in the absence of protected associational rights.

105. For example, a court might reason that two gang members from Oceanside, CA standing on a sidewalk side by side have just as much potential to obstruct it or to act in concert for nefarious purposes in Aurora, Illinois or Bangor, Maine as they would in Oceanside.

106. Even jurisdictional boundaries would not strictly limit the court's ability to impose such a hypothetical injunction—there is no *per se* bar to an injunction prohibiting action in a foreign jurisdiction. ROBERT S. THOMPSON & JOHN A. SEBERT, JR., REMEDIES: DAMAGES, EQUITY AND RESTITUTION 487 (2d ed. 1989). Of course, enforcement of such an injunction may be, practically speaking, impossible.

107. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) ("Injunctions . . . can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred.").

prevent the prior hypothetical injunction from ever occurring. Because equitable remedies find their root in the English chancery courts, which were courts of conscience, a court considering an injunction must balance the hardships to the parties involved.[108] An injunction covering more territory than a district or city attorney's jurisdiction would likely fail this balancing test because residents of the jurisdiction only have a concrete interest in preventing gang association in their community. An injunction that reaches beyond the afflicted neighborhood would place a greater burden on gang members with no concomitant benefit to area residents.[109] Furthermore, an injunction will issue only if the defendant has violated or imminently will violate the law and there is a "cognizable danger of recurrent violation."[110] Proving a cognizable danger of recurrent violation in a vast area like our nationwide hypothetical situation is virtually impossible, because gangs are generally locally territorial.[111]

These tripartite requirements of balancing hardships of the parties, meeting a heightened standard of proof of nuisance, and proving a cognizable risk of recurrent violation of residents' rights act to limit the legitimate geographic scope of the injunction to the area directly affected by the gang's nuisance activity. If an injunction's terms do not restrict constitutionally protected activity, only these equitable limitations on an injunction's geographic scope will apply. However, as the following Section argues, associational restrictions may well burden protected constitutional rights, notwithstanding the contrary conclusions of the *Acuna* and *Englebrecht* courts.

C. Associational Provisions and Constitutional Limits on Injunction Scope

Constitutional protection of association impacts the permissible scope of gang injunctions both in terms of geography and the range of activity prohibited. The United States Supreme Court has distinguished two lines of cases protecting the right to associate—those protecting intimate relationships essential to safeguarding individual freedom (intimate association), and those protecting

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108. THOMPSON ET AL., *supra* note 106, at 254.

109. A geographically broader injunction would not be necessary to prevent gang crime from moving to neighborhoods adjacent to the target area. *See* Jeffrey Grogger, *The Effects of Civil Gang Injunctions on Reported Violent Crime: Evidence from Los Angeles County*, 45 J.L. & ECON. 69, 81, 84 (2002) (finding that gang injunctions had statistically insignificant "spillover effects" in the form of increased crime in adjacent neighborhoods).

110. *Madsen*, 512 U.S. at 766 n.3 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)).

111. IRVING A. SPERGEL, THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH 87 (1995).

association to exercise First Amendment rights (instrumental association).[112] The former strand stems from the "fundamental rights" Substantive Due Process cases.[113] The latter strand stems from the First Amendment, as incorporated in the Fourteenth Amendment's Due Process clause.[114]

In *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Supreme Court explained that intimate associations deserve constitutional protection because "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights."[115] Such fundamental relationships include marriage, the begetting and bearing of children, child rearing and education, and cohabitation with one's relatives.[116] Where fundamental rights are at stake, infringements of those rights must withstand the scrutiny of the compelling interest test: the state must have a compelling interest in regulating the activity, and the regulations must be narrowly drawn to match that interest.[117] The Supreme Court in *Rotary Club* left the door open to protection of other intimate associations, besides family. It suggested a test based on "factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship."[118] According to the Supreme Court in *Roberts v. United States Jaycees*, only groups that demonstrate "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" are "likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty."[119] Because of their large size and fluid membership, groups like Rotary Clubs and the Jaycees do not qualify as intimate associations.[120]

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112. Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1984).

113. *See* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987) (summarizing precedent finding a fundamental right to certain intimate associations).

114. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

115. 481 U.S. at 545.

116. *Id.* These are the same areas identified as "fundamental" in Roe v. Wade. 410 U.S. 113, 152-53 (1973).

117. *Roe*, 410 U.S. at 155. It is unclear whether such fundamental rights in this context would also be subject to the "undue burden" analysis of Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (plurality opinion).

118. *Rotary Club*, 481 U.S. at 546.

119. 468 U.S. 609, 620 (1984).

120. *Rotary Club*, 481 U.S. at 546; *Roberts*, 468 U.S at 621.

The First Amendment protects instrumental association in pursuit of various political, social, economic, educational, religious, and cultural ends in order to protect individuals' rights to speak, worship, and petition the government for redress of grievances.[121] Explicating the reasons for recognizing instrumental associational rights, the Supreme Court wrote,

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.[122]

These instrumental associational rights are not absolute, however: "Infringements . . . may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[123] Furthermore, the First Amendment does not protect those who would associate with others "for the purpose of depriving third parties of their lawful rights."[124]

1. Intimate Associational Rights and Gang Injunctions

Englebrecht's claims that the injunction burdened a protected association because family members lived in the area fell on deaf ears,[125] but these arguments should not have been so lightly brushed aside. As injunctions grow in area, from four square blocks in *Acuna*, to one square mile in *Englebrecht*, to 6.6 square miles in the Colonia Chiques injunction in Oxnard, the probability that the injunction will affect gang members' interactions with their families grows. A larger area increases the likelihood that more gang members will live in the enjoined area, will have family who do, or both.

Although the California Court of Appeal in *Englebrecht II* acknowledged that the injunction at issue might "place some burden on family contact in the target area," the court concluded that "[the injunction] by no means has, in our view, a fundamental impact on general family association."[126] The court's view is ill-considered, as

121. *Roberts*, 468 U.S. at 622.

122. Nat'l Ass'n for Advancement of Colored People v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (internal citations omitted).

123. *Roberts*, 468 U.S. at 623.

124. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994).

125. *See supra* Part II.D.

126. People v. Englebrecht (*Englebrecht II*), 106 Cal. Rptr. 2d 738, 758 (Cal. Ct. App. 2001).

gang members are often related.[127] Whenever an injunction covers the vicinity in which related gang members live, these family members can no longer be seen together "in public view" in their own neighborhood.[128] Associational provisions thus prevent related gang members from eating together at the same restaurant, grocery shopping together, driving each other to work or school, or performing any number of typical family activities. "Public view" provisions, if strictly construed, would mandate that related gang members keep the drapes of their windows pulled shut if they are together in their own home.[129] Even an exception for parents and children, like the one found in the permanent injunction in *Englebrecht II* (left unaddressed by that court), may insufficiently protect familial associational rights and therefore fail to pass constitutional muster. For example, the *Englebrecht II* exception does not on its face cover spouses, siblings, or extended family in non-traditional living arrangements like those protected by *Moore v. City of East Cleveland*.[130] The *Englebrecht II* court is incorrect: these burdensome effects of an injunction certainly do "fundamental[ly] impact" the family association of related gang members.[131]

Although injunctions can have an impact on constitutionally protected association between family members, it is true that not all gang members are family. Probably only a minority are. Arguably, if only a small percentage of gang members are related, then the

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127. *See* TERENCE P. THORNBERRY ET AL., GANGS AND DELINQUENCY IN DEVELOPMENTAL PERSPECTIVE 78 (2003) (noting that in a study of Rochester, NY gangs, new gang members often joined because their brothers or cousins were involved.); Avelardo Valdez, *Toward a Typology of Contemporary Mexican American Youth Gangs*, *in* GANGS AND SOCIETY: ALTERNATIVE PERSPECTIVES 12, 15 (Louis Kontos et al., eds., 2003) (stating that gang membership may be multigenerational); Cheryl Maxson & Monica L. Whitlock, *Joining the Gang: Gender Differences in Risk Factors for Membership*, *in* GANGS IN AMERICA III 19, 32 (C. Ronald Huff ed., 2002) (reporting that a San Diego, CA study revealed that 73% of female gang members joined because family members were involved in the gang.). *See also* Declaration of Neail Holland in Support of Motion for Preliminary Injunction ¶ 54, People *ex rel.* Totten v. Colonia Chiques, No. CIV 226032 (Cal. Super. Ct. Mar. 18, 2004) [hereinafter "Holland Declaration"] ("In some cases, one or both parents [of gang members] were, or still are, gang members.").

128. *E.g.*, *Westside Injunction*, supra note 5, at 2; *Colonia Chiques Injunction*, supra note 5, at 2.

129. The California Supreme Court noted that gang members would be free to associate in the enjoined area while out of public view but did not indicate what level of precaution the defendants must take—for example, whether associating in an unfenced backyard or a hallway inside an apartment building would be considered in "public view." *Acuna*, 929 P.2d at 616.

130. 431 U.S. 494, 499 (1977). The Supreme Court invalidated an ordinance that would prevent a grandmother from living in the same home as her two grandsons, who were first cousins of each other, in a "single-family" zone of the city. The Court reaffirmed the idea of "a private realm of family life which the state cannot enter." *Id.* (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

131. *Englebrecht II*, 106 Cal. Rptr. 2d at 758.

injunction's impact on family association of gang members as a group might be minimal. However, for those few gang members who *are* related, the injunction imposes a significant burden.[132] The *Englebrecht II* court asserted that "[a]ny attempt to limit the familial association impact of the injunction would make it a less effective device for dealing with the collective nature of gang activity." If related gang members are a small minority, any exception to an injunction's associational provision allowing family association would necessarily ease the injunction's strictures only on a select few. It would remain effective at preventing association between other gang members, without unnecessarily infringing on family members' associational rights.

Conversely, if a large number of gang members are related, the *Englebrecht II* court's argument seems to gain more traction—if the family member exception would apply to large numbers of gang members, then the injunction would necessarily prevent less collective gang conduct. Yet this hypothetical situation in which many gang members are related begs the question whether the associational provision is constitutional at all. If a large number of enjoined gang members are related and live in the target area, the associational provisions may well fail the compelling interest test's requirement of narrow regulatory tailoring.[133] An injunction that so greatly impacts so many gang members' fundamental rights of association with family is not "narrowly drawn to express only the legitimate state interests at stake."[134] Thus, such an injunction should be rewritten to forbid association in furtherance of illegitimate nuisance activity, not association generally. Eating at a restaurant with one's family is not a public nuisance, but it would be barred by an absolute non-association provision nonetheless.

2. Instrumental Associational Rights and Gang Injunctions

In its analysis of gangs' instrumental associational rights in *Acuna*, the California Supreme Court relied extensively on *Madsen v. Women's Health Center, Inc.*[135] In *Madsen*, the United States Supreme

132. *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894 (1992) ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.").

133. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (discussing the requirement of narrow tailoring). Part III.D will address means of drafting associational provisions that would more narrowly tailor an injunction to lessen its burden on familial association without undercutting its overall effectiveness.

134. Roe v. Wade. 410 U.S. 113, 155 (1973).

135. 512 U.S. at 765 (1994).

Court addressed anti-abortion protestors' challenges to the constitutionality of an expanded injunction against their picketing outside an abortion clinic.[136] The demonstrators in *Madsen* contested, among other things, establishment of a protest-free buffer zone around the clinic[137] and a provision prohibiting the use of "images observable" from the clinic in their demonstrations.[138] They also argued that the injunction's claim to apply to those persons acting in concert with them violated their First Amendment freedom of association.[139]

The *Madsen* Court determined that the injunction at issue was a content neutral restriction on speech. Although the injunction was effective only against pro-life protestors, there were no pro-choice protestors obstructing access to the clinic; the obstructionist conduct of the protestors—not the content of their protest—was objectionable.[140] The Court cautioned, however, that courts must be wary of injunctions' greater risks of censorship and discriminatory application compared to general ordinances.[141] The Court therefore concluded that the appropriate test for constitutionality is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[142]

Applying this test to the injunction in place at the clinic, the Court concluded that the buffer zone protecting access to the clinic was constitutional.[143] However, the court also determined that a buffer zone shielding the rest of the clinic property (which was not necessary for access to the clinic) burdened more speech than necessary.[144] Moreover, the court struck down the "images observable" provision, because it did not limit itself to prohibiting the display of signs that could be interpreted as threats or veiled threats against clinic patients and their families.[145] As to the petitioners' freedom of association arguments, the Court noted that "[t]he freedom of association protected by the First Amendment does not extend to joining with

136. *Id.* at 757.

137. *Id.* at 768-71.

138. *Id.* at 773.

139. *Id.* at 776.

140. *Id.* at 762 ("To accept petitioners' claim would be to classify virtually every injunction as content or viewpoint based. An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group.").

141. *Id.* at 764.

142. *Id.* at 765.

143. *Id.* at 770.

144. *Id.* at 771.

145. *Id.* at 773.

others for the purpose of depriving third parties of their lawful rights."[146]

In the California Supreme Court's decision in *Acuna*, the narrow geographical area covered by the injunction probably played a role in the court's constitutional approval of the gang injunction under *Madsen*'s test. The enjoined area was clearly limited to the neighborhood where the gang was a pervasive nuisance. At several places in its opinion, the California Supreme Court referred to the small area covered by the injunction.[147] In analyzing the burden the associational provisions of the injunction placed on enjoined gang members' First Amendment rights, the court wrote,

> Outside the perimeter of Rocksprings the superior court's writ does not run; gang members are subject to no special restrictions that do not affect the general population. Given the limited area within which the superior court's injunction operates, the absence of any showing of constitutionally protected activity by gang members within that area, the aggravated nature of the misconduct, the fact that even within Rocksprings the gang members may associate freely out of public view . . . we conclude that this aspect of provision (a) passes muster . . . under the standard of *Madsen*.[148]

Following suit, the California Court of Appeal in *Englebrecht I* approved the larger injunction at issue in that case, and similarly emphasized that the target area at issue there encompassed only "the turf of the Posole gang and the area that the gang has made a public nuisance."[149] Thus, California courts have concluded that blanket associational provisions pass constitutional muster under *Madsen* when areas targeted are limited to the neighborhoods in which the gangs have made themselves a public nuisance and in which the gangs are not actively engaging in constitutionally protected activity.

The courts give short shrift to considerations of gang members' abilities to engage in protected instrumental association in the future. Notwithstanding the contrary assertions of the California Supreme Court in *Acuna*, the associational provisions typically found in gang injunctions are broad enough that they potentially infringe on some protected instrumental forms of association. The California Supreme Court in *Acuna* concluded, "Manifestly, in its activities within the four-block area of Rocksprings, the gang is not an association of individuals formed for the purpose of engaging in protected speech or

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146. *Id.* at 776.

147. For example, "The effect of provision (a)'s ban on defendants' protected speech is minimal. To judge from the evidence placed before the superior court, the gangs appear to have had no constitutionally protected or even lawful goals *within the limited territory of Rocksprings*." People *ex. rel.* Gallo v. Acuna, 929 P.2d 596, 615 (Cal. 1997) (emphasis added).

148. *Id.* at 616.

149. In re Englebrecht (*Englebrecht I*), 79 Cal. Rptr. 2d 89, 95 (Cal. Ct. App. 1998).

religious activities."[150] While it may be true that an enjoined gang might not be engaged in protected activity at the time an injunction is imposed, that circumstance does not change the fact that a broadly worded injunction curtails all *future* collective protected speech, political or religious activity within the enjoined area.

Under injunction provisions banning all gang member association in public view, gang members would not be allowed to petition the government as a group for redress of any perceived grievances while they were within the target area of the injunction. Gang members would not be allowed to stand in line together at a polling place on Election Day while exercising their right to vote. Situations where government buildings are located in the enjoined area are especially problematic: the injunction against the Colonia Chiques gang in Oxnard envelops both the Oxnard City Hall and Oxnard Police Department buildings, effectively preventing gang members from picketing their local government and law enforcement agencies.[151] In most states, these constraints would be particularly restrictive because persons subject to an injunction must obey it (unless it is "transparently invalid") while they contest its legitimacy in court.[152]

Provisions forbidding all association necessarily include politically motivated assembly, thereby prospectively abridging gang members' First Amendment rights—even if the enjoined defendants were not using those rights at the time the injunction was imposed. A larger target area further increases the burden on gang members' instrumental associational rights; they must travel farther to associate. Most problematic, however, is a case like the Colonia Chiques in Oxnard, where the very houses of government are included in the enjoined area and no amount of travel would allow direct picketing of the institutions. When such essential constitutional rights are at stake, the courts must carefully balance them under *Madsen* to ensure that no more speech is burdened than necessary.

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150. *Acuna*, 929 P.2d at 608 (internal punctuation and italics omitted) (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987)).

151. Oxnard City Hall is located at 300 West Third Street, and the Oxnard Police Department is located at 251 South "C" Street. Both addresses are within the enjoined area. *See* Ventura County District Attorney, Colonia Chiques Gang Injunction Safety Zone Map, http://da.countyofventura.org/coch/Injunction_Safety_Zone_Handout.pdf (last visited Sept. 22, 2006).

152. Walker v. City of Birmingham, 388 U.S. 307, 315, 317 (1967); *see also* DOBBS, *supra* note 95, at 213 ("[T]he fact that an injunction is erroneously issued constitutes no defense to a criminal contempt charge; the court's order must be obeyed until reversed."). However, this "collateral bar rule" is not the law in California; contempt defendants may mount a jurisdictional challenge to the validity of the underlying injunction. People v. Gonzalez, 910 P.2d 1366, 1375 (Cal. 1996).

D. Recommendations

The physical boundaries of the area covered by a gang injunction will generally be determined by equitable principles, not by constitutional tests. Courts should therefore carefully balance the hardships to the parties involved when considering the geographic scope of the injunction, to make sure that the enjoined area is not larger than it needs to be to prevent a public nuisance to neighborhood residents. If the government has not demonstrated proof of a cognizable risk of recurrent violation of residents' rights,[153] an injunction should not issue in that area. Courts should ensure that the government carries its burden of proving the extent of the nuisance through the entire area in which the injunction is sought. They should emphasize that the standard of proof by clear and convincing evidence must be met for an injunction to issue.[154]

Considerations of constitutional rights should inform the court's eventual injunction. The injunction's terms should be adjusted in light of the rights at stake. Although a smaller enjoined area imposes a lighter burden on gang members because it is relatively easy to leave the area, a geographic solution to potential abridgements of substantive constitutional rights is a blunt instrument at best. For example, gang members who are subject to an injunction banning all association with other gang members in public view and who have family in the gang need protection for their intimate associational rights. To protect these rights, one could draft an injunction that physically excludes the gang members' homes from the enjoined areas. This would safeguard the gang members' family association while in public view on their property, but it would do nothing to protect related gang members who want to go to a restaurant together. Conversely, removing gang members' property from the enjoined area would exclude from the injunction not just familial association on the property, but non-familial, non-protected association as well.

To protect instrumental association, an injunction could physically be drawn on the map to avoid government buildings, houses of worship, and polling places, thereby permitting gang members to petition the government, to worship, and to stand in line together while voting. Such a map-based solution suffers the same imprecision as the intimate association geographic solution above. It would prohibit protected politically expressive association in other areas not removed from the injunction's purview, at the same time that it would

153. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 766 n.3 (1994).

154. People v. Englebrecht (*Englebrecht II*), 106 Cal. Rptr. 2d 738, 753 (Cal. Ct. App. 2001).

potentially allow nuisance activities (those which are lawful when not enjoined) to occur in the lands physically excluded from the injunction's reach.

A more precise solution to the constitutional concerns implicated by gang injunctions can be found by narrowing the scope of the prohibited activities, rather than shrinking the enjoined area's physical boundaries. It does not take much adjustment of injunction terms to respect protected forms of association while still preventing association in furtherance of the nuisance. Consider the need to protect instrumental association for expressing political views.[155] An injunction that prohibits all public association between gang members in a broad geographic area probably violates the compelling interest test's requirement of narrow tailoring because its prohibition includes instrumental association.[156] Courts should consider how better to tailor associational provisions. For inspiration, they can look to the "images observable" provision struck down in *Madsen*.[157] There, the Supreme Court noted that the provision could have been drafted more narrowly: the state could have enjoined "the display of signs that could be interpreted as threats or veiled threats," rather than "all 'images observable.'"[158]

Judge Iwasko's injunction[159] against two gangs in Lompoc provides a good example of narrow tailoring analogous to the Supreme Court's suggestion in *Madsen*. Rather than prohibit *all* public association between enjoined gang members, his order prohibits association "under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable [the gang] and/or its Members to engage in the nuisance conduct prohibited" by the injunction.[160] By exempting conduct that does not have a purpose or effect of perpetuating nuisance and by imposing a reasonable person standard on the conduct, Judge Iwasko noticeably lightens the burden on enjoined gang members'

155. Assuming that the California Supreme Court was correct to apply *Madsen*'s "no more speech than necessary test" to expressive association, courts must also examine their orders in light of this test. *Acuna*, 929 P.2d at 616. Even if the California court was incorrect, applying the test would be a sound policy choice (if not a constitutional mandate) that would aid a court in narrowly drafting its orders.

156. It is a question for another day whether a provision banning all public association within a very narrowly circumscribed area passes this test; however, one would imagine that if the area were small enough (one square meter, for the sake of argument), then the requirements of narrow tailoring would still be met.

157. 512 U.S. at 773.

158. *Id.*

159. *Westside Injunction*, supra note 5, at 1-2. Two gangs were sued in the same action, resulting in identically worded injunctions addressed to each group individually. *Id.*

160. *Id.* at 2-3.

associational rights—both intimate and instrumental. Gang members in the same family who go grocery shopping together or who sit in a coffee shop together would not appear to a reasonable person to be engaging in public nuisance activity. Neither would gang members assembling in public to petition their government peacefully nor standing near each other in line at a polling place. Limiting the associational ban only to conduct that furthers the nuisance refocuses the court on the behavior that it seeks to prevent. Mere public association is not harmful to the community by itself; rather it is the destructive results that occur when gang members associate to engage in nuisance activity together.[161] Because narrowly tailored terms lighten an injunction's burden on gang members' liberties to associate publicly, concerns about broad geographic scope are lessened. When an injunction does not bind those people subject to it so tightly that it prevents them from engaging in everyday activities, we need not be as concerned with literally how far they must go to avoid its strictures.

IV. SUING GANGS AS UNINCORPORATED ASSOCIATIONS: EMPTY COMPLAINTS?

A. A New Trend? Injunctions in Oxnard and Lompoc Do Not Name Any Individual Defendants

In a public nuisance suit against a Latino gang in Oxnard, California that resulted in a six square mile injunction, the Ventura County District Attorney named the Colonia Chiques gang, as an unincorporated association, and 500 Does as defendants.[162] A one square mile injunction in Lompoc, California named two gangs alone, with no individual defendants.[163] The Oxnard and Lompoc injunctions could have been imposed as default judgments when no one appeared in court to oppose them,[164] but the judges hearing the cases allowed interveners to argue against imposing the requested injunctions.[165] After the injunction against the Colonia Chiques was imposed, police

161. *See* People *ex. rel.* Gallo v. Acuna, 929 P.2d 596, 615 (Cal. 1997) ("It is the threat of *collective* conduct by gang members loitering in a specific and narrowly described neigbborhood that the [associational] provision is sensibly intended to forestall.") (emphasis in original).

162. *Colonia Chiques Injunction*, supra note 5.

163. *Westside Injunction*, supra note 5.

164. *See* CAL. CIV. PROC. CODE § 585 (West 2006) (default judgment statute); *see also* Bonnie M. Dumanis, Office of the San Diego District Attorney, Gang Injunction Workflow Chart, http://www.sdcda.org/protecting/gi_workflow.pdf (last visited Sept. 22, 2006) (explaining the process of obtaining gang injunctions in California).

165. *Westside Injunction*, supra note 5; *Colonia Chiques Injunction*, supra note 5.

began serving it on members of the gang, thereby binding them to its terms.[166] The lack of notice to and service of process on members of the gang before the imposition of the injunction—and the consequent absence of an opportunity for gang members to contest it—drew criticism. The Chief Deputy Public Defender for Ventura County, California (who was allowed to intervene in the *Colonia Chiques* case) opined, "This is a strange, novel process of getting a court order and essentially leaving the name blank. And they allow the police to fill in the name as the need arises."[167] This Section will explore the practical difficulties and constitutional procedural due process concerns that arise from permitting gangs to be sued without naming any individual defendants.

B. Gang Organizational Structure and the Impracticability of Service and Defense

Although California law probably allows gangs to be considered unincorporated associations,[168] gang organizational structure raises several due process problems that would not as likely arise with other varieties of unincorporated associations, such as political parties or labor unions.[169] While most legally recognized unincorporated associations have designated officers—e.g., party chairmen, or union presidents—most gangs do not.[170] Many experts agree that gangs (especially in "emerging gang cities" with less established gang activity) are generally not very organized.[171] In particular, very few gangs have a bureaucratic structure with a discernable hierarchy.[172] In a 1990 study of Los Angeles gangs, one sociologist concluded that Mexican American gangs are "informally organized, without

166. Alvarez, *supra* note 12, at B1.

167. Catherine Saillant, *Injunction on Gang Violated*, L.A. TIMES, Aug. 28, 2004, at B1.

168. *See supra* Part II.B.

169. Political parties and labor unions are now often treated by courts as incorporated, but early in the 20th Century, they were generally considered to be unincorporated associations. Barr v. United Methodist Church, 153 Cal. Rptr. 322, 327 (Cal. Ct. App. 1979); 41 CAL. JUR. 3D *Labor* § 172 (2006).

170. For example, Detective Neail Holland described the Colonia Chiques gang thus: "[The gang] is an unincorporated association. It consists of individual members with no formal organization. As such, there is no president or vice president. There are associates, members, OG's (old or original gangsters) and veteranos. There is no rank structure in the gang, and because the gang is geographically so widespread, the members develop into smaller groups." *Holland Declaration*, *supra* note 127, ¶ 379.

171. *See* James C. Howell et al., *The Changing Boundaries of Youth Gangs*, *in* GANGS IN AMERICA III at 9 (C. Ronald Huff ed., 2002) (citing fifteen studies of gang organization).

172. WEISEL, *supra* note 16, at 55.

acknowledged leadership. . . ."[173] An organizational theorist also points out, "[T]he proportion of contemporary gangs that may be considered as 'more organized' . . . may reflect only a small percentage of gangs."[174] Oxnard Police Department Detective and gang expert Neail Holland described the Colonia Chiques as a "loosely knit organization" in his declaration supporting the injunction.[175]

For lawsuits against unincorporated associations, California law requires service on an officer or designated individual,[176] but the lack of hierarchical organization in gangs makes it difficult to determine who must be served with process. In this situation, California law provides for service upon members generally: "[T]he court or judge may make an order that service be made upon the unincorporated association by delivery of a copy of the process to one or more of the association's members designated in the order and by mailing a copy of the process to the association at its last known address."[177] If the gang itself does not have a "known address," it is impossible to comply with statutory requirements for service of process unless individual gang members are named in the order. If they must be named in the order, then there is no reason why they should not also be named in the complaint, since they ultimately will be bound by any future injunction.

Ignoring this complication for a moment, if a group of gang members are served on behalf of the gang but are not individually named in the complaint, a collective action problem arises: each member has an incentive to do nothing and to let other members respond to the nuisance suit. If Member A does nothing, but Members B and C successfully argue in court that the gang's conduct is not a public nuisance, Member A gets the benefit of B's and C's action (no injunction will be imposed) without having to pay any of the costs of

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173. SPERGEL, *supra* note 111, at 78 (quoting Joan W. Moore, *Gangs, Drugs, Violence*, *in* DRUGS AND VIOLENCE: CAUSES, CORRELATES AND CONSEQUENCES 160, 168 (Mario de la Rosa et al., eds. 1990) (internal punctuation omitted).

174. WEISEL, *supra* note 16, at 55.

175. *Holland Declaration*, *supra* note 127, ¶ 53.

176. CAL. CIV. PROC. CODE § 416.40 (West 2004) ("A summons may be served on an unincorporated association . . . by delivering a copy of the summons and of the complaint . . . (b) If the association is not a general or limited partnership, to the person designated as agent for service of process in a statement filed with the Secretary of State or to the president or other head of the association, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the association to receive service of process . . . .").

177. CAL. CORP. CODE § 18220 (West 2006).

defense.[178] Because Members B and C have the same incentives as Member A, they will also do nothing, and the nuisance suit will probably end up unopposed in court.[179] Highly involved gang members may yet decide to stand up for the gang to which they are loyal, while less involved members may refuse to act. This allows a district attorney to select strategically which unnamed members of the gang to serve with process. District attorneys who seek an easy path to an injunction can simply serve one or a few peripherally involved gang members in order to comply with the letter of the procedural statute; they thereby can reduce the chances of opposition in court and concomitantly increase the likelihood of winning an injunction by default.[180]

Further problems arise because unincorporated associations have a legal existence separate from their members. As separate legal entities, unincorporated associations must be represented in court by an attorney.[181] Assuming that the collective action problem described above were overcome, if a purported gang leader were to try to represent the gang's interests in court, he would be engaged in the unauthorized practice of law.[182] Furthermore, California precedent denies gang members the right to appointed counsel when the court is considering imposing an injunction.[183] Because any gang members served on behalf of the gang cannot represent the gang as an unincorporated association and the state will not provide them counsel, they must hire an attorney in order to defend the gang in court. This is an unrealistic expectation for two reasons. First, gang members tend to come from lower economic classes and so it may be

178. Even if Members B and C fail in their defense and an injunction is imposed, A has spent nothing on defense and is thus better off than B and C, who have expended resources and are still subject to the same injunction.

179. This assumes that the members are rational actors.

180. This is not to impute an illegitimate motive to district attorneys seeking to enjoin gang conduct, but rather to examine the nature of the incentives involved, without considering any individual prosecutor's sense of fairness. However, in one case, a district attorney relied on the fact that no individual gang members were named as defendants in the nuisance suit to argue that a gang member who came forward to contest his inclusion in the injunction lacked standing and should not be heard. Raul Hernandez, *Injunction Ordered Against the Southside Chiques Gang*, VENTURA COUNTY STAR, Sept. 19, 2006, at A1.

181. Clean Air Transp. Sys. v. San Mateo County Transit Dist., 243 Cal. Rptr. 799, 800 (Cal. Ct. App. 1988); *see supra* Part II.B.

182. *Clean Air Transp. Sys.*, 243 Cal. Rptr. at 800-01 (asserting that a layperson purporting to represent a corporation is engaged in the unlawful practice of law, and that the same logic applies to unincorporated associations).

183. *See* Iraheta v. Superior Court, 83 Cal. Rptr. 2d 471, 478 (Cal. Ct. App. 1999) (holding that gang members do not have a right to appointed counsel unless they are at risk of losing their liberty, i.e. during a contempt hearing.).

impossible for them to afford an attorney.[184] Second, if an individual member *does* hire an attorney, that member's personal interest diverges from the gang's collective interest in the litigation. Rather than have their counsel argue that the gang as an association is not a nuisance, the persons served have an incentive to claim that they are not members of the gang at all.[185]

C. Procedural Due Process and the Constitutional Problem of Notice

1. The Requirements of Due Process

The practical problems of service and notice create constitutional procedural due process problems.[186] The United States Supreme Court created a three-part balancing test in *Mathews v. Eldridge* to determine whether procedural due process rights have been abridged.[187] First, a court must consider the nature and importance of the individual interest at stake during the proceeding.[188] Second, it must consider the risk of an erroneous deprivation or infringement of that interest under the current procedures and the probable value of "additional or substitute procedural safeguards."[189] Third, it must consider the financial and administrative burdens on the government that the extra procedures would require.[190] The *Mathews* test provides a general approach to due process challenges to state procedures.[191]

Issues of procedural due process particularly related to notice, however, are analyzed according to the rule of *Mullane v. Central*

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184. SPERGEL, *supra* note 111, at 60 ("Contemporary youth gangs are located primarily in lower-class, slum, ghetto, barrio, or working class . . . communities . . . .").

185. In *Acuna*, two admitted gang members asserted that they had not personally contributed to nuisance activity and therefore they should not be bound. People *ex. rel.* Gallo v. Acuna, 929 P.2d 596, 616-18 (Cal. 1997). Their interests diverged from the group's interest; rather than argue that the gang was not a nuisance, which would benefit the gang as a whole, they argued that they personally should not be bound. Their arguments were rejected. *Id.* at 618. A claim of non-membership has the same effect, and highlights the same divergent interests in the litigation.

186. The Due Process Clause reads: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend XIV, § 1.

187. 424 U.S. 319, 335 (1976).

188. *Id.*

189. *Id.*

190. *Id.*

191. Parham v. J.R., 442 U.S. 584, 599-600 (1979). However, the *Mathews* test does not apply in criminal or military cases. Medina v. California, 505 U.S. 437, 443 (1992) (criminal); Weiss v. United States, 510 U.S. 163, 177 (1994) (military).

Hanover Bank & Trust Co.[192] Under *Mullane*, the appropriate question is whether the notice given was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[193]

The next Subsections apply procedural due process analysis to different phases of a public nuisance suit brought against a gang as an unincorporated association with no individually named defendants.

2. Application of Due Process Requirements

a. Upon Consideration of the Injunction: Whether an Enjoinable Public Nuisance Exists

Naming an unincorporated association with no individual members joined as defendants abridges gang members' procedural due process rights when the court considers the propriety of a public nuisance injunction. The Due Process Clause "at a minimum . . . require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[194] The notice must reasonably convey the pendency of the action, and it must afford a reasonable time for interested parties to make their appearance.[195] Efforts to provide notice must be those one would use if reasonably attempting to notify the absentee in the hopes that he would come forward; a "mere gesture" is not due process.[196] Still, the government need not go to heroic efforts to notify a party, but merely must use means "reasonably calculated" to apprise the party of the pendency of the action.[197]

Naming gangs as defendants without naming individual defendants fails the *Mullane* test. When no gang members are named in the suit and served with process at all, notice of the suit is not "reasonably calculated" to apprise them of the public nuisance suit against them.[198] This is all the more apparent when one recognizes that securing a gang injunction is a lengthy process during which the

192. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

193. Dusenbery v. United States, 534 U.S. 161, 168 (2002) (quoting *Mullane*, 339 U.S. at 314).

194. Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (quoting *Mullane*, 339 U.S. at 313).

195. *Mullane*, 339 U.S. at 314.

196. *Id.* at 315.

197. *Dusenbery*, 534 U.S. at 170.

198. *See Mullane*, 339 U.S. at 314 (discussing the "reasonably calculated" standard).

government learns much about the gang. Officials must assemble crime statistics for the area in which the injunction is sought and must gather and file sworn declarations by area residents.[199] The process often takes months. During its course, the government learns the names of at least some gang members. A gang expert ordinarily gives a lengthy statement explaining the nature of the nuisance conduct in the area targeted by the injunction.[200] Details of crimes by known gang members are often recounted to the court.[201] When these individuals are known to the government, it is a clear violation of *Mullane* not to provide them with notice of the nuisance suit. *Mullane* held that when names and addresses of those affected by a proceeding are known, even notice by publication is inadequate; notice by ordinary mail is required, at a minimum.[202] Yet, by not naming individual gang members in or notifying them about the pending action,[203] the government denies them their constitutional rights.

Even when examining this stage of the litigation under the more general *Mathews* analysis,[204] it is clear that gang members' due process rights are violated. When the district attorney alleges that the gang is engaging in public nuisance activities and asks for specific conduct to be enjoined, the gang's collective liberty interest in pursuing the enumerated activities (e.g. public association, wearing gang-related clothing, etc.) is at risk. The liberty to engage in these activities is highly important, as the *Englebrecht II* court noted, "not because the personal activities enjoined are sublime or grand but rather because they are commonplace and ordinary."[205] Gang injunctions' terms frequently enjoin everyday conduct that most individuals take for granted; prohibitions on this conduct are therefore especially onerous.

Proponents of the injunction might argue that, in the context of *Mathews* balancing, the chance of an erroneous finding of a public nuisance is low because it requires such a substantial effort by local law enforcement to gather the data necessary to prove public

199. 48 declarations were gathered in *Acuna*. People *ex. rel.* Gallo v. Acuna, 929 P.2d 596, 601 (Cal. 1997).

200. *E.g.*, *Holland Declaration*, *supra* note 127.

201. *See, e.g.*, *id.* ¶¶ 379-888 (profiling many individual gang members by name).

202. 339 U.S. at 318.

203. *See supra* Part IV.B (discussing the impracticability of appropriate service of gangs as unincorporated associations).

204. *Mullane*'s more simply phrased test can be viewed as a specific application of the *Mathews* factors to be used when analyzing notice. The *Mathews* factors can be helpful to decide whether the notice given is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane*, 339 U.S. at 314.

205. People v. Englebrecht (*Englebrecht II*), 106 Cal. Rptr. 2d 738, 753 (Cal. Ct. App. 2001).

nuisance. Furthermore, under *Acuna*, in order for a public nuisance to be found and enjoined, the government must show that the interference with public rights posed by the gang's nuisance activity is substantial and unreasonable.[206] *Englebrecht II* raises the standard of proof beyond the typical preponderance standard of a civil lawsuit, demanding proof of the nuisance by clear and convincing evidence.[207] These extensive requirements for obtaining injunctions seem to indicate a low risk of error in finding a nuisance.

Such arguments are misplaced. Despite these procedures, the risk of an erroneously issued injunction can be greatly reduced by simply naming individual gang members as defendants and serving them with process. When the gang is sued as an unincorporated association and no individual defendants are named, it is unlikely that anyone will appear to defend the gang in court.[208] This is nearly certain if no one is actually served with notice of the public nuisance lawsuit.[209] Only one side of the story will be told. The sheer impracticability of statutorily proper service to "the gang" as a lone defendant denies individual members their right to notice and hearing, yet these rights are "central to the Constitution's command of due process."[210] The essential function of an adversary hearing is "to ensure the requisite neutrality that must inform all governmental decisionmaking."[211] When the state presents its case without any opposition, there is an elevated risk of an erroneously issued injunction.[212]

The cost of additional procedures to reduce the likelihood of wrongly finding that a public nuisance exists is essentially non-existent. Individual gang members must have notice of any injunction against the gang in order to bind them to its terms;[213] therefore, they must be identified and served with process at some point. The police could simply identify the gang members before the injunction is imposed, instead of afterward. There is no reason to believe that it

206. People *ex. rel.* Gallo v. Acuna, 929 P.2d 596, 604 (Cal. 1997).

207. 106 Cal. Rptr. 2d at 753.

208. *See supra* Part IV.B (discussing the collective action problem and divergent interests between the gang as an association and individuals served on behalf of a gang).

209. *See supra* Part IV.B (discussing the practical problems of serving a gang as an unincorporated association).

210. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993).

211. *Id.* at 55.

212. It would seem from *Boddie*'s dicta tbat imposing a default judgment after inadequate notice would be unconstitutional. Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

213. *See, e.g.*, People v. Gonzalez, 910 P.2d 1366, 1368-69 (Cal. 1996) (finding that Gonzalez was bound by the injunction because, although not a party to the action, he was a gang member who had been served with the injunctive order).

costs more to identify those subject to a potential injunction before the injunction is imposed. Because the risk of an erroneous injunction depriving gang members of basic liberties is high when gangs are sued as associations and that risk can be substantially lowered at little cost to the government merely by identifying and serving gang members prior to any hearing, the procedural due process requirements of *Mathews* have been violated when gangs are sued as unincorporated associations without individually named defendants.

b. Service of Gang Members with the Injunction

Once an injunction against a gang as an unincorporated association has been imposed,[214] individual gang members are bound to the injunction's terms after they are served with a copy.[215] In order to be served, of course, the police must identify them as gang members. At this point, the interest at stake in the *Mathews* balancing test is the liberty of the specific person served to engage in the enjoined conduct.[216]

The risk of misidentification as a gang member by the police is quite high, especially if there are not clear standards for identification. The California Court of Appeal in *Englebrecht II* created a definition of "gang member" that, broken down into its essential elements, requires that:

(1) there be an organization of three or more persons,
  (a) which has a common name, sign or symbol, and
  (b) which engages in nuisance conduct as a primary activity, and
  (c) whose members participate in the nuisance activity;[217] and
(2) the individual, in order to be a "member," must
  (a) participate or act in concert with the organization
  (b) in a way that is more than nominal, passive, inactive, or purely technical.[218]

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214. This Section ignores the procedural due process problems, discussed above, with imposing the injunction against the gang in the first place.

215. *See, e.g.*, *Gonzalez*, 910 P.2d at 1368-69 (discussing a gang member's conviction for contempt after being served with an injunction).

216. This is distinct from the interest of the gang as an entity to engage in the conduct, as discussed in the prior Section.

217. It is hard to imagine how such a group could possibly have nuisance conduct as a primary activity if its members do not engage in the conduct, so this seems to be a redundant criterion.

218. People v. Englebrecht (*Englebrecht II*), 106 Cal. Rptr. 2d 738, 756 (Cal. Ct. App. 2001) ("[A gang member is] a person who participates in or acts in concert with an ongoing

For all its verbiage, this definition offers little to aid the police in identifying gang members. It provides no guidance on what sort of conduct would constitute acting in concert "more than nominal[ly], passive[ly], inactive[ly], or technical[ly]."[219] It also does not expressly mandate a nexus between the enjoined nuisance conduct and participation with the organization. Under this definition, a person who has played video games with gang members might conceivably be a considered "gang member": he has acted in concert with members of the gang (even though it was not in furtherance of the nuisance) and that is all the definition strictly requires. A dearth of objective criteria to legally determine gang membership under the *Englebrecht II* definition leads to a risk of erroneous identification by police.[220]

This definition is probably also unconstitutionally vague. A law may be unconstitutionally vague for either of two reasons: (1) it may provide inadequate notice to enable ordinary people to understand what conduct it prohibits; or (2) it may authorize or encourage arbitrary and discriminatory enforcement.[221] In *City of Chicago v. Morales*, the United States Supreme Court struck down Chicago's anti-loitering ordinance, which prohibited remaining "in any one place with no apparent purpose."[222] The ordinance was fatally flawed both because it failed to give adequate notice of what conduct was prohibited and because it permitted arbitrary enforcement, "necessarily entrust[ing] lawmaking to the moment-to-moment judgment of the policeman on his beat."[223] The *Englebrecht* definition of a gang member probably does not provide adequate notice of who may be served with the injunction, because the definition's lack of objective criteria against which to assess an individual's participation with the gang makes it difficult for an individual to know whether his or her association with the gang is "nominal, passive, inactive, or

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organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of acts constituting the enjoined public nuisance, having a common name or common identifying sign or symbol and whose members engage individually or collectively engage in the acts constituting the enjoined public nuisance. The participation . . . must be more than nominal, passive, inactive or purely technical."). The Colonia Chiques and Westside injunctions adopted this definition of "gang member." *Westside Injunction*, supra note 5, at 2; *Colonia Chiques Injunction*, supra note 5, at 5.

219. *Englebrecht II*, 106 Cal. Rptr. 2d at 756.

220. It should be noted that police often apply their own independent criteria for determining who is a member of a gang. *Holland Declaration*, *supra* note 127, ¶¶ 73-29. However, for the purposes of an injunction, the only criteria that matter are those legally mandated or listed in the injunction.

221. City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

222. *Id.* at 51 n.14.

223. *Id.* at 61 (quoting Kolender v. Lawson, 461 U.S. 352, 360 (1983) (internal quotation marks omitted)).

purely technical."[224] While this is problematic, the second prong of unconstitutional vagueness—excessive delegation to police—is even more so. Without objective criteria, police have free rein to determine whose action in concert with gang members is "more than nominal, passive, inactive or purely technical," much like they had absolute (and unconstitutional) discretion to determine in *Morales* who was remaining in one place "with no apparent purpose."[225]

Further increasing the difficulty of challenging one's identification as a gang member, those persons served who wish to contest their identification must also do so without the aid of appointed counsel.[226] They must either hire an attorney (which might present an impossible financial burden) or represent themselves. Accurate identification at this stage is vital because once an individual has been determined to be a gang member subject to the terms of the injunction, that determination is not subject to collateral attack during a contempt hearing.[227]

Additional procedures would probably reduce the risk of erroneous identification at little extra cost. Objective standards to determine gang membership can increase accuracy of identification by police on the street. The police in *Englebrecht II* did in fact use such objective criteria to identify Englebrecht as a gang member; the court approved of those criteria to the extent that they "employed those concepts" articulated in the court's newly announced definition of gang membership.[228] Objective criteria, such as a recent arrest while acting with the gang,[229] having gang-associated tattoos, wearing gang-associated clothing, and admitting membership in the gang, provide concrete standards whereby police may assess whom to serve with an injunction.[230] Such criteria would be relatively cheap to design and promulgate. They would also increase the accuracy of who is identified as a gang member and served with the injunction.

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224. *Englebrecht II,* 106 Cal. Rptr. 2d at 756.

225. *Morales,* 527 U.S. at 61; *Englebrecht II,* 106 Cal. Rptr. 2d at 756.

226. Iraheta v. Superior Court, 83 Cal. Rptr. 2d 471, 481 (Cal. Ct. App. 1999).

227. *Id.* at 480; *Englebrecht II,* 106 Cal. Rptr. 2d at 749. It is only at the contempt hearing that the right to appointed counsel attaches because the defendant's physical liberty would be at risk. *Iraheta,* 80 Cal. Rptr. 2d at 478.

228. *Englebrecht II,* 106 Cal. Rptr. 2d at 756.

229. A specific and relatively short time period could, and should, be identified to increase the likelihood that the person arrested has not since dropped out of the gang.

230. It is true that these criteria are imperfect—tattoos may remain after gang membership is terminated, "gang related clothing" might also be used to express support for a particular athletic team, and an individual might dishonestly profess gang membership to seem "cool" to peers—but they still provide more guidance than the test outlined by *Englebrecht II.* By clearly articulating in the injunction what criteria the police are to use, those wrongly identified as gang members can argue against their fitting specific criteria.

Because the definitions and procedures in place falter under both *Morales*'s vagueness standards and under *Mathews*'s general test, due process analysis at this stage of the proceedings indicates that more accurate procedures are needed to safeguard the rights of those at risk of being served with an injunction.

c. *Contempt Proceedings*

Presently, contempt proceedings are the focus of most of the attention in securing enjoined gang members' procedural due process rights. Because contempt of court is a quasi-criminal offense, punishable by fine or imprisonment, the physical liberty of the gang member accused of violating the injunction is at stake. [231]

The risk of an erroneous deprivation of the defendant's physical liberty during a contempt trial is low. At contempt proceedings, there is a full trial on whether the gang member violated the terms of the injunction.[232] The State must prove its case beyond a reasonable doubt, like in any criminal trial, and the defendant has the right to appointed counsel.[233] Because these procedures are as full as those in any criminal case, there is no due process problem here.

D. Recommendations

Courts typically focus on contempt proceedings when considering procedural due process issues and ignore due process problems that arise earlier in the lawsuit.[234] Gang members' constitutional rights are abridged by a lack of adequate notice when a public nuisance suit is brought against the gang as an unincorporated association without naming individual defendants. Suits that do not name individual defendants violate due process at the imposition of the nuisance suit, when the court is considering whether to issue an injunction.[235] The government does not meet *Mullane*'s requirement of notice "reasonably calculated" to inform gang members of the

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231. CAL. PENAL CODE § 166(b)(1) (West 1999).

232. *See* People v. Gonzalez, 910 P.2d 1366, 1369 (Cal. 1996) (describing contempt charges against defendant and defendant's waiver of jury trial).

233. *See* Iraheta v. Superior Court, 83 Cal. Rptr. 2d 471, 478 (Cal. Ct. App. 1999) (stating that when one's physical liberty is at stake, the state must appoint counsel to indigent defendants).

234. *See, e.g., id.* (denying a right to appointed counsel until a contempt hearing); *Gonzalez*, 910 P.2d at 1373-76 (discussing how a collateral attack may be made on an injunction's validity during a contempt hearing).

235. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (describing the factors that courts must balance when deciding whether the requirements of due process have been met).

action.[236] It costs the government nothing more in police resources to identify the gang members to be enjoined *before* suing for an injunction than it does to identify and serve those same gang members after securing an injunction against the gang as an unincorporated association. Courts should therefore find such lawsuits unconstitutional on procedural due process grounds at this stage in the proceedings. Individual gang members must be named as defendants, regardless of whether the gang itself is named as a separate entity.

Although equity permits the inclusion of clauses extending an injunction's provisions to those acting in concert with the enjoined defendants in order to safeguard the rights of the plaintiff,[237] a core of named individual defendants is needed to ensure fairness. Naming even one individual defendant helps at least that particular gang member to overcome one part of the collective action problem identified previously;[238] the individually named defendant knows that he is being targeted specifically and is at risk of losing his liberty if he does not act. Enjoining only the gang as an entity, and then using the court's broad equitable power to prohibit acts by all its members without giving them notice *ex ante*, is fundamentally unfair because it denies gang members a chance to contest the imposition of the injunction. Such an expansive use of injunctive power contradicts the court's mission in equity: to balance the hardships of those involved and achieve a just outcome.[239] The state should be required to join as many named defendants as practicable in the original complaint, rather than relying on the court's broad equitable powers to enjoin all collaborators.[240] Even though some gang members might not be named (and therefore lack notice and the ability to contest the imposition of an injunction personally), if a critical mass is named, those gang members will effectively represent by proxy the other members' interests in opposing the injunction.

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236. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

237. Berger v. Superior Court, 167 P. 143, 144 (Cal. 1917).

238. *See supra* Part IV.B. The gang member will have an incentive to go to court but still has an incentive to argue that he is not a gang member. Only when large numbers of gang members are named and appear would the prudent strategy shift to arguing that no nuisance exists—it would look foolish for a large number of gang members to appear and for all of them in turn argue that they are not members of the organization.

239. THOMPSON ET AL., *supra* note 106, at 254.

240. At a minimum, the state should name as an individual defendant any gang member identified in a police expert declaration supporting the injunction. *E.g.*, *Holland Declaration*, *supra* note 127, ¶¶ 379-888 (profiling many individual gang members by name). Because the police already know who these gang members are, the gang members deserve reasonable notice under *Mullane*. 339 U.S. at 314.

Naming individual defendants at the outset of the lawsuit would appear, at first glance, to moot any procedural due process concerns raised by erroneous identification as a gang member.[241] At this stage, no injunction has been imposed, so there is not yet a risk of depriving anyone of liberties; those who have been served can contest their membership. However, this ignores the court's equitable power to enjoin those acting in concert with or on behalf of the named defendants. Unless the injunction is expressly limited to those defendants named in the injunction and the court does not utilize this power, there is still a risk of misclassification by the police as they attempt to enforce the injunction against those acting in concert with the named defendants. Once served, alleged members can contest their identification in court, but objective criteria are needed in order to clarify what evidence can be used to identify gang members and justify binding them to the terms of the injunction. Therefore, adoption of more definite criteria for identification of gang members than those criteria found in *Englebrecht II* is advisable to ensure compliance with the requirements of due process, even if a critical mass of gang members is joined as individual defendants to the public nuisance suit.

V. CONCLUSION

The criminal activities engaged in by street gangs understandably strike fear in the hearts of those living in neighborhoods afflicted with gang problems. Gang injunctions can provide a sense of control and security for neighborhood residents, who know that the authorities are monitoring the gang problem in their environs.[242] The flexibility that injunctions provide to law enforcement officials is particularly valuable because injunctions can be adapted to the circumstances "on the ground."[243] Every injunction is different. This means, however, that it is impossible to impose uniform standards on injunctions. Still, equitable and constitutional principles must guide courts in tailoring their injunctions.

There is an impulse to expand the geographic scope of injunctions to protect more territory from being claimed by a gang. This Note has argued that increased geographic scope may be justified by the area in which a gang actually engages in nuisance conduct, but that courts must carefully balance the hardships to the parties as the

241. See *supra* Part IV.C.2.ii.

242. Cheryl Maxson, et al., *"It's Getting Crazy Out There": Can a Civil Gang Injunction Change a Community?*, 4 CRIMINOLOGY & PUB. POL'Y 577, 577 (2005).

243. People *ex. rel.* Gallo v. Acuna, 929 P.2d 596, 616 (Cal. 1997).

scope of the proposed injunction expands. Constitutional concerns about the heavier burden on liberties caused by greater geographic scope can be mitigated by narrowly tailoring an injunction's restrictions to the conduct that directly facilitates the public nuisance. Properly tailored associational provisions can pass constitutional muster.

Procedural due process problems caused by naming no individual defendants, however, can be fixed only by ending that practice. For constitutionally mandated procedural due process, individual defendants must be named and served.

While this Note has suggested means to ensure the constitutionality of injunctions in the face of new developments since *Acuna*, it is ultimately up to the courts to police themselves. Trial courts are in many ways the first and last line of defense with regard to equitable limits on injunctions because appellate courts can only review preliminary injunctions for abuse of discretion.[244] When balancing the hardships to the parties in a public nuisance suit—the abrogation of gang members' everyday liberties versus the community's intimidation by gang activity—courts should remember that equity is the ultimate goal. They should neither succumb to knee-jerk, tough-on-crime reactions, nor overzealously guard the liberties of those who would use them to oppress others.

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244. *See id.* at 607 (noting that its review is confined to whether the trial court "abused its discretion").

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