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## WHAT ARE STREET GANGS WHEN THEY GET TO COURT?

MALCOLM W. KLEIN\*

### I. INTRODUCTION

I have been studying street gangs on and off since 1962, yet it is only in the last half dozen years or so that one of my most intriguing challenges has emerged. Because of the proliferation of gangs and gang violence across the country,<sup>1</sup> the volume and complexity of court cases involving gangs have dramatically increased. Because prosecutorial armament in these cases has consistently exceeded that of the defense, I have been solicited to serve as consultant and expert witness in several dozen cases. These have been both civil and criminal, but overwhelmingly the latter. They have ranged from juvenile fitness hearings to capital cases, requiring my involvement in both adjudicatory and penalty phases. I have been a social scientist unpreparedly thrown into the legal pond where my self-perceived butterfly stroke probably looks like dog paddling to the spectators.

But there is good reason for my awkwardness. Inevitably solicited by the defense and never by the prosecution, I have been the last resort for many attorneys: when all is lost, call the academic! Thus, the experiences that inform my discussion here are primarily with cases where the evidence is stacked in favor of the prosecution, where guilt is highly likely, and the defense goal is most commonly to establish mitigating circumstances. Although the cases are strikingly varied in their context and substance, one element emerges above all as common: prosecution, defense, and judges have serious misconceptions about what gangs are and what they are not. To set the stage for what follows, then, let me first address the issue of what gangs look like in the street, before they become distorted by court proceedings.<sup>2</sup>

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1. MALCOLM W. KLEIN, *THE AMERICAN STREET GANG* (1995).

2. Much of the material presented here can be found in greater detail elsewhere. For gang depictions, see *id.* For a discussion of my earlier court cases, see Malcolm W. Klein, *Street Gangs and Deterrence Legislation*, in *THREE STRIKES AND YOU'RE OUT* 203-21 (David Shichor & Dale K. Sechrest eds., 1996).

## II. THE DEFINITIONAL ISSUE

Because gangs are informal groups commonly lacking membership rosters, time clocks, written constitutions or organizational charts, they are inherently ambiguous. Every effort to provide a definition common to all gangs has failed. Efforts to determine who is and who is not a gang member similarly have failed, with the numbers of false positives and false negatives often approaching the numbers of agreed-upon membership.

Yet gangs exist; they behave in ways that are generally distinguishable from other groups; and by their own nominations, members can be shown to differ in significant ways from non-members. I have found it useful to concentrate my efforts on *street gangs*—easily the most common form of gang—and to approach the definitional issue in two ways: I *exclude* certain groups from the category of street gangs, and then offer general *characterizations* of those groups I do include in the category.

Excluded from the street gang category are prison gangs, terrorist gangs, motorcycle gangs, organized crime groups, and many youth groups or cliques that occasionally get into trouble with the law but for whom delinquency is incidental to their social focus. Less easily dismissed from the street gang category are drug distribution gangs, tagger crews, and some Asian American gangs that differ in several respects from other street gangs. Drug and tagger groups will be discussed later. Asian gangs I generally *do* include, although they often fail to share the characteristics of territoriality and versatile crime patterns mentioned next.

What's left for street gangs are groups that, for the most part, can be characterized as sharing most of the following:

- (1) Territoriality, usually based on common residence;
- (2) Versatility in offense patterns, as opposed to crime specialization;
- (3) A preponderance of male members; but note that there are a few autonomous female gangs and many female gangs in auxiliary status to male gangs;
- (4) A preponderance of racial or ethnic minority membership, usually black or Hispanic;
- (5) Ages that may range from pre-teens to the thirties, with average age being between sixteen and twenty-one;

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- (6) Location in the more inner city areas even if the location is generally classed as suburban—i.e., gangs are concentrated in areas with other social problems;
- (7) Street gangs are composed of members who are generally oriented toward, and often quite involved in, criminal activity. The range of such activity between gangs can be great, but the tolerance for and engagement in criminal pursuits is a central normative standard.

Our recent research, taken from reports provided by the police in over 200 jurisdictions, reveals that most gangs fall under one of five structural types,<sup>3</sup> ranging at one extreme from very large “traditional” structures of almost 200 members on average, through “compressed” gangs of about fifty members each, to “specialty” gangs of about twenty-five members. Traditional gangs are highly territorial, compressed gangs may or may not be, and specialty gangs define territories by their criminal markets. Traditional gangs have histories of several generations, whereas compressed and specialty gangs on average have less than a ten-year time span. Traditional and compressed gangs show a highly varied pattern of offending, whereas specialty gangs focus narrowly on only a few crime types, most typically drug sales (“drug gangs”), burglary, graffiti, or auto theft.

Given the above characterizations, the ambiguous groups also help to give a sense of the boundaries of street gangs. For instance, prison gangs are largely defensive of ethnicity or race, not physical territory. They are older in membership, more cohesive, and less criminally versatile. Tagger crews are less cohesive, younger on average, nonversatile in their offending, and usually only weakly territorial. They are short-lived unless they transform themselves through intergroup rivalries into new street gangs.

Most importantly for intervention and prosecution purposes is the distinction between street gangs and drug gangs. The latter are specialists in offending, older in age on average, more cohesive, more tightly and hierarchically led, territorial in the market rather than residential sense, far smaller, and more demanding of members’ loyalty. In short, they have the structure needed to carry out a criminal enterprise, much as described by Padilla,<sup>4</sup> rather than the loose structure that results from the focus on versatile offending and the neighborhood rivalries that feature most street gangs.

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3. For simplicity, I describe here only the three most clearly defined types.

4. FELIX M. PADILLA, *THE GANG AS AN AMERICAN ENTERPRISE* (1992).

The typical attorney's and judge's image of street gangs is, unfortunately, like the depiction of the drug gang, with strong overtones of the Jets and Sharks of *West Side Story* fame. This image of the structured, cohesive, criminally sophisticated gangs is a clear misconception, and can lead to errors of fact and major errors in the handling of gang cases in court.

### III. IN COURT: ADVANTAGE TO THE PROSECUTION

Gang-related felony cases, more often than most, bring with them special prosecutorial advantages. Depending on the jurisdiction and the state involved, at least three such advantages can be cited. First, many states have passed special antigang legislation, and many local jurisdictions have invoked old civil abatement procedures or arranged new court injunctions to increase suppression of gang activity. As a result, more cases can be brought to court, clearer specifications of gang membership *per se* can be alleged, and major sentence enhancements can be applied. All of this new legal armament has been brought about to increase law enforcement's and the prosecution's ability to attack the gang problem by defining gangs, gang members, and gang behavior in a convenient but criminologically incorrect fashion. For example, a gang may be defined in law as "three or more people," gang members as youth seen in the company of gang members, and gang behavior as normal activities sometimes associated with drug sales (carrying a beeper, being on a roof top, and so on).

Second, in cities with a sizeable gang problem, the office of the district attorney or city attorney may have a special gang prosecution unit (commonly referred to as the "hardcore" unit, after the first such group in Los Angeles County). These units employ such tactics as vertical prosecution, special search warrant training procedures, refusal of plea bargains, and witness protection procedures to achieve conviction rates in gang cases well above the norm.

Third, in most gang-involved cities the police now have special gang officers or gang units that can serve as expert witnesses in court. Their ability to cite specifics about the behavior of the gangs whose members are being prosecuted goes largely unchallenged, as there are few defense experts whose profession it is to know the local gangs as the gang police do.

With special laws, special prosecution procedures, and special police experts, the prosecution's general theme in gang cases is simple and straightforward: prove the defendant's gang affiliation and thereby increase the likelihood of conviction and of sentence enhancement. Gang membership *per se* is taken as evidence of guilt and of commitment to a career of crime.

#### IV. IN COURT: THE HANDCUFFED DEFENSE

In contrast to the prosecution, the defense in gang cases has few gang-specific advantages. Of all the special gang legislation and statutes passed or invoked, none that I have seen were initiated on behalf of the defense bar. No public defender's office or private attorney's group has emerged with a gang defense specialization. No counterpart to police gang units has appeared to provide expert testimony for the defense. Even the legal literature on gang cases is relatively devoid of treatises on the defense of gang cases.<sup>5</sup>

Academics or gang researchers are brought in (often, as I noted, very late and out of desperation) to serve as *generic* experts. That is, they can consult on and testify about the nature of gangs, gang members, and gang behaviors generally. But, in all likelihood, they cannot speak effectively about the specific gangs whose members are being charged. This generic expertise is occasionally ruled irrelevant by the court specifically because the research expert has no firsthand knowledge of the particular gangs involved in the case. Thus, the prosecution does have an expert witness—the gang unit officer—but the defense does not. Among other things, this situation deprives the defense of expert testimony about the criminological relevance or validity of the antigang laws invoked in the case, and of any data on *patterns* of gang activity that might contextualize the offenses alleged.

The most interesting aspect of the defense approach in many gang cases is, ironically, that it is the very obverse of the prosecution approach. Where the prosecution uses the defendant's gang affiliation to demonstrate culpability, the defense often uses it as a mitigating factor. In some cases, the defense suggests that peer pressure resulting from gang membership compelled the behavior involved. In other cases, the defense suggests that growing up in a gang-impacted neighborhood compels gang membership. Most gang experts—including this writer—could not support either proposition. These are the cases in which one phone call terminates my consultancy!

At the risk of oversimplification, I can categorize the gang issue attempted by the defense in my continuing cases as follows:

- (1) *Gang culture issues*: something in the nature of the incident might be exculpatory—peer pressure, perceived threat due to a gang atmosphere, event escalation due to intergang rivalry, and so on. These are generally

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5. For an exception, see Susan Burrell, *Gang Evidence: Issues for the Criminal Defense*, 30 SANTA CLARA L. REV. 739 (1990).

weak straws on which to build a defense, as they overstate gang effects; that is, they are based more on *West Side Story* than on gang realities.

- (2) *The nongang group*: the prosecution claims gang involvement where the evidence for such involvement is debatable. Many youth groups that occasionally produce illegal behavior may not fit the depiction of a street gang. Tagger crews are questionably labeled street gangs by the prosecution. Street gangs and prison gangs are treated as highly interrelated. Street gangs are confused by the prosecution with drug gangs. These are issues highly relevant to the generic expertise of the gang researcher.
- (3) *Defendant's gang status*: the prosecution asserts the defendant's gang affiliation, and the defense disputes any such affiliation. Since this is, at bottom, a judgment call, the evidence supplied to the prosecution by the police can be challenged by the generic expert very effectively in ambiguous cases. For example, in a recent case, a defendant's relative supplied photos of the defendant in gang attire and flashing gang signs. But the police had *no* record of gang affiliation (arrests, F.I. cards, gang affiliates, et cetera) and the defendant had no police record. This occurred in a jurisdiction that legally defined gangs and gang membership by reference to specific criminal behavior. Secondary information—school and job performance, the gang status of friends, witness statements, and the like—yielded nothing but ambiguity, a situation interpretable by generic expertise as insufficient to establish gang membership.
- (4) *Challenging the gang officer*: expertise, too, is an ascribed status. Case law is conflicting about specific versus generic knowledge. The prosecution on occasion places more faith in an officer's knowledge than is justified, and the defense can use its gang expert to challenge that knowledge. The officer usually concentrates on crime patterns as the quintessential defining attribute of gangs. He may know little about gang structure, ethnic differences, noncriminal activities, or statistical probabilities of behavior. For instance, in one case the prosecution went for first degree murder against a defendant who was not one of the assailants but did contribute as driver of their car. The gang officer testified that the defendant would know that death was the "natural and probable consequence" of a gang assault. I was able to provide the defense with data from that officer's department that the actual ratio of recorded gang assaults to gang homicides was approximately fifteen to one, making death hardly "natural and probable." Further, while all homicides are recorded but many assaults are not, I could testify that the fifteen to one

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ratio was in fact a considerable understatement of the real likelihood that a gang assault would result in a death.

V. CONCLUSION

Gangs as they exist in the street are very different from the depiction often offered in court. This situation is sometimes due to incorrect or distorted testimony, often due to unenunciated misconceptions, and increasingly due to inaccurate definitions codified into law. Social science evidence is not equated with legal evidence, especially if it is offered by the defense. A simple syllogism rules: gangs do crime; cops know crime and gangs; therefore, gang cops are *the* experts.

I have been ruled an "expert" by two judges who nonetheless ruled my testimony to be irrelevant. In one case, the event involved not an intergang killing, but one in which victim and defendant were members of the same gang. The judge accepted the prosecution's assertion that only inter-gang offenses were "gang related." The second case was the one cited above about the assault-to-homicide ratio. My testimony was ruled inadmissible by the court because I had no personal specific knowledge of the two gangs involved—I had not studied them. Thus, the prosecution's gang expert prevailed, unchallenged.

To the extent that the court accepts the syllogism favoring the gang cop, and so long as juries as well accept that syllogism, the prosecution's advantage is even greater than suggested by my earlier depiction of the prosecution's special gang armament. But the point is less the relative advantage available to one side or the other—the reader may find my description faulty—but rather the disjuncture between the gang in court and the gang on the street. Expert testimony about the latter should be available to both prosecution and defense, and indeed it is, in the criminological literature. But this literature is seldom employed by either side, and that is a great mistake.



