

January 1998

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Recommended Citation

Bergen Herd, *Injunctions as a Tool to Fight Gang-Related Problems in California After People ex rel Gallo v. Acuna: A Suitable Solution?*, 28 Golden Gate U. L. Rev. (1998).
<http://digitalcommons.law.ggu.edu/ggulrev/vol28/iss3/11>

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NOTE

INJUNCTIONS AS A TOOL TO FIGHT GANG-RELATED PROBLEMS IN CALIFORNIA AFTER *PEOPLE EX REL GALLO V. ACUNA*: A SUITABLE SOLUTION?

I. INTRODUCTION

On January 30, 1997, the California Supreme Court decided *People ex rel Gallo v. Acuna*,¹ holding that gang members meeting in public with other gang members constituted a public nuisance.² The court reasoned that gangs congregating in public interfered with the neighborhood residents' enjoyment of life and property and obstructed the free passage and use of public sidewalks and streets.³ As a result of this decision, cit-

1. *People ex rel Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997), *cert. denied*, 117 S. Ct. 2513 (1997).

2. *See id.* at 614-15.

See CAL CIV. CODE § 3479 (West 1997). The civil code states that "anything 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, ... is a [public] nuisance." *Id.*

See CAL. PENAL CODE § 370 (West 1988). The penal code has a similar definition for a public nuisance:

Anything which is injurious to health, or is indecent, or [is] offensive to the senses, or [is] 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 a considerable number of persons ... is a public nuisance.

Id.

3. *See Acuna*, 929 P.2d at 618 (quoting *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The majority concluded:

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ies may enjoin⁴ gang members from meeting in public without violating the members' First or Fifth Amendment rights.⁵

This Note first discusses different approaches available to law enforcement and courts to combat gang-related problems.⁶ Second, this Note describes the facts and procedural history of *People ex rel Gallo v. Acuna*⁷ and provides the California Supreme Court's rationale for upholding the injunction.⁸ Third, this Note critiques *People ex rel Gallo v. Acuna*⁹ by exploring potential problems of using an injunction as a method to fight crime.¹⁰ Lastly, this Note concludes that the application of public nuisance law is a powerful, constitutional method of abating gang violence and terrorism.¹¹

II. BACKGROUND

As organized crime and violence has increased over the decades, individual punishment has fallen short of destroying the power of organized crime; law enforcement and courts are now focusing on the criminal unit itself to disband criminal enter-

To hold that the liberty of the peaceful, industrious residents of Rock-springs must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense. The freedom to leave one's house and move about at will, and to have a measure of personal security is implicit in "the concept of ordered liberty" Preserving the peace is the first duty of government, and it is for the protection of the community from the predations of the idle, the contentious, and the brutal that government was invented.

See id. at 618 (citations omitted).

4. BLACK'S LAW DICTIONARY 784 (6th Ed. 1990). An injunction is "a court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." *Id.*

5. U.S. CONST. amend. I. The First Amendment provides: "[c]ongress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble...." *Id.*

U.S. CONST. amend. V. The Fifth Amendment states that "no person shall ... be deprived of life, liberty, or property, without due process of law... ." *Id.*

6. *See infra* notes 12-79 and accompanying text for the background discussion.

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

8. *See infra* notes 81-243 and accompanying text for the facts, procedural history and court's analysis of *People ex rel Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997).

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

10. *See infra* notes 244-302 and accompanying text for a critique on the use of public nuisance law to abate gang-related problems.

11. *See infra* notes 303-12 and accompanying text for this Note's conclusion.

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prises, such as criminal street gangs.¹² Enforcing the Racketeering Influenced and Corrupt Organizations Act and the Street Terrorism and Enforcement Prevention Act is often more effective than charging the individual with a crime because the statutes enable law enforcement to extinguish an entire criminal enterprise and induce cooperation by criminal defendants with authorities by providing negotiable sentence enhancements.¹³ Additionally, law enforcement and courts are eroding the domination of criminal associations through the application of century-old public nuisance law.¹⁴

A. TOOLS TO FIGHT GANG-RELATED PROBLEMS

1. Racketeering Influenced and Corrupt Organizations Act

One method of attacking the structure and economic gains of enterprise criminality is through the Racketeering Influenced and Corrupt Organizations Act ("RICO Act").¹⁵ In 1970, Congress enacted the RICO Act to curtail behavior and activities of enterprises characteristic of organized crime.¹⁶ The

12. See generally David R. Truman, Note, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q., 683, 685-686 (1995) (discussed different state's statutory responses to the escalating number of violent street gangs).

13. See 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1997); CAL. PENAL CODE § 186.22 (West Supp. 1998). See also Truman, *supra* note 12, at 687 (general discussion of RICO and STEP Act).

14. See generally Suzanne Lieberman, Note, *Drug Dealing and Street Gangs -- the New Nuisances: Modernizing Old Theories and Bringing Neighbors Together in the War Against Crime*, 50 WASH. U. J. URB. & CONTEMP. L. 235, 237-38 (1996) (analysis of public nuisance law and other tort theories available to fight crime and violence in a community).

15. 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1997).

16. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). The Congressional Statement of Findings and Purpose outlined the legislative reasoning behind the RICO Act. Congress concluded, in part, that:

(1) organized crime in the United States is a highly sophisticated, diversified and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and to corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of

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RICO Act makes it illegal to collect an unlawful debt or to use any income of, acquire any interest in, or conduct an enterprise through, a pattern of racketeering activity.¹⁷ Criminal penalties for violating the RICO Act include fines, imprisonment and/or asset forfeiture.¹⁸ The RICO Act also provides civil penalties in the form of treble damages and attorney's fees to citizens whose business or property is injured by the racketeering activity.¹⁹

Although the RICO Act's original purpose was to combat large scale organized crime,²⁰ at least one federal court has extended RICO's application to curtail drug dealing activity.²¹ In

the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow . . . because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

See id. at 922-923.

17. *See* 18 U.S.C.A. § 1962 (West 1984).

See 18 U.S.C.A. § 1961(5) (West Supp. 1997). A "pattern of racketeering activity" is defined as the commission of at least two "racketeering activities" within ten years of each other. *Id.*

See 18 U.S.C.A. § 1961(1). "Racketeering activity" encompasses many felonies including "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year." *Id.*

18. *See* 18 U.S.C.A. § 1963(a)-(b) (West Supp. 1997). A violator of the RICO Act shall be "fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both," and shall forfeit to the United States, any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over "any enterprise which the person has established, operated, controlled, conducted or participated in the conduct of, in violation of (the RICO Act)." *Id.*

See 18 U.S.C.A. § 1963(b). Property subject to criminal forfeiture includes real property and tangible and intangible personal property, including rights, privileges, interests, claims and securities. *See id.*

19. *See* 18 U.S.C.A. § 1964(c) (West Supp. 1997). Any person injured in his or her business or property by reason of a violation of the RICO Act may recover threefold the damages he or she sustained and the cost of the suit, including reasonable attorney's fees. *See id.*

20. *See supra* note 16.

21. *See generally* Michelle J. Stahl, Comment, *Oscar v. University Students Cooperative Ass'n: Can Citizens Use RICO to Rid Neighborhoods of Drug Houses?* 67 NOTRE DAME L. REV. 799, 800-01 (1992) (discussed the application of the RICO Act to drug houses).

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Oscar v. University Students Co-operative Ass'n,²² urban residents used the RICO Act to close a student housing cooperative that was used as a "crack house."²³ The neighboring residents asserted that the student's racketeering activities interfered with the residents' use and enjoyment of their property.²⁴ The court ordered the drug dealers in *Oscar* to pay for the diminution in value of the residents' property interest, treble damages, as well as the residents' attorney's fees.²⁵ Hence, RICO can be an effective method to attack a criminal organization by making its members forfeit profits and possessions resulting from the racketeering activity and holding its members liable for damages caused by this activity.²⁶

Recently, the application of the RICO Act has been extended to the abatement of gang-related activity.²⁷ Federal prosecutors have successfully convicted numerous gang members for RICO Act violations by classifying gang activity as "racketeering."²⁸ For example, in *United States v. McAnderson*,²⁹ federal prosecutors obtained more than fifty convictions against the El Rukn gang in Chicago, which had generated between \$3 mil-

22. *Oscar v. University Students Co-operative Ass'n*, 939 F.2d 808 (9th Cir. 1991).

23. *See id.* Known as a "drug den and anarchist household," Berkeley's Barrington Hall in California was notorious for "alternative" and "revolutionary expression." *Id.* at 809-810. At least 19 drug dealers used Barrington Hall as a base of operation. *See id.* at 810.

24. *See id.* at 810. The residents' injuries were based on the defendants' damaging racketeering activity: repeating sales of controlled substances, posting look-outs in front of the residents' apartments, creating the appearance that the residents were drug dealers, and regularly dumping the bodies of persons suffering from drug overdoses onto the sidewalks near the neighboring apartments. These activities interfered with the residents' property interests and reduced the property value. *See id.*

25. *See id.* at 812.

26. *See also* Truman, *supra* note 12, at 687.

27. *See id.* at 724-28.

28. *See e.g.*, *United States v. Bates*, 843 F. Supp. 437, 440-441 (N.D. Ill. 1994) (convictions of the "El Rukn" street gang affirmed despite misconduct by the U.S. Attorney's staff); *United States v. Williams-Davis*, 821 F. Supp. 727, 730 (D. D.C. 1993) (motions to dismiss RICO convictions of drug trafficking conspirators of the "R Street Organization" denied); *United States v. Louie*, 625 F. Supp. 1327 (S.D. N.Y. 1985) (motions to dismiss indictments for 22 defendants known as the "Ghost Shadows" denied).

See supra note 17 for a definition of "racketeering."

29. *United States v. McAnderson*, 914 F.2d 934 (7th Cir. 1990).

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lion and \$4 million in profits from trafficking cocaine.³⁰ Thus, the RICO Act can be a powerful method for attacking the organization and economic benefits of criminal enterprises, such as criminal street gangs.³¹

2. The Street Terrorism Enforcement and Prevention Act

As a result of escalating gang activity, crime and violence throughout the state, the California legislature determined that California was in a state of crisis.³² In 1988, California Legislature enacted the Street Terrorism Enforcement and Protection Act ("STEP Act").³³ The STEP Act was specifically aimed at ending gang-related activity by punishing a broad spectrum of gang-related conduct.³⁴ Under this act, an individual who participates in a criminal gang knowing it has or is engaging in a pattern of criminal activity may be punished.³⁵

30. See Robert Blau, *Too Close for Comfort? How the Government's Assault on the Rukns Went Up in Smoke*, CHI. TRIB. Aug. 21, 1994 (Magazine), at 10, available in 1994 WL 6465837.

31. See generally John Gibeaut, *Gangbusters*, A.B.A. J., Jan. 1998, 64. Similarly, federal prosecutors have secured indictments and won convictions against gang leaders across the nation using the RICO Act. See *id.* at 65. For example, prosecutors in New York City have successfully used RICO and similar statutes against approximately 200 defendants involved in 300 murders. See *id.*

32. See CAL. PENAL CODE § 186.21 (West Supp. 1998). The California State Legislature declared that:

The State of California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected.

See *id.*

33. See CAL. PENAL CODE §§ 186.20-186.28 (West Supp. 1998).

34. See CAL. PENAL CODE § 186.22(e) (West Supp. 1998). Prohibited gang member conduct outlined by subdivision (e) includes: arson; assault; burglary; carjacking; discharging firearm from a vehicle or at an occupied vehicle or dwelling; extortion; grand theft; intimidation of witnesses or victims; looting; mayhem; money laundering; rape; robbery; sale, manufacture or possession of controlled substances; unlawful homicide or manslaughter; and vandalism. See *id.*

35. See CAL. PENAL CODE §186.22(a) (West Supp. 1998). Section186.22(a) provides that:

Any person who actively participates in any criminal street gang with the knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one

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An individual's participation must be active and the gang member must devote at least a substantial part of their time and effort to the criminal street gang.³⁶ A gang member's crimes, however, do not have to benefit, further or relate to the gang.³⁷ Rather, the predicate crimes need only occur within three years of each other and the offenses must be committed on separate occasions or by two or more persons.³⁸ The STEP Act also provides sentence enhancements for felony convictions committed in furtherance of or in association with the gang.³⁹

year, or by imprisonment in the state prison for 16 months, or two or three years.

Id.

See CAL. PENAL CODE § 186.22(f) (West Supp. 1998). A criminal gang is defined as:

Any ongoing organization, association, or group of three or more persons, whether formal or informal, having one of its primary activities the commission of one or more of the criminal acts enumerated in ... subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Id.

See CAL. PENAL CODE § 186.22(e) (West Supp. 1998). A "pattern of criminal gang activity" is defined as "the commission of, attempted commission of, or solicitation of, sustained juvenile petition for, or conviction" of two or more criminal offenses. At least one of the offenses had to have occurred after Sept. 23, 1988, the effective date of the STEP Act. The second offense must occur within three years of a prior offense. Lastly, the offenses must be committed either on separate occasions or by two or more persons." *Id.*

See *supra* note 34 for a list of qualifying offenses.

36. See *People v. Green*, 278 Cal. Rptr. 140 (Cal. Ct. App. 1991). Nominal, passive, inactive or purely speculative membership is not enough to sustain a conviction under the STEP Act. See *id.* at 145-46.

37. See *People v. Gardley*, 927 P.2d 713 (Cal. 1997). To qualify for a sentence enhancement, the STEP Act does not require that each offense be committed for the "benefit of, at the direction of, or in association with" the gang," as contended by the defendant in *Gardley*. *Id.* at 723 (quoting CAL. PENAL CODE § 186.22(e)). Rather, the clear language of the statute requires only that two of the predicate offenses listed in 186.22(e) occur within three years of each other and are committed either on separate occasions or by two or more persons. See *id.*

38. See *id.*

39. See CAL. PENAL CODE § 186.22 (West Supp. 1998). Section 186.22(a) provides imprisonment in a county jail for no more than one year or imprisonment in the state prison for 16 months, two or three years for "any person who actively participates in any criminal street gang with the knowledge that its members engage in or have engaged in a pattern of criminal activity and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang." *Id.*

See CAL. PENAL CODE § 186.22(b)(1). Section 186.22(b)(1) provides one, two or three year sentence enhancements for those "convicted of a felony for the benefit of, at the direction of, or in the association with any criminal gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." *Id.*

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Additionally, the STEP Act declares that every building or place used for the purpose of committing crimes by criminal street gang members is a public and/or a private nuisance.⁴⁰

For example, the county of Riverside, California, successfully used the STEP Act to provide sentence enhancements for the defendant in *People v. Akins*.⁴¹ On the evening of May 8, 1995, the defendant, a gang member, and his accomplice burglarized a convenience store.⁴² Subsequently, during the early morning hours of May 9, 1995, the defendant burglarized and robbed an apartment and assaulted the inhabitant.⁴³ A few hours later, the defendant and accomplice committed another burglary and robbery of a different apartment and assaulted the inhabitant.⁴⁴ The court concluded defendant's crimes fell within the STEP Act's definition of a "pattern of criminal gang activity" - the defendant, a gang member, committed two of the predicate offenses within three years of each other on two separate occasions.⁴⁵ The defendant was convicted of all counts and

See CAL. PENAL CODE § 186.22 (b)(2). Section 186.22(b)(2) states that if the felony as described in section 186.22(b)(1) above is committed within 1000 feet of a school, sentence enhancements may increase to two, three or four years. See *id.*

40. See CAL. PENAL CODE § 186.22a(a) (West Supp. 1998). Section 186.22a(a) states that:

Every building or place used by members of a criminal street gang for the purpose of the commission of the offenses listed in subdivision (c) of Section 186.22 or any offense involving dangerous or deadly weapons, burglary, or rape, and every building or place wherein or upon which that criminal conduct by gang members takes place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

Id.

41. *People v. Akins*, 65 Cal. Rptr. 2d 388 (Cal. Ct. App. 1997).

42. See *id.* at 340. The defendant and accomplice took five alcoholic beverages from a convenience store without paying. See *id.*

43. See *id.* Shortly after the defendant and accomplice stole the alcoholic beverages, they broke into Mr. Simpson's apartment, hit Mr. Simpson on the head with a rock, forced him down on the bed and robbed him of his wallet and a case of Henry Weinhard's beer. See *id.*

44. See *id.* After the Simpson incident, the defendant and his accomplice drank the Henry Weinhard's beer at a nearby school. See *id.* at 341. After noticing a light on in an apartment, the defendant and his accomplice decided to rob the occupant; they broke a bottle of Henry Weinhard's beer over Mr. Martin's head and stole game cartridges and remote alarm keys. See *id.* at 340-41.

45. *Id.* at 343. The defendant asserted that the two robberies were a "continuous course of conduct" thereby constituting only one crime, rendering the STEP Act inapplicable. The court rejected the defendant's argument, noting that the two robberies involved different victims and were separated by time and distance. It was after the

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the court imposed a two year, eight month sentence enhancement, as provided by section 186.22(b)(1) of the STEP Act, in addition to a sixteen year, eight month sentence for the individual crimes.⁴⁶

B. PUBLIC NUISANCE LAW

The use of public nuisance law to fight gang-related problems has stemmed from the shortcomings of current law enforcement tools available to abate gang violence: as the California Supreme Court majority noted in *People ex rel Gallo v. Acuna*,⁴⁷ the RICO and STEP Acts punish crimes after the injury has occurred and the public right forfeited.⁴⁸ The injunction of a public nuisance, in contrast, helps prevent crimes and their respective injuries before they occur.⁴⁹ Public nuisance law focuses not on the punishment of crime but rather on preserving the rights of the community.⁵⁰ Through its broad definition, public nuisance empowers the community to stop "anything which is injurious to the health, ... or is indecent or offensive to the senses, or [is] an obstruction to the free use of

completion of the first robbery did the defendant "form a separate and distinct criminal objective to rob again." *Id.*

See supra note 34 for predicate offenses of the STEP Act. *See supra* note 35 for definition of a "pattern of criminal activity."

46. *See Akins*, 65 Cal. Rptr. 2d at 339-40. *See supra* note 39 for text of section 186.22(b)(1) of the STEP Act.

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

48. *See id.* at 607. The majority noted that a criminal prosecution was inadequate because it did not prevent the commission of an unlawful act. Although criminal prosecution may ultimately correct the wrong, during the process of correction the public is "deprived of an important and valuable right, wherefore the injury is irreparable." *Id.*

49. *See id.*

50. *See id.* at 607. The majority reasoned:

Acts or conduct which qualify as public nuisances are enjoined as civil wrongs or prosecutable as criminal misdemeanors, a characteristic that derives not from their status as independent crimes, but from their inherent tendency to injure or interfere with the community's exercise and enjoyment of rights common to the public. It is precisely this recognition of -- and willingness to vindicate -- the value of community and the collective interests it furthers rather than to punish criminal acts that lie at the heart of the public nuisance as an equitable doctrine.

Id.

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property, so as to interfere with the comfortable enjoyment of life or property.”⁵¹

1. History of Public Nuisance Law

The first cases of public nuisance involved encroachments on the royal domain or public highway which were exclusively redressed by the King of England.⁵² During King Edward III's reign between 1327 and 1377, the Crown extended public nuisance principles to the invasion of public rights, such as the interference with the operation of a public market.⁵³ During the subsequent reign of Richard II, the first public nuisance statute was enacted, providing criminal liability for one who polluted water and ditches near settlements.⁵⁴ The first recorded public nuisance case to permit a private action in tort rather than by the Crown occurred in 1536.⁵⁵

Imported from England, public nuisance law in the United States developed into a broad body of law aimed at protecting and redressing community interests in public order, tranquility, security and health.⁵⁶ The interference with a public right was held to be so unreasonable that the conduct constituted a criminal offense and the condition created a public nuisance.⁵⁷ In 1872, California enacted general public nuisance laws in its

51. *Acuna*, 929 P.2d at 604. The court based its decision on both civil and penal code definitions of public nuisance. *See id.*

See CAL. CIV. CODE § 3479 (West 1997). The civil code states that “anything 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, ... is a (public) nuisance.” *Id.*

See CAL. PENAL CODE § 370 (West 1988) (penal code defined public nuisance similarly).

52. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1979).

53. *See id.*

54. *See Acuna*, 929 P.2d at 603.

55. *See* RESTATEMENT (SECOND) OF TORTS § 821C cmt. a (1979). In this 1536 case, the Crown allowed a private person in addition to the Crown to maintain a tort action. The victim had to show that he or she suffered a particular harm beyond that suffered by the public or by other members of the public exercising the same public right. It was not enough that the victim suffered the same inconvenience or was exposed to the same threat of injury to which no one else who may be exercising the same public right. *Anonymous*, Y.B. Mich., 27 Hen. 8, fol. 26, pl. 10 (1536).

56. *See Acuna*, 929 P.2d at 603.

57. *See generally* RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1979).

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Civil and Penal Codes.⁵⁸ Law enforcement and the courts used these statutes to banish prostitution brothels, illegal liquor and cigarette establishments, gambling houses and other institutions that allegedly jeopardized public morals.⁵⁹ In 1965, the Restatement Second of Torts clarified five general categories of public "rights" in addition to public morals that should remain free from unreasonable interference: public health,⁶⁰ public safety,⁶¹ public peace,⁶² public comfort⁶³ and public convenience.⁶⁴

2. Modern Public Nuisance Law

Currently, criminal, equitable and legal remedies are available to abate a public nuisance.⁶⁵ Criminal prosecutions are aimed at penalizing the actor for his or her conduct causing the nuisance.⁶⁶ An equitable remedy, in the form of a preliminary or permanent injunction, generally terminates present and future conduct causing the nuisance.⁶⁷ Lastly, a legal remedy, in

58. See CAL. CIV. CODE § 3479 (West 1997); CAL. PENAL CODE § 370 (West 1988).

59. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 643-645 (5th ed. 1984).

60. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1979). Interference with public health has included the keeping of diseased animals or maintenance of a pond breeding malarial mosquitoes. See *id.*

61. See *id.* Interference with public safety has included storing explosives or shooting fireworks in public streets. See *id.*

62. See *id.* Interference with public peace has included loud and disturbing noises. See *id.*

63. See *id.* Interference with public comfort has included the dissemination of bad odors, dust and smoke. See *id.*

64. See *id.* Interference with public convenience has included the obstruction of a public highway or navigable stream. See *id.*

65. See CAL. CIV. PROC. CODE § 731 (West 1980); CAL. PENAL CODE § 372 (West 1988).

66. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 646 (5th ed. 1984). All jurisdictions in the United States have enacted broad criminal statutes prohibiting the maintenance of a public nuisance. See *id.*

See also CAL. PENAL CODE § 372 (West 1988). For example, in California it is a misdemeanor to maintain a public nuisance. See *id.*

67. See generally RESTATEMENT (SECOND) OF TORTS § 821B cmt. i (1979)

See CAL. CIV. PROC. CODE § 526(a)(2) (West 1979). An injunction may be granted when "it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action." *Id.*

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the form of monetary damages, compensates for harm and damages caused by past conduct.⁶⁸

As long as a condition or activity satisfies the statutory definition of a public nuisance, the condition or activity may be abated to enforce public policy or compensate for inadequacies in criminal law.⁶⁹ For example, courts may prohibit lawful acts that have become public nuisances because of changed conditions or population growth.⁷⁰ Current application of public nuisance law includes enjoining nighttime sporting events,⁷¹ massage parlors⁷² and environmental polluters.⁷³ Public nuisance law also protects neighbors from a public nuisance by holding the owner liable for creating and maintaining the public nuisance: due to an owner's continuous negligent manage-

68. See CAL. CIV. PROC. CODE § 731 (West 1980). Section 731 provides that "[a]n action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance ... and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered." *Id.*

See CAL. CIV. CODE § 3484 (West 1997). Additionally, section 3484 states: "[t]he abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence." *Id.*

See generally 58 AM. JUR. 2D Nuisances § 293 (1989). Damages have been awarded to compensate for the destruction of plaintiff's property and its rental value as well as for the personal discomfort, annoyance, mental distress, and illness suffered by plaintiffs. See *id.*

69. See *Acuna*, 929 P.2d at 607. The *Acuna* majority noted that even if the act is a not crime:

[I]t does not bar the remedy in equity, because the citizen and the general public have an immediate right to the enjoyment of the thing interfered with. A criminal prosecution is inadequate in this case because it does not prevent the doing of the unlawful act. It may ultimately correct the wrong, but while the process of correction is going on, the public is deprived of an important and valuable right.

Id.

70. See generally 58 AM. JUR. 2D Nuisances § 51 (1989).

71. See *e.g.*, *Chicago Nat'l League Ball Club, Inc. v. Thompson*, 483 N.E.2d 1245 (Ill. 1985). An injunction was granted to abate noise emissions from night-time sporting events at Wrigley Field. See *id.* at 1252.

72. See *e.g.*, *City of Signal Hill v. Owens*, 200 Cal. Rptr. 925 (Cal. Ct. App. 1984). Massage parlor declared a public nuisance upon evidence that the establishment was used for prostitution. See *id.* at 926-927

73. See *e.g.*, *Taylor Bay Protective Ass'n v. Administrator U.S. Env'tl. Protection Agency* 884 F.2d 1073 (8th Cir. 1989). The government was held liable for negligent operation of a flood control project. The unnecessary use of water pumps, lack of maintenance and other factors caused high amounts of sediment to deposit in a downstream recreation area which created a public nuisance. See *id.* at 1076-78.

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ment of his rental property, his apartment building developed into a public nuisance - a drug dealing "crack house."⁷⁴

Public nuisance law has now taken a new dimension with its successful application to another community problem: gangs.⁷⁵ For example, in December, 1987 the Superior Court of Los Angeles granted the first anti-gang injunction against the Playboy Gangster Crips street gang.⁷⁶ The court declared the entire 300-member gang a public nuisance and issued a six-point preliminary injunction enjoining gang members from conducting *illegal* activities throughout a twenty-six block neighborhood.⁷⁷ The injunction at issue in *People ex rel Gallo v. Acuna*⁷⁸ is the first injunction to contain provisions prohibiting *legal and illegal* conduct of individual gang members and survive constitutional challenge.⁷⁹

III. FACTS OF *PEOPLE EX REL GALLO V. ACUNA*⁸⁰

Over the past several years the Latino gang known as Varrío Sureño Town, Varrío Sureño Treces or Varrío Sureño Locos⁸¹ ("VST") transformed a four-square-block urban residential area called Rocksprings⁸² located in San Jose, California,

74. *Lew v. Superior Court of Alameda County*, 25 Cal. Rptr. 2d 42 (Cal. Ct. App. 1993). The appellate court agreed with the superior court which found that the property owner had negligently managed his property. *See id.* at 43-44. The owner failed to take reasonable steps to end drug dealing and other criminal activity on or near his property that a reasonable person under similar circumstances would have done. The result was both a private and public nuisance. The property owner was found liable for mental distress of seventy-five neighboring residents caused by the illegal activities and had to pay \$218,325.00 in damages. *See id.* at 44, 46-47.

75. *See generally* Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 212, 215 (1994).

76. *See id.* at 217-18.

See also *People v. Playboy Gangster Crips*, No. WEC 118860 (Cal. Super. Ct. L.A. County Dec. 11, 1987).

77. *See* Yoo, *supra* note 75, at 218.

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

79. *See id.* at 607, 618-19.

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

81. *See id.* at 601.

82. Respondent's Opening Brief on the Merits at 7, *People ex rel Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997) (No. S046980) [hereinafter "Respondent's Opening Brief"]. Rocksprings is a distinct, four-block residential neighborhood consisting of primarily low income apartment buildings. It is isolated from other residential areas and has limited ingress and egress; the only way to enter and leave the neighborhood is on

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into a crime and drug infested war zone.⁸³ Consisting of 150 to 200 members between ages fourteen and twenty-three, the VST gang was informally structured.⁸⁴ Nonetheless, members reportedly often acted in concert with each other in drug selling and other illegal activities.⁸⁵

Life for the residents within the VST's territory was a living nightmare.⁸⁶ Gang members, nearly all of whom lived elsewhere, congregated on the residents' lawns, sidewalks and in front of apartment complexes at all hours.⁸⁷ The Rocksprings residents were subjected to loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire resonating in their streets.⁸⁸ The residents testified that gang members used their garages as urinals, commandeered their homes as escape routes and turned their walls, fences, garage doors, sidewalks, and vehicles into "a sullen canvas of gang graffiti."⁸⁹

Because of the gang's intimidation, threats of retaliation and continual presence, the VST gang seized control over the Rocksprings neighborhood and their criminal conduct was rarely challenged.⁹⁰ Members of the VST openly drank, smoked marijuana, sniffed toluene⁹¹ and snorted cocaine from

Nordale Avenue and Needles Avenue. The limited access, small size and population of Rocksprings made it ideal for the propagation of the VST gang member's criminal activities. *See id.*

83. *See Acuna*, 929 P.2d at 601.

84. *See id.* at 624.

85. *See id.*

Respondent's Opening Brief, *supra* note 82, at 9. Noting that there were only two entryways into the center of Rocksprings, the City continued:

Law enforcement efforts were impeded by the fact that the criminal street gang members would establish "lookouts" to warn when police were in the neighborhood. The gang members used hand signs to warn each other when police, as well as rival gang members, were approaching the area. In one instance, they actually established a lookout by placing a mattress on top of a tree.

Id.

86. *See Acuna*, 929 P.2d at 601-02.

87. *See id.* at 601.

88. *See id.*

89. *Id.*

90. *See People ex rel Gallo v. Acuna*, 40 Cal. Rptr. 2d 589 (Cal. Ct. App. 1995). The appellate court noted that most residents failed to report crimes to the police because they were intimidated by the gang and feared retaliation. *See id.* at 592.

91. *See CAL. PENAL CODE* § 380 (West 1988). It is a misdemeanor to sell, distribute or dispense toluene or any substance that contains toluene. *See id.* at §380(a). The

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“neat lines laid out on the hoods of resident’s cars.”⁹² The gang members took over the resident’s driveways, carports, apartment parking areas and obstructed traffic on the public streets to conduct their “drive-up drug bazaar.”⁹³ Common crimes in the neighborhood were murder, attempted murder, drive-by shootings, assault, battery, vandalism, arson and theft.⁹⁴

Forced to remain indoors day and night, the Rocksprings residents became prisoners in their own homes.⁹⁵ They encountered verbal harassment, physical intimidation, threats of retaliation and actual retaliation if anyone reported VST’s illegal activities to the police.⁹⁶ The residents maintained they lived in constant fear.⁹⁷ The resident’s children were not allowed to play outside and friends and relatives refused to visit.⁹⁸ Even strangers wearing the “wrong” color within the VST turf were at risk of physical harm.⁹⁹

term toluene includes glue, cement, paint thinner, paint or solvents, which can cause a person to be under the influence of or intoxicated from such substances when inhaled, ingested or breathed. *See id.* at § 380(c).

92. *Acuna*, 929 P.2d at 601.

93. *Id.*

94. *See id.*

95. *See id.* at 601-02.

96. *See id.* at 602. Residents were threatened by VST gang members if they told the police that drugs were hidden in the trash dumpsters, their vehicles, parking spaces or even laundry rooms. *See id.* On one occasion, a resident testified that VST members threatened to cut her nine-year-old daughter’s tongue out if she talked to the police. *See id.* at 624.

97. *See Acuna*, 929 P.2d at 601-02.

98. *See id.* at 602.

See also Respondent’s Opening Brief, *supra* note 82, at 8-9. The City stated as evidence of terror in Rocksprings:

For example, the daughter of one resident was very ill and required the care of a nurse at home. When the nurse came to the apartment complex for the first time, she was approached by several different individuals about buying drugs. The nurse became so frightened that she got back into her car, locked the doors and left the neighborhood. The resident had to agree to walk the nurse from her car to the apartment before the nurse would agree to return.

Id.

99. *See Acuna*, 929 P.2d at 602.

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IV. PROCEDURAL HISTORY

On February 26, 1993, the City of San Jose sought preliminary and permanent injunctive relief¹⁰⁰ in its complaint against thirty-eight named VST gang members and one hundred "Doe" defendants.¹⁰¹ The complaint asserted that for the last twelve months VST's conduct constituted a public nuisance because the gang members' conduct was injurious to public health, indecent and/or offensive to the senses.¹⁰² The complaint also alleged that the gang members' conduct obstructed the free use of property which interfered with the comfortable enjoyment of life and property by the residents living in the neighborhood.¹⁰³ After asserting that the defendant's conduct caused "great and irreparable injury" and there was no "plain, adequate and speedy remedy at law," the complaint prayed for

100. See CAL. CIV. CODE § 3494 (West 1997); CAL. CIV. PROC. CODE § 731 (West 1980). Both the civil code and the civil procedure code authorize any public body or officer, including the city attorney, to abate a public nuisance. See *id.*

101. See *People ex rel City Attorney of San Jose v. Carlos Acuna* (aka Flaco); Richard Alvarez (aka Shadow); Tomasina Alvarez (aka Tamal); Huerto Ambrosio (aka Goofy); Angel Aurelio (aka Lopez); Fred Barajas; Jose Becerra, Jr.; Jose Bravo (aka Wino); Juan Bravo (aka Flaco); Elizabeth Canales (aka Goofy); Madaline Castro; Eberardo Cervantes; Efrén Cervantes; Marcario Chavez (aka Marcos); Sterling Cruz (aka Tyson); Martin Davila (aka "HD"); Richardo Escobar (aka Gordo); Jose Fernandez (aka Pelon); Jose Garcia; Jorge Gomez, Jr.; Blanca Gonzalez (aka Shorty); Jorge Gonzalez (aka Smiley); David Hernandez; Herardo Hernandez (aka Chino); Juan Hernandez; Roberto Hernandez (aka Mosco); Joel Lopez (aka Oscar); Miguel Lopez (aka Cobra); Miguel Moreno; Flavio Quinonez (aka Flavio); Arturo Ramirez; Ruben Recillas (aka Isas); Everado Rios; Francisco Rodriguez (aka Cisco); Rafael Ruiz (aka Rafa); Jorge Serrano (aka Angel); Jose Solano; Maria Valencia (aka La Chaparra); and Does 1-100, inclusive, No. 729322 (Cal. Super. Ct. Santa Clara County Feb. 26, 1993).

See also *People ex rel Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997). Gang membership was confirmed by police when the individual was seen wearing clothing or tattoos which indicated gang affiliation or using hand signs, was named by two or more members of a gang as a gang member, was known to actively participate in a gang crime, was identified by a reliable informant as a gang member, or was observed associating with gang members on two or more occasions. See *id.* at 623 n.1.

102. See CAL. CIV. CODE § 3479 (West 1997). The civil code defines public nuisance as "[a]nything which is injurious to health, ... or is indecent or offensive to the senses, or [is] an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." *Id.*

See *supra* note 2 for similar penal code definition of a "public nuisance."

103. See *Acuna*, 929 P.2d at 602. Forty-eight declarations supported the city attorney's plea for injunctive relief. See *id.* at 601.

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a broad injunction against the VST gang members' legal and illegal activities in Rocksprings.¹⁰⁴

On the day the City of San Jose filed the complaint, the Superior Court of Santa Clara immediately granted an *ex parte* temporary restraining order, enjoining all named defendants from engaging in both legal and illegal acts in the Rocksprings neighborhood.¹⁰⁵ The superior court also issued an order to show cause.¹⁰⁶ Twenty-two defendants were served with the restraining orders.¹⁰⁷

Five of the thirty-eight named defendants appeared at the order to show cause hearing to oppose the injunction.¹⁰⁸ Fol-

104. *Id.* at 602.

105. *See id.*

See BLACK'S LAW DICTIONARY 576 (6th Ed. 1990). An *ex parte* hearing is defined as one "in which the court or tribunal hears only one side of the controversy." *Id.* A temporary restraining order is defined as an "(o)rd(er) which is issued to maintain status quo pending a hearing on an application for an injunction." *Id.* at 1464.

106. *See Acuna*, 929 P.2d at 602.

See BLACK'S LAW DICTIONARY 1379-80 (6th Ed. 1990). An order to show cause is defined as:

An order to a person or corporation, on motion of opposing party, to appear in court and explain why the court should not take a proposed action. If the person or corporation fails to appear or give sufficient reasons why the court should take no action, the court will take the action.

Id.

107. *See* Nick Anderson, *S.J. Cracks Down to Reclaim Gang Territory*, SAN JOSE MERCURY NEWS, Mar. 11, 1993 at 1B. Twenty-two suspected gang members were with served the restraining orders. *See id.*

108. *See Acuna*, 929 P.2d at 602.

See Respondent's Opening Brief, *supra* note 82, at 16 n.2. The City provided evidence of gang membership of the five defendants who sought to dissolve the injunction:

Carlos Acuna was convicted of assault with a deadly weapon in a gang-related incident involving the beating and shooting of a rival gang member. In that case he was identified by a witness in court, under oath, as a member of the VST criminal street gang. Acuna also proclaimed gang membership during independent vehicle stops on August 4, 1991 and June 6, 1992. During both stops, the police officer observed that Acuna had a tattoo of the number 13 on his right wrist, which was indicative of his "Sureño" affiliation. Moreover, on the August 4, 1991 traffic stop, the police officer noticed that Acuna was dressed in a manner consistent with his asserted gang affiliation. *See id.*

Jose Bravo proclaimed his membership in the VST criminal street gang on March 3, 1993, in response to questions by police officers serving him with a temporary restraining order in the case at bar. Bravo also proclaimed his membership in the VST criminal street gang during four separate contacts with police between May 19, 1992 and November 21, 1992. On the May 19, 1992 police contact, the officer noticed Bravo's tattoo with three dots on his right hand. The November 21, 1992 police were responding to a call for service based on a report that there were twenty or thirty drug dealers

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lowing the hearing, the superior court continued the matter but left the temporary restraining order in force against those five defendants and entered a preliminary injunction against thirty-three named defendants who did not appear.¹⁰⁹ The five defendants who appeared at the order to show cause hearing were joined by six other named defendants and moved to vacate the preliminary injunction.¹¹⁰ After briefs and argument,

throwing beer cans at the reporting party's son because he asked them to leave yet the drug dealers refused; Bravo was involved. On a vehicle stop on September 25, 1992, in which Bravo was a passenger, police officers found three baggies of cocaine and three baggies of marijuana in the vehicle. *See id.*

Hassan Martin Davila proclaimed membership to police on at least four separate occasions between October 7, 1992 and February 29, 1993. In each contact with police, Davila was loitering in Rocksprings, sometimes with other individuals. During these contacts police noted that he had tattoos and wore clothing consistent with "Sureño" gang membership. During one police contact, he displayed the gang hand signs. *See id.*

Juan Pineda Hernandez admitted VST gang membership. During an October 17, 1991 investigation of a possible gang-related fight, Hernandez claimed gang membership and was clad in clothing consistent with the VST gang. On November 18, 1991 he proclaimed gang affiliation to a police officer. During a November 19, 1992 police interview conducted as part of an auto burglary investigation, Hernandez claimed that he had been a member of the VST criminal street gang for the past four years. *See id.*

Flavio Quinonez was convicted of assault with a deadly weapon in a gang-related incident involving the beating and shooting of a rival gang member. Quinonez was identified in court by a witness under oath as a criminal street gang member. In addition, admitted VST member Jose Fernandez identified Quinonez as a fellow gang member. During the course of a prior arrest, Quinonez admitted to being a VST gang member. *See id.*

109. *See Acuna*, 929 P.2d at 602.

110. *See id.* Carlos Acuna, Jose Bravo, Hassan Davila, Juan Hernandez and Flavio Quinonez were joined by Eberardo Cervantes, Blanca Gonzalez, Jorge Gonzalez, Miguel Lopez, Miguel Moreno and Rafael Ruiz in their motion to vacate the preliminary injunction. *See id.* at 602.

People ex rel Gallo v. Acuna, 40 Cal. Rptr. 2d 589 (Cal. Ct. App. 1995). The appellate court provided summaries of evidence confirming VST gang membership for Eberardo Cervantes, Blanca Gonzalez, Jorge Gonzalez, Miguel Lopez, Miguel Moreno and Rafael Ruiz. *See id.* at 600-02.

Eberardo Cervantes first claimed VST affiliation on December 21, 1992 to police officers investigating an illegal drug transaction; Mr. Cervantes was subsequently prosecuted for possession for sale and sale of marijuana and cocaine. On May 5, 1993, two weeks after escaping from Boy's Ranch, Mr. Cervantes admitted VST membership to police while investigating a gang-related homicide. *See id.* at 601.

Blanca Gonzalez, while talking to police officers on two separate occasions, claimed membership to the VST street gang. On May 20, 1992, Ms. Gonzalez, clad in VST colors, was cruising in the rival gang's neighborhood when she claimed VST gang membership to a police officer. On October 31, 1992, Ms. Gonzalez and a friend drove up to a Rocksprings address when she told a police officer on patrol she was a VST gang member. *See id.*

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the superior court declared that the VST's activities constituted a public nuisance and issued a twenty-four point preliminary injunction on June 28, 1993.¹¹¹ The injunction included a pro-

Jorge Gonzalez, during a traffic stop on September 25, 1992, admitted gang membership. On January 8, 1993, Mr. Gonzalez, clad in gang colors, admitted gang membership when questioned by police about a gang-related disturbance. *See id.*

Miguel Lopez, on January 15, 1992, was observed by officers to have conducted several drug sales; upon questioning Lopez claimed VST membership and showed the police officers his three dot tattoo on his hand, symbolic of VST affiliation. During a traffic stop in Rocksprings on July 17, 1992, Mr. Lopez told the police officer he was on probation for a burglary conviction and that he was a VST member. On September 18, 1992, during another police encounter, Mr. Lopez told the officer he was a VST member and displayed his tattoos of the "VST" acronym on his stomach and the three dots on his hand. *See id.*

Miguel Moreno, after being approached by an officer on foot patrol in Rocksprings on August 28, 1992, admitted VST membership. Mr. Moreno was later involved in an illegal drug transaction on October 13, 1992 in Rocksprings. *See id.* at 601-02.

Rafael Ruiz admitted to VST gang membership to police on one occasion. A police officer, responding to a citizen call reporting a drug deal on October 1, 1992, identified Mr. Ruiz as a participant. *See id.* at 602.

111. *See Acuna*, 40 Cal. Rptr. 2d at 592. The superior court did not prepare a written decision but only an order granting the preliminary injunction against the eleven named defendants. *Acuna*, 929 P.2d at 624-25 n.3. The preliminary injunction prohibited Carlos Acuna, Jose Bravo, Eberardo Cervantes, Martin Davila, Blanca Gonzalez, Jorge Gonzalez, Juan Hernandez, Miguel Lopez, Miguel Moreno, Flavio Quinonez and Rafael Ruiz from engaging in legal and illegal acts in the four-block Rocksprings neighborhood. The eleven named defendants were enjoined from:

- (a) Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant herein, or with any other 'VST' (Varrío Sureño Town or Varrío Sureño Treces) member;
- (b) Drinking alcoholic beverages in public excepting consumption on properly licensed premises or using drugs;
- (c) Possessing any weapons including but not limited to knives, dirks, daggers, clubs, nunchukas [*sic*; nunchakus], BB guns, concealed or loaded firearms, and any other illegal weapons as defined in the California Penal Code, and any other object capable of inflicting serious bodily injury including but not limited to the following: metal pipes or rods, glass bottles, rocks, bricks, chains, tire irons, screwdrivers, hammers, crowbars, bumper jacks, spikes, razor blades, razors, sling shots, marbles, ball bearings;
- (d) Engaging in fighting in the public streets, alleys, and/or public and private property;
- (e) Using or possessing marker pens, spray paint cans, nails, razor blades, screwdrivers, or other sharp objects capable of defacing private or public property;
- (f) Spray painting or otherwise applying graffiti on any public or private property, including but not limited to the street, alley, residences, block walls, vehicles and/or any other real or personal property;
- (g) Trespassing on or encouraging others to trespass on any private property;
- (h) Blocking free ingress and egress to the public sidewalks or street, or any driveways leading to or appurtenant thereto in 'Rocksprings';

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hibition of gang members associating with other gang members and a complete bar on gang members intimidating or harassing Rocksprings residents.¹¹²

The six named defendants, in addition to the five appearing at the order to show cause hearing, appealed the preliminary

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- (i) Approaching vehicles, engaging in conversation, or otherwise communicating with the occupants of any vehicle or doing anything to obstruct or delay the free flow of vehicular or pedestrian traffic;
 - (j) Discharging any firearms;
 - (k) In any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings', or any other persons who are known to have complained about gang activities, including any persons who have provided information in support of this Complaint and requests for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction;
 - (l) Causing, encouraging, or participating in the use, possession and/or sale of narcotics;
 - (m) Owning, possessing or driving a vehicle found to have any contraband, narcotics, or illegal or deadly weapons;
 - (n) Using or possessing pagers or beepers in any public space;
 - (o) Possessing channel lock pliers, picks, wire cutters, dent pullers, sling shots, marbles, steel shot, spark plugs, rocks, screwdrivers, 'slim jims' and other devices capable of being used to break into locked vehicles;
 - (p) Demanding entry into another person's residence at any time of the day or night;
 - (q) Sheltering, concealing or permitting another person to enter into a residence not their own when said person appears to be running hiding or otherwise evading a law enforcement officer;
 - (r) Signaling to or acting as a lookout for other persons to warn of the approach of police officers and soliciting, encouraging or offering payment to others to do the same;
 - (s) Climbing any tree, wall, fence, or passing through any wall or fence by using tunnels or other holes in such structures;
 - (t) Littering in any public place or place open to public view;
 - (u) Urinating or defecating in any public place or place open to public view;
 - (v) Using words, phrases, physical gestures, or symbols commonly known as hand signs or engaging in other forms of communication which describe or refer to the gang known as 'VST' or 'VSL' ... as described in this Complaint or any of the accompanying pleadings or declarations;
 - (w) Wearing clothing which bears the name or letters of the gang known as 'VST' or 'VSL';
 - (x) Making, causing, or encouraging others to make loud noise of any kind, including but not limited to yelling and loud music at any time of the day or night.

Acuna, 929 P.2d at 624-25 n.3.

112. See *supra* note 111 for exact language of paragraphs (a) and (k) of the preliminary injunction.

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injunction.¹¹³ The Sixth District California Court of Appeal upheld only those provisions of the preliminary injunction that enjoined conduct defined as criminal by the California Penal Code.¹¹⁴ The appellate court held that an injunction can be used to abate gang-related criminal activity as a public nuisance.¹¹⁵ The remaining provisions of the preliminary injunction were stricken, however, because they infringed upon the defendants' First and Fifth Amendment rights.¹¹⁶ The First Amendment¹¹⁷ guarantees freedom of speech and association; paragraphs (v) and (w), which prohibited communications conveying VST gang affiliation or wearing symbolic gang clothing, were stricken from the injunction because both provisions prohibited protected expressive conduct.¹¹⁸ The Fifth Amend-

113. See *Acuna*, 929 P.2d at 602. The six named defendants submitted declarations in support of their motion to vacate the preliminary injunction. See *id.* at 624 n.2. Some of the defendants alleged that they were never or no longer VST gang members. Others stated that they had family or other ties to the Rocksprings neighborhood. See *id.*

114. See *Acuna*, 40 Cal. Rptr. 2d at 600. The Appellate Court upheld provisions (b), (d), (f), (g), (h), (j), (p), (t), and (u) because they enjoined acts which constituted criminal conduct under the California Penal Code. See *id.* For example, paragraph (b) prohibits the defendants from consuming alcohol in public, a misdemeanor according to CAL. PENAL CODE section 647(f) (West 1988). Paragraph (f) prohibits defendants from applying graffiti on any private or public property, a crime punishable by fines and/or jail term of not more than one year as provided by CAL. PENAL CODE section 594 (West Supp. 1998).

115. See *Acuna*, 40 Cal. Rptr. 2d at 595.

See also Yoo, *supra* note 75, at 215. The appellate court's reasoning in *Acuna* followed similar California cases where the courts granted injunctions against gang members that prohibited only criminal activity. For example, the following courts granted injunctions that prohibited only illegal conduct: *City of Norwalk v. Orange St. Locos*, No. VC 016746 (Cal. Super. Ct. L.A. County Aug. 25, 1994); *People v. "B" St. Boys*, No. 735405-4 (Cal. Super. Ct. Alameda County June 17, 1994); *People ex rel City Attorney v. Avalos*, No. CV 739089 (Cal. Super. Ct. Santa Clara County Mar. 30, 1994); *People ex rel Jones v. Amaya*, No. 713223 (Cal. Super. Ct. L.A. County Nov. 10, 1993); *People ex rel Fletcher v. Acosta*, No. EC 010205 (Cal. Super. Ct. L.A. County Nov. 2, 1992); *People v. Playboy Gangster Crips*, No. WEC 118860 (Cal. Super. Ct. L.A. County Dec. 11, 1987). See *id.* at n. 10-15.

116. See *Acuna*, 40 Cal. Rptr. 2d at 598-601.

See U.S. CONST. amend. I. The First Amendment provides: "(c)ongress shall make no law ... abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble...." *Id.*

See U.S. CONST. amend. V. The Fifth Amendment states that "no person shall ... be deprived of life, liberty, or property, without due process of law...." *Id.*

117. See *supra* note 116 for text of the First Amendment.

118. See *Acuna*, 40 Cal. Rptr. 2d at 595 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)). The appellate court stated that "(t)he First Amendment generally prevents government from proscribing speech (citation) or even expressive conduct, (cita-

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ment¹¹⁹ protects a person's right to due process: the terms of the injunction cannot be so vague or over broad as to create an uncertain standard of conduct, permit arbitrary enforcement, or limit otherwise legal conduct; most other provisions of the injunction were stricken because the appellate court found the injunction to prohibit too much "ordinary and innocuous conduct."¹²⁰

The City of San Jose appealed to the California Supreme Court to review the two stricken paragraphs enjoining the gang members from associating in public with other gang members and prohibiting gang members from harassing or threatening the Rocksprings residents.¹²¹ The California Supreme Court reversed part of the appellate court's decision and reinstated paragraphs (a) and (k) the preliminary injunction after concluding those provisions did not violate a gang member's First Amendment right to associate and were not vague, overbroad, or overreaching as to violate the defendant's Fifth Amendment

tion) because of the disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *Id.* See also *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Provision (v), which prohibited defendants from using words, phrases, physical gestures or symbols commonly known as hand signs which represent the VST gang, and provision (w), which prohibited the defendants from wearing clothing bearing the name or symbols which represent the VST gang, were stricken because both provisions prohibited protected expressive conduct protected by the First Amendment. See *Acuna*, 40 Cal. Rptr. 2d at 596.

119. See *supra* note 116 for text of the First Amendment.

120. *Acuna*, 929 P.2d at 625. In addition to paragraphs (v) and (w), paragraphs (a), (e), (i), (m), (n), (o), (q), (r), (s), and (x) in whole, and (c), (k) and (l) in part were stricken because the appellate court found them to be unconstitutionally vague, overbroad or prohibited too much ordinary and innocuous conduct. Prohibited conduct included appearing in public with other gang members, obstructing or delaying the free flow of traffic, owning, possessing or driving a vehicle found to have controlled substances or deadly weapons within it or possessing devices used to break into locked vehicles. See *id.*

See *supra* note 111 for exact terms of injunction.

121. *Acuna*, 929 P.2d at 624 n.3. Paragraph (a) enjoined any VST member from: "standing, sitting, walking, driving, gathering or appearing anywhere in public view" with any other VST member. *Id.* Paragraph (k) enjoined any VST member from:

[C]onfronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings', or any other persons who are known to have complained about gang activities, including any persons who have provided information in support of this Complaint and requests for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction.

Id. at 625 n.3.

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right to due process.¹²² Thus, the defendants were enjoined from engaging in criminal activity and “standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other VST member” or “in any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering” any resident, patron, or visitor to Rocksprings, or any other person known to have complained about gang activities.¹²³

Two defendants in *People ex rel Gallo v. Acuna*, Blanca Gonzalez and Miguel Moreno, appealed to the United States Supreme Court.¹²⁴ On June 27, 1997, the Court denied certiorari.¹²⁵

V. COURT'S ANALYSIS

A. MAJORITY OPINION

In *People ex rel Gallo v. Acuna*,¹²⁶ the California Supreme Court majority in determined that the appropriate standard of review of the two provisions of the preliminary injunction was a narrow abuse of discretion standard.¹²⁷ The court then determined that neither the First nor the Fifth Amendment was violated by either of the challenged preliminary injunction provisions, which prohibited defendants from “standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other VST member” or “in any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering” any resident, patron, or visitor to Rocksprings, or any other person known to

122. *See id.* at 609, 614, 618.

123. *Id.* at 608, 613, 618-19.

124. *People ex rel Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997), *cert. denied*, 117 S. Ct. 2513 (1997).

125. *See id.*

126. *People ex rel Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997). Justice Janice Brown wrote the opinion for the majority. *See id.* at 601 (George, C.J.; Baxter, J.; Werdegar, J. concurring).

127. *See infra* notes 132-37 and accompanying text for discussion of the supreme court's standard of review.

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have complained about gang activities.¹²⁸ Despite the defendants' challenge, the court also concluded that the STEP Act was not the exclusive means of abating gang behavior.¹²⁹ Finding the gang members' activities fell within the statutory definition of a public nuisance, the court held that the terms of the injunction burdened no more conduct than necessary to achieve government's significant interest in abating the public nuisance.¹³⁰ Finally, the majority of the court reversed the appellate court and concluded that the two challenged provisions of the preliminary injunction were constitutional.¹³¹

1. Standard of Review

The California Supreme Court in *Acuna* acknowledged that its review of the trial court's order granting the preliminary injunction was limited to a narrow abuse of discretion standard.¹³² The supreme court applied its two-prong test from *Cohen v. Board of Supervisors*¹³³ to determine whether the trial court properly granted the preliminary injunction.¹³⁴ First, the supreme court considered whether the trial court abused its discretion when it determined that the City would likely prevail on the merits at trial.¹³⁵ Second, the supreme court analyzed whether the trial court abused its discretion

128. See *infra* notes 138-71 and accompanying text for the court's analysis of the First and Fifth Amendment.

129. See *infra* notes 172-78 and accompanying text for the discussion of the STEP Act.

130. See *infra* notes 179-201 and accompanying text for the court's analysis of applying public nuisance law to the defendants.

131. See *infra* notes 202-04 and accompanying text for the court's conclusion.

132. See *Acuna*, 929 P.2d at 607. The majority acknowledged that a trial court's order granting preliminary injunctive relief reflected the trial court's evaluation of the record at the time of its ruling and not a final adjudication of the merits of the dispute. See *id.* at 608.

133. *Cohen v. Board of Supervisors*, 707 P.2d 840 (Cal. 1985).

134. See *id.* at 845. Upon appeal, the supreme court in *Cohen* mandated that the court of appeal to consider two factors to determine if the trial court abused its discretion when it denied the application for an injunction. See *id.* First, the supreme court directed the appellate court to examine whether the trial court believed that plaintiff would likely prevail on the merits at trial. Second, the court remanded the case for the appellate court to determine whether the trial court abused its discretion when it balanced the interim harm the plaintiff would likely sustain if the injunction was denied against the harm the defendant would likely suffer if the preliminary injunction was issued. See *id.* at 844, 857.

135. See *Acuna*, 929 P.2d at 607.

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when it determined that the interim harm the plaintiff would likely suffer if the injunction was denied was greater than the harm the defendants would likely sustain if the preliminary injunction was issued.¹³⁶ The majority did not disturb the trial court's ruling and reaffirmed provisions (a) and (k), thereby reversing the appellate court.¹³⁷

2. The Injunction Did Not Violate the Defendant's First Amendment Right to Associate.

The United States Constitution guarantees the right to peaceful assembly.¹³⁸ The First Amendment¹³⁹ protects two types of association: associations with an intrinsic or intimate value and associations instrumental to political and religious expression.¹⁴⁰ The right to associate, however, is not abso-

136. *See id.* at 607-08.

137. *See id.* at 608.

138. *See* U.S. CONST. amend. I. The First Amendment states that "[c]ongress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble... ." *Id.*

139. *See id.*

140. *See Acuna*, 929 P.2d at 608. The supreme court in *Acuna* relied primarily on *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). In *Roberts*, women were excluded from full membership in the Jaycees, a non-profit public organization. This exclusion violated the Minnesota Human Rights Act. *See Roberts*, 468 U.S. at 614. The Jaycees defended their actions, claiming they were within the constitutionally protected right of association to pursue political, social, economic, educational, religious and cultural ends. After recognizing the two types of association protected by the Constitution, the Supreme Court concluded that the Jaycees right of male-only association was outweighed by the government's interest in ending sex discrimination. *See id.* at 617-23. Women were allowed to obtain full membership in Jaycees thereafter. *See id.* at 623. Similarly, the supreme court determined that the gang members' activities did not fall into the "political" or "religious" association protected by the United States Constitution. *See Acuna*, 929 P.2d at 608.

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lute.¹⁴¹ The First Amendment does not protect conduct which deprives third parties of their lawful rights.¹⁴²

The *Acuna* majority noted that the collective public activities of the gang members mainly involved illegal drug trafficking and securing control of the Rocksprings neighborhood by "systematic acts of intimidation and violence."¹⁴³ Even though gang members may share common values and affiliation with the gang may be a source of personal enrichment, the criminal association was not constitutionally protected.¹⁴⁴ The supreme court majority determined that the gang's activities neither fostered intrinsic or intimate relationships nor promoted political or religious expression.¹⁴⁵ Therefore, the supreme court

141. See *Acuna*, 929 P.2d at 608 (citing *Dallas v. Stanglin*, 490 U.S. 19 (1989)). In *Stanglin*, a Dallas ordinance restricted admission to certain dance halls to minors under eighteen years old by limiting the times minors were admitted. See *id.* at 20. Adults over eighteen years old challenged the ordinance, claiming it violated their First Amendment association rights because it had the effect of limiting minors from dancing with adults. See *id.* at 22-23. The Supreme Court in *Stanglin* did not recognize "chance encounters in dance halls" as "expressive" or "intimate" association protected by the First Amendment. The Supreme court "do(es) not think the Constitution recognizes a generalized right of 'social association'..." *Id.* at 25.

142. See *Acuna*, 929 P.2d at 609 (citing *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994)). In *Madsen*, the United States Supreme Court enjoined activity generally protected by the Constitution because it interfered with third parties' lawful rights. See *Madsen*, 512 U.S. at 768. The court held that anti-abortion protesters, exercising their free speech and association rights, could be enjoined from interfering with both the clinic patron's right to seek medical treatment and the state's interest in ensuring public safety and free flow of traffic. See *id.*

See *infra* notes 150, 174, 189, 214 for further discussion of the California Supreme Court's analysis of *Madsen*.

143. *Acuna*, 929 P.2d at 608. In her declaration supporting the City's injunction, one Rocksprings resident stated that gang members had threatened to cut out her nine-year-old daughter's tongue out if she talked to police. Another resident reported her neighbor was threatened and her property was vandalized after the neighbor reported to the police that gang members had urinated in her garage. A police officer declared that numerous residents told him that gang members threatened them with physical violence if the gang members were asked to leave the residents' property. Other residents refused to provide declarations, fearing for their lives if any gang members should ever discover their identities. See *id.* at 613-14.

144. See *id.* at 609. The majority corrected the defendant's interpretation of *Dawson v. Delaware*, 503 U.S. 159 (1992). The *Acuna* defendants claimed that dicta in *Dawson* stood for the proposition that association with a criminal gang was constitutionally protected. *Acuna*, 929 P.2d at 609. However, in *Dawson*, the court ruled that evidence of the defendant's membership in a prison gang should not have been admitted in his penalty hearing. See *Dawson*, 503 U.S. at 163.

145. See *Acuna*, 929 P.2d at 608-09. The court reasoned: "without minimizing the value of the gang to its members as a loosely structured, elective form of association, that characteristic is in itself insufficient to command constitutional protection." *Id.*

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concluded that the gang members' right to meet in public was not protected association.¹⁴⁶

Furthermore, according to the overbreadth doctrine, a statute cannot be overbroad as to inhibit or "chill" freedoms or conduct of those not represented in court.¹⁴⁷ The Supreme Court majority examined possible overbreadth of paragraphs (a) and (k) of the injunction and determined that there was no risk that the injunction would affect those not before the court.¹⁴⁸ Guided by *Madsen v. Women's Health Center, Inc.*,¹⁴⁹ the court identified features of the injunction which prevented it from being unconstitutionally overbroad.¹⁵⁰ First, the preliminary injunction applied only to those named as defendants, whose interests were represented and vigorously litigated.¹⁵¹ Second, unlike broad statutes regulating conduct of the general population, the injunction provisions were narrowly focused, as they only applied to specific conduct of the named defendants in a

The gang members associated neither for "intimate" value, such as family members or spouses, nor for the purpose of pursuing political, social, economic, educational, religious or cultural expression. *See id.*

146. *See id.* at 609 (quoting *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)). The *Acuna* court reiterated, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes - for example, walking down the street or meeting one's friends at a shopping mall - but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Id.* at 609 (alteration in original).

147. *Acuna*, 929 P.2d at 609 (quoting *New York State Club Ass'n. v. New York City*, 487 U.S. 1, 11 (1988)). The overbreadth doctrine was declared a "narrow exception and requires finding of a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court." *Acuna*, 929 P.2d at 610. Additionally, the supreme court was reminded by *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), that the overbreadth doctrine is "strong medicine" to be used sparingly, only as a last resort. *See Acuna*, 929 P.2d at 610.

148. *See Acuna*, 929 P.2d at 611.

149. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

150. *See Acuna*, 929 P.2d at 610-11. The supreme court noted that the "narrow and particularized focus" of the injunction was significant in deciding that its terms were not overbroad. *Id.* at 610.

See also Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994). In *Madsen*, the terms of a second injunction directed to anti-abortion protesters were not found to be overbroad. The second injunction prohibited protesters from approaching persons seeking clinic services or entering clinic premises. The injunction also limited the volume of the protesters, protected the ingress and egress of the clinic driveway and entrance, and preserved a 36 foot buffer zone free from protesters congregating, picketing, patrolling, demonstrating or entering within that area. *See id.* at 759-61.

151. *See Acuna*, 929 P.2d at 610. The majority noted that "[n]o one, apart from the defendants themselves, is or can be subject to the prophylactic relief granted by the trial court." *Id.* (emphasis in original).

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particular area described in the injunction.¹⁵² Lastly, the injunction was not issued until the named defendants appeared before court and had the opportunity to oppose the injunction.¹⁵³ Thus, the supreme court majority minimized the risk that the injunction was overbroad and would be wrongly applied to parties not before the court.¹⁵⁴

3. The Injunction Did Not Violate the Fifth Amendment Guarantee of Due Process of the United States Constitution

The supreme court majority stated the evidence did not support the appellate court's or the defendants' contentions that paragraph (a) or (k) of the injunction were unconstitutionally "void for vagueness."¹⁵⁵ A void for vagueness challenge is based on a defendant's claim of having inadequate notice of the law as required by the Fifth Amendment Due Process Clause.¹⁵⁶ A claim of void for vagueness also means that the application of an injunction could result in "arbitrary and discriminatory" enforcement or subjective "ad hoc" resolution.¹⁵⁷

152. *See id.* at 611. The court noted that the injunction was not like broad or abstract statutes which create a "chilling effect" of otherwise lawful activity. Rather, the injunction regulated specific conduct of the named defendants only. *See id.*

153. *See id.* As the court noted, before the preliminary injunction was granted, the trial court issued an order to show cause why the injunction should not be entered. Five of the forty-eight named defendants appeared at this hearing and unsuccessfully challenged the preliminary injunction. *See id.* at 602.

154. *See id.* at 611. As Justice Janice Brown stated for the majority, "[t]here is accordingly no basis, factual or legal, for the professed concern that protected speech of communicative conduct by anyone *other* than defendants might be endangered by the terms of the trial court's injunction." *Id.* (emphasis in original).

155. *Acuna*, 929 P.2d at 611.

156. *See* U.S. CONST. amend. V. The Fifth Amendment Due Process Clause states that "no person shall ... be deprived of life, liberty, or property, without due process of law..." *Id.*

See Acuna, 929 P.2d at 611 (quoting *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)). The *Acuna* court used *Lanzetta* to clarify the requirements of due process: "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta*, 306 U.S. at 453.

157. *Acuna*, 929 P.2d at 612 (quoting *Grayned v. City of Rockford* 408 U.S. 104, 108-109 (1972)). The United States Supreme Court in *Grayned* ruled that a city anti-noise ordinance surrounding schools in session was not impermissibly vague. *See Grayned*, 408 U.S. at 110. The ordinance prohibited any person "while on public or private grounds adjacent to any building in which a school or any class thereof is in session [from willfully making] any noise or diversion which disturbs or tends to disturb the peace or good order of such school session..." *Id.* at 107-08. The United States

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When evaluating the vagueness challenges to paragraphs (a) and (k), the supreme court considered the context in which the terms of the injunction were to be applied as well as the specificity of the language used in these paragraphs.¹⁵⁸

The supreme court majority did not find that paragraph (a), which enjoined defendants from associating with any other known gang member in public, was void for vagueness.¹⁵⁹ Paragraph (a) prohibited defendants from “standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other VST member.”¹⁶⁰ Although the appellate court found paragraph (a) to be a “classic case of vagueness” because of the indefiniteness created by requiring a defendant to know of his or her associate’s gang membership status, the supreme court concluded that a defendant’s knowledge was implied in paragraph (a).¹⁶¹ In the event a defendant’s knowledge of their associate’s gang membership was not implied, the supreme court was confident that trial courts would insert a knowledge requirement as a limiting construction on para-

Supreme Court found no risk of arbitrary enforcement because interference with school activities must first be demonstrated. Thus, the anti-noise ordinance was not vague. *See id.* at 113-14.

158. *See Acuna*, 929 P.2d at 612 (quoting *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995)). The *Tobe* court stated that the “purpose of the clause of the ordinance is considered and the terms are read in that context as they should be” when considering vagueness claims. *Tobe*, 892 P.2d at 1167-68 (emphasis added in *Acuna*, 929 P.2d at 612). The supreme court reasoned that the “contextual application of otherwise unqualified legal language may supply the clue to a law’s meaning, giving facially standardless language a constitutionally sufficient concreteness.” *Acuna*, 929 P.2d at 612.

See Acuna, 929 P.2d at 612 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)). The *Acuna* court also used the “reasonably specificity” standard from *Coates* to evaluate the defendant’s vagueness claims. *Acuna*, 929 P.2d at 612. In *Coates*, an ordinance prohibited groups of three or more from assembling on a public sidewalk and annoying passers-by. *See Coates*, 402 U.S. at 611. The United States Supreme Court struck down the ordinance because it failed to specify any standard of conduct. The result was that “men of common intelligence must necessarily guess at its meaning.” *Coates*, 402 U.S. at 614 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

159. *See Acuna*, 929 P.2d at 613.

160. *Id.* at 624 n.3.

161. *Id.* at 613. The appellate court considered the hypothetical case of a defendant engaged in one of the prohibited activities with someone known to the police but not known to the defendant to be a gang member. The effect, according to the appellate court, was that the defendant would not know he or she was violating the injunction, which could result in arbitrary enforcement of the injunction. *Acuna*, 40 Cal. Rptr. 2d 589, 598 (Cal. Ct. App. 1995).

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graph (a) in the event paragraph (a) was enforced.¹⁶² Thus, the City would have the burden of proving a defendant's knowledge of his or her associate's gang membership status.¹⁶³ With the minor stipulation of an implied requirement of proof of a defendant's knowledge of his or her associate's gang membership status, the supreme court concluded that paragraph (a) survived scrutiny under the vagueness doctrine.¹⁶⁴

Paragraph (k) also survived the defendant's vagueness challenge.¹⁶⁵ Paragraph (k) prohibited harassment and intimidation of residents or visitors "known to have complained about gang activities."¹⁶⁶ Like paragraph (a), the defendant's knowledge of who complained about the gang's activities would also be implied in paragraph (k).¹⁶⁷ The appellate court claimed that the words "confront," "annoy," "provoke," "challenge," or "harass" in paragraph (k) failed to sufficiently proscribe a standard of conduct for the gang members.¹⁶⁸ The supreme court disagreed with the appellate court and noted that the same and

162. See *Acuna*, 929 P.2d at 613. The majority of the *Acuna* court was confident that trial courts will follow *People v. Garcia*, 23 Cal. Rptr. 2d 340 (Cal. Ct. App. 1993). In *Garcia*, a probation condition prohibited the appellant from associating with "felons, ex-felons or sellers or users of narcotics." See *id.* at 341. Even though the appellant waived her constitutional rights by accepting probation, the terms must be narrowly drawn. The court rejected the respondent's argument that appellant's knowledge of her associate's criminal status should be implied. Rather, the court found that probation conditions must be narrowly drawn; knowledge "should not be left to implication." *Id.* at 342. The court modified the condition of probation to provide that the appellant was not to associate with persons she *knew* to be felons, ex-felons, or sellers or users of narcotics. See *id.* at 324-43. Similarly, in *Acuna*, paragraph (a) prohibits a named defendant from associating with "any other *known* VST" gang member. See *Acuna*, 929 P.2d at 613 (emphasis added).

163. See *Acuna*, 929 P.2d at 613.

164. See *id.* at 613.

165. See *id.* at 614.

166. *Id.* at 625. Paragraph (k) enjoined the defendants from:

{C}onfronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings', or any other persons who are known to have complained about gang activities, including any persons who have provided information in support of this Complaint and requests for a Temporary Restraining Order, Preliminary Injunction and Permanent Injunction.

Id.

167. See *supra* notes 160-63 and accompanying text for the court's analysis of implying a defendant's knowledge of their associate's gang membership status.

168. *Acuna*, 929 P.2d at 613; *People ex rel Gallo v. Acuna*, 40 Cal. Rptr. 2d 589, 599 (Cal. Ct. App. 1995).

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even broader language has been used in other injunctions, such as that used in *Madsen v. Women's Health Center, Inc.*,¹⁶⁹ which survived the similar vagueness challenges.¹⁷⁰ When considered in light of the objective to prevent intimidation and harassment of Rocksprings residents and in context of the injunction, the supreme court found paragraph (k) to not be void for vagueness.¹⁷¹

4. The Street Terrorism Enforcement and Prevention Act Did Not Prevent the State from Using Public Nuisance Law

The California legislature enacted the STEP Act¹⁷² to punish, deter and end criminal gang activity.¹⁷³ Despite the defendants' assertion that the STEP Act was the exclusive means of enjoining criminal street gangs and preempted use of general public nuisance law, California Supreme Court agreed with the appellate court that the STEP Act neither excluded other means to enjoin gang members nor preempted the city's use of general public nuisance law.¹⁷⁴ The STEP Act states that "[n]othing in this chapter shall prevent a local governing body from adopting and enforcing laws consistent with this

169. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

170. *See Acuna*, 929 P.2d at 613. In *Madsen*, even broader injunction terms survived a void for vagueness challenge. The injunction prohibited anti-abortion protesters from "intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving" the clinic. *Madsen*, 512 U.S. at 760-61. The supreme court majority stated, "we find nothing in the context of this case, factually similar to the situation before the court in *Madsen*, that makes the same words, sufficiently definite there, somehow constitutionally infirm here." *Acuna*, 929 P.2d at 613.

171. *See id.* at 613-14. The *Acuna* court stated that "the declarations filed by the City in support of preliminary relief leave little doubt as to what kind of conduct the decree seeks to enjoin." The court recounted several declarations, including one resident's statement in which a gang member threatened to cut out her nine year old daughter's tongue if she talked to the police. *See id.*

See supra note 143 for additional evidence of intimidation by the VST gang members.

172. Street Terrorism Enforcement and Prevention Act of 1988 (STEP Act), CAL. PENAL CODE §§ 186.20-186.28 (West Supp. 1998).

173. *See supra* notes 34-35 and accompanying text for exact provisions of the STEP Act. Generally, according to penal code section 186.22(a), if a gang member commits, attempts to commit, or solicits to commit one of the criminal acts outlined in section 186.22(e), that gang member may be punished for the crime he or she committed plus a sentence enhancement. *See id.*

174. *See Acuna*, 929 P.2d at 614, 620, 627; *People ex rel Gallo v. Acuna*, 40 Cal. Rptr. 2d 589, 594 (Cal. Ct. App. 1995).

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chapter relating to gangs and gang violence. Where local laws duplicate or supplement this chapter, this chapter shall be construed as providing alternative remedies and not as preempting the field.”¹⁷⁵ The appellate court concluded that the “plain language [of the STEP Act] expressly contemplates the use of any other applicable means, statutory or otherwise, to abate gang activity.”¹⁷⁶ The supreme court affirmed the appellate court’s conclusion that the STEP Act provided not an exclusive but rather an alternative remedy to abate gang activity.¹⁷⁷ Hence, the City of San Jose was not precluded or preempted from applying public nuisance law to the Rocksprings neighborhood.¹⁷⁸

5. The Defendant’s Conduct was within the Statutory Definition of a Public Nuisance

Next, the California Supreme Court considered whether the activity enjoined under paragraphs (a) and (k) fell within the statutory definition of a public nuisance.¹⁷⁹ When anything is injurious to health, or is indecent or offensive to the senses, or is an obstruction to the free use of property which interferes with the comfortable enjoyment of life or property by a community, the state may request injunctive relief of this public nuisance.¹⁸⁰ However, the state need not prove that the conduct at issue is criminal.¹⁸¹ Using *People v. Lim*¹⁸² as guidance, the

175. See CAL. PENAL CODE § 186.25 (West Supp. 1998).

See also CAL. PENAL CODE § 186.22a(d) (West Supp. 1998). Furthermore, section 186.22a(d) states that “[n]othing in this chapter shall preclude any aggrieved person from seeking any other remedy provided by law.” *Id.*

176. *Acuna*, 40 Cal. Rptr. 2d at 594. After reviewing the above sections of the STEP Act, the appellate court continued: “[n]othing in the [STEP] Act prohibits other statutory or common law remedies from being utilized.” *Id.*

177. See *Acuna*, 929 P.2d at 614. The California Supreme Court stated that the STEP Act “plainly contemplates remedies in addition to the act to abate criminal gang activities, including those made available by the general public nuisance statutes.” *Id.*

178. See *id.*

179. See *id.* at 614-15.

180. See CAL. CIV. CODE § 3479 (West 1997). The civil code states that “anything 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, ... is a (public) nuisance.” *Id.*

See *supra* note 2 for exact language of CAL. PENAL CODE § 370 (West 1988).

181. See *supra* notes 56-74 and accompanying text for general principles of public nuisance law.

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court compared the conditions created by the gang members' activities to the statutory definition of a public nuisance.¹⁸³ The court noted that many declarations filed in support of the injunction reported that gang members had routinely obstructed the residents' use of their own property and habitually blocked the free passage and use of public streets and sidewalks by the gang members' drug dealing from the residents' lawns, sidewalks and cars.¹⁸⁴ The gang members also interfered with the Rocksprings residents' enjoyment of life in the Rocksprings community by their constant threats of violence and intimidation.¹⁸⁵ In addition, the court determined the gang members' conduct, including drive-by shootings, murder and vandalism, were indecent and offensive to the senses.¹⁸⁶ The California Supreme Court agreed with the superior court's determination that the gang members' activities constituted a public nuisance.¹⁸⁷

6. The Terms of the Injunction were Not Impermissibly Overreaching

The California Supreme Court majority followed the intermediate scrutiny test in *Madsen v. Women's Health Center*,

182. *People v. Lim*, 118 P.2d 472 (Cal. 1941).

183. *See Acuna*, 929 P.2d at 614 (citing *People v. Lim*, 118 P.2d 472 (Cal. 1941)). The *Lim* court considered whether the environment the gambling house created a public nuisance. Specifically, the complaint alleged that the gambling house:

[C]orrupt[s] the public morals, encourage[s] idle and dissolute habits, draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life and property.

Lim, 118 P.2d at 474.

184. *See Acuna*, 929 P.2d 615. The supreme court concluded that such activities significantly interfered with the resident's use of their own property. *See id.*

185. *See id.* The supreme court found the threats of violence to individual Rocksprings residents, murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson and associated crimes obstructed the free use of property and interfered with the enjoyment of life of an entire community. *See id.*

186. *See id.* The court concluded that the "hooligan-like atmosphere that prevails night and day in Rocksprings - the drinking, consumption of illegal drugs, loud talk, loud music, vulgarity, profanity, brutality, fistfights and gunfire - easily [met] the statutory standard" of conduct that is "indecent or offensive to the senses." *Id.*

187. *See id.* at 618.

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*Inc.*¹⁸⁸ to determine whether paragraphs (a) and (k) of the injunction were narrowly tailored such that the injunction did not burden more speech or conduct than necessary to achieve an important governmental interest.¹⁸⁹ The court concluded that all of the terms in paragraphs (a) and (k) were required to serve the governmental interest of abating the nuisance.¹⁹⁰

The supreme court concluded that paragraph (a), which enjoined the gang members from “standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other VST member,” was not overreaching.¹⁹¹ In light of the government’s interest in ending the public nuisance, the supreme court noted that, despite its breadth, paragraph (a) burdened no more conduct than necessary.¹⁹² The supreme court recognized that the collective conduct of the gang members in meeting, loitering and drug dealing created the public nuisance.¹⁹³ The protective shield from a group of gang members allowed individual members to commit crimes with impu-

188. *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753 (1994).

189. *See Acuna*, 929 P.2d at 614-615 (citing *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753 (1994)). In *Madsen*, the United States Supreme Court stated that “injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Madsen*, 512 U.S. at 765 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). The injunction prohibited protesters from approaching persons seeking services of the clinic, entering the clinic premises or blocking the ingress or egress of the clinic’s driveway. The injunction also limited the volume of the protesters and preserved a 36-foot buffer zone free from protesters congregating, picketing, patrolling, demonstrating or entering. *See Madsen*, 512 U.S. at 759-761. The *Madsen* court articulated an intermediate scrutiny test to evaluate the content neutral injunction: “we think that our standard time, place and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.” *Id.* at 765. The *Madsen* court found that most of the terms in the injunction were necessary to achieve the government’s interests: protecting a woman’s freedom to seek lawful medical or counseling services, ensuring public safety and order, promoting free flow of traffic, and protecting the property rights of all citizens. *See id.* at 767-68.

190. *See Acuna*, 929 P.2d at 616.

191. *Id.*

192. *See id.* at 615. Keeping the governmental interest in abating the nuisance in mind, the supreme court reasoned that “the prohibitions enumerated in provision (a) are not easily divisible. Permitting two or more gang members to drive together but not sit, or to stand together but not walk, would obviously defeat the core purpose behind the proscription.” *Id.*

193. *See id.* at 615-16.

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nity by virtue of the individual's gang affiliation.¹⁹⁴ In addition, the supreme court determined that the VST members were not engaged in constitutionally protected activity, thus any infringement on their right of association contained in the First Amendment was minimal.¹⁹⁵ Furthermore, the injunction applied only to the defendants in public in a four-block area in Rocksprings; the gang members were free to associate with other gang members in private or outside of Rocksprings.¹⁹⁶ Hence, the court concluded that all the terms of paragraph (a) were necessary to eradicate the nuisance.¹⁹⁷

Paragraph (k), which enjoined the defendants from "confronting, intimidating, annoying, harassing, threatening, ... assaulting or battering" Rocksprings residents or visitors who complained about VST's conduct, was also found not to be overreaching as applied to the defendants' conduct.¹⁹⁸ The supreme court recognized that the City had an important interest in and duty to protect its residents from violence and intimidation.¹⁹⁹ The supreme court reasoned that VST members' criminal threats of violence and actual violence toward residents or visitors was not protected by the First Amendment.²⁰⁰

194. *See id.* at 615-16. The supreme court noted that the protective shield provided by the VST gang allowed numerous narcotic transactions occurred in the Rocksprings area. *See id.* Individuals who claim to be affiliated with the VST gang were free to deal drugs in a "veritable 'safe' zone." *Id.* at 616

See also Respondent's Opening Brief, *supra* note 82, at 9. The City noted:

Law enforcement efforts were impeded by the fact that the criminal street gang members would establish 'lookouts' to warn when police were in the neighborhood. The gang members used hand signs to warn each other when police, as well as rival gang members, were approaching the area. In one instance, they actually established a lookout by placing a mattress on top of a tree.

Id.

195. *See Acuna*, 929 P.2d at 615. According to the evidence from the trial court, the supreme court reasoned that the VST gang members "appear to have no constitutionally protected or even lawful goals... [T]he gangs and their members engaged in no expressive or speech-related activities which were not either criminally or civilly unlawful or inextricably intertwined with unlawful conduct." *Id.*

196. *See id.* at 616.

197. *See id.*

198. *Id.*

199. *See id.*

200. *See Acuna*, 929 P.2d at 616 (quoting *NAACP v. Claiborne Hardware Co.* 458 U.S. 886, 916 (1982)). The *Acuna* court relied on *Claiborne*, when it stated, "[i]t has long been the rule, of course, that physical violence and the threat of violence are not constitutionally protected: '[t]he First Amendment does not protect violence.'" *Acuna*,

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Thus, all terms of paragraph (k) were necessary for the government to achieve its goal of protecting the residents and patrons of Rocksprings.²⁰¹

In conclusion, neither provision (a) not (k) of the injunction violated the defendants' First or Fifth Amendment rights.²⁰² Therefore, the majority of the Supreme Court upheld paragraphs (a) and (k) as constitutional.²⁰³ In closing, Justice Janice Brown wrote for the majority:

To hold that the liberty of the peaceful, industrious residents of Rocksprings must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense.... Preserving the peace is the first duty of government, and it is for the protection of the community from the predations of the idle, the contentious, and the brutal that government was invented.²⁰⁴

B. JUSTICE JOYCE KENNARD'S CONCURRING AND DISSENTING OPINION

Justice Joyce Kennard would have upheld paragraph (k) of the injunction as constitutional.²⁰⁵ She would have stricken paragraph (a), however, as impermissibly overreaching.²⁰⁶

1. Justice Kennard's Concurring Opinion

Justice Kennard concurred with the majority's constitutional analysis of paragraph (k) of the injunction, enjoining the gang members from intimidating, harassing, threatening, provoking or assaulting persons within the four-block area of

929 P.2d at 616. Because the conduct described in paragraph (k) consists of threats of violence or violent acts, the supreme court reasoned that they were not shielded by the Constitution. *See id.*

201. *See Acuna*, 929 P.2d at 616.

202. *See id.* at 618-19.

203. *See id.*

204. *Id.* at 618.

205. *See id.* at 619.

206. *See Acuna*, 929 P.2d at 619-20.

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Rocksprings.²⁰⁷ Justice Kennard found that the prohibitions set forth in paragraph (k) prohibited no more conduct that necessary to achieve the City's legitimate purpose of abating the nuisance.²⁰⁸ She determined that the terms in paragraph (k) were not unconstitutionally vague when considered in the context of abating the nuisance because the language used provides reasonable certainty and specificity as to what conduct the injunction prohibited.²⁰⁹ Justice Kennard stated, "(d)ue process requires no more."²¹⁰

2. Justice Kennard's Dissenting Opinion

Justice Kennard, however, asserted that paragraph (a), which prohibited the defendants from being in the company of other gang members while standing, sitting, walking, driving, gathering or appearing anywhere in public view in Rocksprings, should not be upheld.²¹¹ Justice Kennard disagreed with the majority and held that the right to peaceful assembly, a constitutionally protected interest, was at stake.²¹² Although the majority found paragraph (a) to be narrowly tailored to prevent unconstitutional infringement of the defendants' rights, she disagreed.²¹³ Justice Kennard stated:

I am not convinced that [paragraph (a)'s] prohibition of *any public contact* between the defendants and other members of the VSL and VST gangs within the four-block Rocksprings neighborhood is couched in the narrowest terms possible to accomplish the injunction's goal of restoring the residents' "comfortable enjoyment of life [and] property." (alteration and emphasis in original).²¹⁴

207. *See id.* at 619.

208. *See id.*

209. *See id.*

210. *Id.*

211. *See Acuna*, 929 P.2d at 619-20.

212. *See id.*

213. *See id.* at 616, 620.

214. *Id.* at 619 (quoting CAL. CIV. CODE § 3479).

See Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994). Relying on *Madsen*, the majority of the court stated that it failed to see a difference between the two standards "burden no more speech than necessary" and "couched in the narrowest

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Justice Kennard determined that paragraph (a) was unconstitutional under the First Amendment and would have affirmed the court of appeal's judgment invalidating paragraph (a).²¹⁵

C. JUSTICE MING CHIN'S CONCURRING AND DISSENTING OPINION

Justice Ming Chin concurred with the majority's analysis of the injunction and would uphold both contested paragraphs of the injunction.²¹⁶ Justice Chin disagreed only on the narrow issue of applying the injunction to two of the named defendants because of insufficient evidence.²¹⁷

1. Justice Chin's Concurring Opinion

Justice Chin concurred with the majority and would uphold both paragraphs of the injunction.²¹⁸ He also agreed that a court has the power to enjoin non-criminal acts when they create a public nuisance.²¹⁹

2. Justice Chin's Dissenting Opinion

Justice Chin did not find, however, that sufficient evidence existed to enjoin two of the thirty-eight named defendants: Blanca Gonzalez and Rafael Ruiz.²²⁰ Blanca Gonzalez, while talking to police officers on two separate occasions, claimed membership to the VST street gang.²²¹ Rafael Ruiz admitted to VST gang membership to police on one occasion and was

terms that will accomplish the pin-pointed objective" when evaluating possible overreaching terms of an injunction. *See Madsen*, 512 U.S. at 767. Thus, the *Acuna* majority and Justice Kennard used the same test to evaluate the overreaching capabilities of paragraph (a) but reached different conclusions. *See Acuna*, 929 P.2d at 616, 620.

215. *See Acuna*, 929 P.2d at 620.

216. *See id.*

217. *See id.* at 620-23.

218. *See id.* at 620. Justice Chin stated, "I am in general agreement with the majority." *Id.*

219. *See id.*

220. *See Acuna*, 929 P.2d at 621-23. Justice Chin found the evidence linking Blanca Gonzalez and Rafael Ruiz to the public nuisance to be weak. *See id.*

221. *See id.* at 600. *See supra* note 110 for further explanation of evidence of Blanca Gonzalez' gang membership.

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identified as a participant in a drug deal in Rocksprings.²²² Even though Justice Chin agreed that in special circumstances a court may enjoin individuals based on group membership, he did not find that a broad injunction could be applied to the defendants in the present case.²²³ Justice Chin asserted that gang membership alone was not a sufficient link between that individual gang member and the creation and continuance of the public nuisance.²²⁴ Rather than relying on a gang member's self proclamation of membership or prior identification by another gang member corroborated by police observation to identify those subject to the injunction, Justice Chin asserted that the injunction should only apply to a gang member if the record indicated that the person had "substantially contributed to the nuisance in Rocksprings or intends to do so in the future."²²⁵ Justice Chin further asserted that although some gang members commit crimes, the entire gang does not have crime as its universal purpose, primary activity or condition of

222. *See id.* at 602. *See supra* note 110 for further explanation of evidence of Rafael Ruiz' VST gang membership.

223. *See id.* at 620. Justice Chin did not believe that the City of San Jose met this burden of proof with respect to two defendants, Rafael Ruiz and Blanca Gonzalez. *See id.* at 620-621. Justice Chin's reasoning followed *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In *Claiborne*, a boycott of white merchants by individuals of the community, including members of the NAACP, turned violent and destroyed property of the boycotted businesses. *See NAACP*, 458 U.S. at 900-06. The Mississippi Supreme Court upheld an award of monetary damages against members of the NAACP who supported the boycott and others without proof that they caused the damage. *See id.* at 893. The United States Supreme Court reversed the damages award, ruling that "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." *Id.* at 920. The Supreme Court further stated, "mere association with [a] group -- absent specific intent to further an unlawful aim embraced by that group -- is an insufficient predicate for liability." *Id.* at 925-26.

224. *See Acuna*, 929 P.2d at 622. Justice Chin agreed that:

Dire problems demand bold solutions and circumstances like those in Rocksprings warrant highly aggressive law enforcement. Nevertheless, the City must prove its case. A court's judgment may not stand on a visceral prejudice against street gangs or on a pervasive mood of public hysteria in the face of a law-and-order crisis; rather, that judgment must stand on evidence.

Id.

225. *See id.* at 622. Justice Chin's proposal to apply the injunction only to those gang members who actively contributed to the nuisance was consistent with the holding in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

See supra note 223 for a discussion of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

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membership.²²⁶ Justice Chin concluded that Blanca Gonzalez and Rafael Ruiz should have been excluded from the injunction.²²⁷

D. JUSTICE STANLEY MOSK'S DISSENTING OPINION

Justice Stanley Mosk found that paragraphs (a) and (k) violated the Due Process Clause of the Fifth Amendment and agreed with the appellate court which held paragraphs (a) and (k) to be "a classic case of vagueness."²²⁸ He noted that the injunction lacked any specific definition of gang membership, which meant that neither police officers nor the courts had a consistent standard for determining when a violation occurred.²²⁹ Justice Mosk stated that if paragraphs (a) and (k) remained unaltered, a defendant, unaware that he or she was associating with a gang member, risked arrest for violating the injunction only because the *police officer* knew the associate to be a gang member.²³⁰ Hence, this risk of arbitrary enforcement rendered both provisions of the injunction unconstitutional.²³¹

In addition, Justice Mosk determined select phrases from paragraph (k), which enjoined the defendants from "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering" any Rocksprings resident in any manner, were void for vagueness.²³² Justice Mosk determined the phrases "harassing" and "intimidating" were not vague because their meaning was sufficiently definite

226. See *Acuna*, 929 P.2d at 621. Justice Chin stated that the only express purpose of the VST gang was possibly to compete with the rival Norteño gang. See *id.*

227. See *id.* at 623.

228. *Id.* at 630 (quoting *People ex rel Gallo v. Acuna*, 40 Cal. Rptr. 2d 589, 598 (Cal. Ct. App. 1995)).

229. See *Acuna*, 929 P.2d at 629-630 (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939)). In *Lanzetta*, the United States Supreme Court declared the term "known to be a gang member" within a New Jersey statute unconstitutional because it was vague and ambiguous. *Lanzetta*, 306 U.S. at 458.

230. See *Acuna*, 929 P.2d at 630. Justice Mosk quoted the appellate court which recognized that "a defendant could be engaged in of the activities prohibited in paragraph (a) with a person not known to him or to her but known to police as a gang member, and suffer penalties for refusing to obey the injunction." *Id.* at 630 (quoting *People ex rel Gallo v. Acuna*, 40 Cal. Rptr. 2d, 589, 598 (Cal. Ct. App. 1995)).

231. See *Acuna*, 929 P.2d at 629-31.

232. *Id.* at 630-31.

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when considered in context of the injunction.²³³ However, Justice Mosk concluded that the phrases “confronting,” “annoying,” “challenging,” or “provoking” were not sufficiently defined and included too much “ordinary social behavior.”²³⁴ Without further guidelines, the phrases invited impermissible arbitrary enforcement by police because a violation of the paragraph (k) relies on the individual sensitivity of a Rocksprings resident feeling annoyed, challenged or provoked.²³⁵ Hence, Justice Mosk declared that the vague terms paragraph (k) should have been found unconstitutional.²³⁶

Furthermore, Justice Mosk concluded that paragraph (a), which enjoined gang members from standing, sitting, walking, driving, gathering or appearing in public view with other gang members, was impermissibly overreaching by prohibiting more conduct than necessary.²³⁷ Justice Mosk complained that provision (a) applied without any requirement or condition that a defendant, or his or her associate, be engaged in any illegal activity or misconduct related to the public nuisance.²³⁸ According to Justice Mosk, a defendant:

233. *Id.* at 631 (citing *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 898 P.2d 402 (Cal. 1995)). Justice Mosk also noted that the phrases “harassing” and “intimidating” have been reaffirmed in several cases. For example, in *Shasta-Diablo*, anti-abortion protesters were enjoined from harassing persons entering a family planning clinic. See *Shasto-Diablo*, 898 P.2d at 402-12.

234. *Acuna*, 929 P.2d at 631.

235. See *id.* Justice Mosk relied on *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), where an injunction prohibited three or more persons from assembling on sidewalks and “annoying” passers by. The United States Supreme Court held the injunction unconstitutionally void for vagueness, reasoning:

The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be “annoying” to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is “annoying” because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.

Coates, 402 U.S. at 615-16.

236. See *Acuna*, 929 P.2d at 631.

237. See *id.* at 630.

238. See *id.*

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[s]hould not be subject to a contempt sanction for merely walking in, driving through, or 'appearing' in the Rock-springs neighborhood in the company of any "known" gang member without causing disruption. Such every-day conduct is not "injurious to health, . . . or . . . inde-cent or offensive to the senses, or an obstruction to the free use of property."²³⁹

By penalizing lawful, "everyday" conduct, Justice Mosk as-asserted that paragraph (a) extended further than "absolutely necessary to protect the lawful rights of the parties seeking such injunction."²⁴⁰

Finally, Justice Mosk expressed concern that the City pre-sented insufficient evidence to enjoin alleged VST gang mem-bers, Blanca Gonzalez, Miguel Moreno or Rafael Ruiz, who have admitted gang membership, been seen circling up and down a street outside of Rocksprings and were involved in drug deals in Rocksprings.²⁴¹ Like Justice Chin, Justice Mosk con-tended that the City should enjoin only those gang members who actively participated or intended to participate in future activity that, according to the terms of the injunction, created the public nuisance.²⁴² Justice Mosk maintained that the past conduct and the lack of future intentions of these three gang members did not amount to a public nuisance in Rock-springs.²⁴³

VI. CRITIQUE

Are the dissenters' concerns distinguishable?²⁴⁴ What im-pact will the injunction have on gang activity in the Rock-

239. *Id.* (quoting CAL. CIV. CODE § 3479) (omissions in *Acuna*).

240. *Acuna*, 929 P.2d at 630.

241. *See id.* at 631-33.

See supra note 110 for a discussion of the evidence against Blanca Gonzalez, Miguel Moreno and Rafael Ruiz.

242. *See id.* at 632.

See supra notes 220-27 and accompanying text for Justice Chin's dissenting opinion.

243. *See id.* at 632-33.

244. *See infra* notes 249-75 and accompanying text for a discussion of the dissent-ing opinions.

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springs neighborhood?²⁴⁵ Is the application of public nuisance law an appropriate response the social problem of gang-related crime and violence?²⁴⁶ What ramifications will this decision have on future applications?²⁴⁷ This critique addresses these questions in light of *People ex rel Gallo v. Acuna*.²⁴⁸

A. JUSTICES CHIN, KENNARD AND MOSK'S CONCERNS ARE DISTINGUISHABLE

Justice Mosk stated that provision (a), which prohibited gang members from "standing, sitting, walking, driving, gathering or appearing anywhere in public view" with any other VST member, was too burdensome and overreaching because it prohibited more conduct than necessary.²⁴⁹ However, the VST gang members were not selling lemonade or performing community service. Rather, the gang members dealt drugs, listened to offensive, loud music, blocked traffic, destroyed public and private property and physically and mentally intimidated the Rocksprings residents.²⁵⁰ To allow a gang member to loiter and consume alcohol, but not sit and drink, or to drive around the gang "turf," but not walk about their territory, would be absurd and fail to achieve the government's objective of abating the nuisance.²⁵¹ Hence, as the majority reasoned, all the terms of the injunction were necessary to end the conduct creating the public nuisance.²⁵² Therefore, paragraph (a) rightfully survived constitutional challenge.²⁵³

Justices Chin and Mosk were concerned about applying the injunction to gang members not actively contributing to the

245. See *infra* notes 276-87 and accompanying text for an evaluation of the injunction in Rocksprings.

246. See *infra* notes 288-96 and accompanying text for an analysis of applying public nuisance law to gangs.

247. See *infra* notes 298-302 and accompanying text for an outlook on future applications of public nuisance law.

248. *People ex rel Gallo v. Acuna*, 929 P.2d 596 (Cal. 1995).

249. See *supra* notes 228-31 and accompanying text for Justice Mosk's discussion of paragraphs (a) and (k).

250. See *Acuna*, 929 P.2d at 601.

251. See *supra* notes 189-201 and accompanying text for the majority's analysis of possible overreaching effects of the injunction.

252. See *Acuna*, 929 P.2d at 615-16.

253. See *id.*

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nuisance.²⁵⁴ According to *NAACP v. Claiborne Hardware*,²⁵⁵ such “guilt by association” is unconstitutional because it is not based on a showing of the individual’s specific intent to further the gang’s illegal aims.²⁵⁶ The dissenting Justices, however, may not be considering the dynamics of a criminal gang in its entirety when they oppose applying the injunction to gang members who may not have actively contributed to the nuisance.²⁵⁷ As the majority noted, the VST gang was a powerful collective which derived its strength and ability to dominate and intimidate the Rocksprings residents from the sheer number of its members.²⁵⁸ Even though the VST gang was a loose organization, its members supported each other by acting as a protective shield from dangers threatening the gang’s individual members.²⁵⁹ By claiming gang membership, an individual gave the gang collective strength and power in return for individual security and status.²⁶⁰ Thus, it was necessary to enjoin

254. *See id.* at 633. Justice Mosk wrote in his dissent:

The majority would permit our cities to close off entire neighborhoods to Latino youths who have done nothing more than dress in blue or black clothing or associate with others who do so; they would authorize criminal penalties for ordinary, nondisruptive acts of walking or driving through a residential neighborhood with a relative or friend.

Id.

255. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

256. *See id.* at 925.

See supra notes 220-27, 241-43 and accompanying text for Justice Chin’s and Justice Mosk’s discussion of applying the injunction to defendant’s who may not have the specific intent of furthering VST’s illegal activities.

257. *See supra* notes 84-99 and accompanying text for a description of the gang member’s collaborative efforts.

258. *See Acuna*, 929 P.2d at 615-16.

259. *See id.*

260. *See generally* Truman, *supra* note 12, at 701-02. Experts studying street gangs offer different theories to explain an individual’s attraction to gang membership. Some experts believed that the gang forms as a response to fear and anxiety about an individual’s social position. Others posited that young people, especially minorities, join gangs because of the denial of employment. Another group of experts suggested that the primary motivations behind gang membership were material gain, recreational or social benefits, refuge and physical protection, an expression of rebellion and/or a sense of commitment to their community and culture. *See id.*

See also 20th Century with Mike Wallace: Gangs in America (A&E television broadcast, Oct. 1, 1997). This documentary included several interviews with former gang members. When asked why they joined the gang, each former gang member responded differently. T. H. Kelly, member of Chicago’s High Supreme Gangster for 10 years, said, “I wanted to be hard... I didn’t know who I was at that time. I was reaching out for identity. Gangs provided symbolism, acceptance and belonging [which] made it attractive. [Gangs] gave love, power, recognition....” J. Ortega explained that “gangs show the love and affection lacking in the home. They are your family.” Along similar

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all members of a gang to abate the nuisance rather than selecting only those who gathered in front of the residents' homes or blocked traffic, as contended by the dissenters.²⁶¹ By dismantling the gang members' strength and control derived from public association, the VST members would not have the power they once flaunted and used to intimidate the Rocksprings residents.²⁶² To strip a gang of its power returns peace into the Rocksprings neighborhood.²⁶³

Another potentially problematic issue recognized by Justices Chin and Mosk was the process of identifying an individual as a gang member.²⁶⁴ Under the injunction, a defendant's gang membership was established either by his or her own admission or identification by another gang member, corroborated by police observation.²⁶⁵ Although rival gang members could misidentify other gang members out of spite or revenge, police corroboration should prevent such errors.²⁶⁶ Perhaps requiring stronger evidence of police corroboration of gang membership, such as requiring police to see the individual with other gang members on more than two different occasions within a particular time period, would prevent wrongful identification.²⁶⁷ To prevent further error, perhaps identified gang

lines, another gang member said, "my homeboys are the only people that will take me in." *See id.*

261. *See supra* notes 220-27, 241-43 and accompanying text for the dissenting opinions of Justices Chin and Mosk.

262. *See* Greg Moran, *Fighting Criminal Activity with Civil Law*, SAN DIEGO UNION-TRIB., Dec. 15, 1997, at A1. William Stuntz, Professor of Law at University of Virginia, remarked, "[w]hat you really want to do is not so much pack a few of these guys off to prison, (but) make it impossible for them to be a gang. ... Break them up, get them off the streets. Well, nothing in ordinary law and procedure allows you to do that." *Id.*

263. *See generally* Maura Dolan and Alan Abrahamson, *State High Court Allows Injunctions to Restrict Gangs*, L.A. TIMES, Jan. 31, 1997 at A1, A30.

264. *See supra* notes 220-27, 241 and accompanying text for Justice Chin's and Justice Mosk's discussion of the process used to identify gang members.

265. *See Acuna*, 929 P.2d at 623 n.1. Gang membership was confirmed by police when the individual was seen wearing clothing or tattoos which indicated gang affiliation or using hand signs, was named by two or more members of a gang as a gang member, was known to actively participate in a gang crime, was identified by a reliable informant as a gang member, or was observed associating with gang members on two or more occasions. *See id.*

266. *See id.*

267. *See* Interview with John P. Wilson, Professor of Law at Golden Gate University School of Law, in San Francisco, CA. (Oct. 23, 1997).

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members should be given notice and a chance to refute their gang member identification.²⁶⁸

Lastly, Justice Mosk stated that to impose knowledge of an associate's gang membership status was too great a burden on the defendant.²⁶⁹ Because the 150 to 200 member VST gang lacked an organized structural hierarchy, many of its members allegedly did not know one another.²⁷⁰ However, despite the VST's loose structure, the gang members often cooperated with one another in drug dealing and other illegal activities.²⁷¹ Even if a defendant did not know their associate on a personal level, it was likely that a defendant would know if he or she were associating with another gang member because of blatant identifying marks.²⁷² For example, the gang members were typically clad in blue and black clothing, used hand signs and symbols, marked their turf with graffiti and tagged property with their names, often including VST's symbol "13."²⁷³ Furthermore, the prosecution would have the burden of proving that the defendant knew the gang status of their associate.²⁷⁴ Hence, requiring the defendant to know the gang status of his or her associate is not unduly burdensome.²⁷⁵

B. THE INJUNCTION HAS HAD A POSITIVE IMPACT ON THE ROCKSPRINGS NEIGHBORHOOD

Before the injunction, Rocksprings residents were prisoners in their homes, held captive by the impending threat of violence and physical harm from the gang members.²⁷⁶ After nearly 500 arrests in 1992, the gang still controlled the area.²⁷⁷

268. *See id.*

269. *See supra* notes 230-31 and accompanying text for a discussion of Justice Mosk's dissent.

270. *See Acuna*, 929 P.2d at 624.

271. *See id.* at 615-16.

See supra note 85 for further evidence of gang member cooperation.

272. *See id.* at 624.

273. *Id.*

274. *See supra* notes 161-64 and accompanying text for the majority's discussion.

275. *See id.*

276. *See Acuna*, 929 P.2d at 601-02.

277. *See Maura Dolan and Alan Abrahamson, State High Court Allows Injunctions to Restrict Gangs*, L.A. TIMES, Jan. 31, 1997 at A1, A30.

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At least twelve percent of reported crime in the four-block neighborhood was possibly gang-related.²⁷⁸ In 1992, police were regularly called out to the Rocksprings area to investigate 494 reports of crime and violence, resulting in 388 arrests for drug crimes.²⁷⁹ "No matter how often officers patrolled the neighborhood, they couldn't wrest control from the territorial youths brandishing the color blue, the number 13 and the initials ... 'VST'..."²⁸⁰

After the implementation of the injunction, Rocksprings transformed.²⁸¹ Three months after the injunction was imposed, 911 emergency calls from Rocksprings residents dropped forty-five percent and narcotic crime arrests fell to sixteen, down from sixty-two arrests made three months prior to the injunction.²⁸² In 1994, one year after the injunction, arrests decreased by seventy-four percent and violent crime dropped by eighty-four percent.²⁸³ Crime did not shift or increase to other areas, as many critics predicted.²⁸⁴ Rocksprings residents re-

278. See *Acuna*, 929 P.2d at 624.

But see Respondent's Opening Brief, *supra* note 82, at 14 n.10. The City explained an uncertainty of the 12% reported crime statistic in their brief. The City stated that 33% of the total crime reports in Rocksprings revealed no indicia of being gang-related. In addition, 53% of the total arrests were exclusively narcotics violations with no documentation of being gang-related. Thus, it was unknown how many of the arrests were, in fact, gang-related. See *id.*

279. See Nick Anderson, *S.J. Cracks Down to Reclaim Gang Territory*, SAN JOSE MERCURY NEWS, Mar. 11, 1993 at 1B.

280. *Id.*

281. See generally Mike Cassidy, *S.J. Neighborhood on the Rebound*, SAN JOSE MERCURY NEWS, Sept. 15, 1993 at 1B.

282. See generally Bill Kisliuk, *Ganging Up on Crime*, THE RECORDER, July 11, 1995 at 1, 10.

283. See V. Dion Haynes, *L.A. Anti-Gang Plan: Three's Company, Four's Illegal*, CHI. TRIB., May 30, 1997, at N4. The article reported arrests and violent crimes decreasing by 74% and 81%, respectively, after the injunction. See *id.*

284. See Dara Akikotom, *Injunctions Keeping Gangs Dispersed*, THE DAILY RECORD, Aug. 19, 1997 at 15. The American Civil Liberties Union reported that crime increased in areas where injunctions are enforced. Authorities disagreed, stating that the increase in crime was attributable to increased police patrol in the area and greater frequency of reported crime because the residents were less intimidated to come forward. See *id.*

See also Raoul Mowatt, *The Injunction Dispute pits Public Safety Against Private Freedoms at a Crossroads*, SAN JOSE MERCURY NEWS, Aug. 21, 1995 at 1A. Additionally, crime decreased in the Rocksprings neighborhood because gang members have married, have jobs or have had a change in attitude. A gang member said, "[w]hen my gang was [in Rocksprings,] we destroyed this place. ... For me, I want to see the neigh-

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ported that they finally felt safe in their own homes.²⁸⁵ Gang members were rarely seen in the neighborhood.²⁸⁶ The melodic sounds of ice cream trucks and children were heard once again in Rocksprings.²⁸⁷

C. USING PUBLIC NUISANCE LAW TO ABATE GANG-RELATED ACTIVITY IS AN APPROPRIATE RESPONSE TO THIS SOCIAL PROBLEM

Crime statistics clearly indicate that traditional methods of law enforcement and prosecution have failed not only Rocksprings, but in other cities nationwide.²⁸⁸ Prosecuting a gang under the RICO Act requires tremendous resources and time.²⁸⁹ Although the STEP Act declares every building used by gang members for criminal purposes either a public or private nuisance, the Act falls short of dismantling the gang collective.²⁹⁰ In addition, the RICO Act and the STEP Act punish crime after it has been committed, after the rights of the victim have been violated and after the victim's physical and/or mental well-being has already been harmed.²⁹¹

borhood cool. I don't want to see any more shooting, any more fighting, any more gang members." *Id.*

285. See V. Dion Haynes, *L.A. Anti-Gang Plan: Three's Company, Four's Illegal*, CHI. TRIB., May 30, 1997, at N4. Sergeant Obos, supervisor of the San Jose Police Department's Hispanic Gang Crimes Section, reported that "[r]esidents felt so much safer" after the injunction was in force. *Id.*

286. See Mike Cassidy, *S.J. Neighborhood on the Rebound*, SAN JOSE MERCURY NEWS, Sept. 15, 1993 at 1B

287. See Maura Dolan and Alan Abrahamson, *State High Court Allows Injunctions to Restrict Gangs*, L.A. TIMES, Jan. 31, 1997 at A1, A30.

288. See *supra*, notes 15-46 and accompanying text for a discussion of the RICO Act and the STEP Act.

See also John Gibeaut, *Gangbusters*, A.B.A. J., Jan. 1998 at 64, 66. A 1995 Department of Justice Survey of 20% of the nation's law enforcement agencies reported 23,388 gangs with approximately 665,000 members. *See id.*

289. See generally Truman, *supra* note 12, at 724 n.228. Although RICO has been successfully employed against criminal street gangs, one commentator stated that RICO prosecutions can be time consuming and expensive in order to prove a criminal enterprise. Prosecutors must rely on wiretaps, informants and other gang members to build a RICO case. *See id.*

290. See *supra* notes 32-46 and accompanying text for a discussion of the STEP Act.

291. See *Acuna*, 929 P.2d at 607. As the majority stated, "[c]riminal prosecution is inadequate ... because it does not prevent the doing of the unlawful act. It may ultimately correct the wrong, but, while in the process of correction is going on, the public is deprived of an important and valuable right, wherefore the injury is irreparable." *Id.*

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The application of public nuisance law is an appropriate response to fight gang-related activity in Rocksprings.²⁹² Preventing gang members from congregating in public essentially strips them of their coercive ability to control and terrorize communities like Rocksprings.²⁹³ The injunction has allowed the Rocksprings residents to regain control of their homes and stabilize the neighborhood.²⁹⁴ As evidenced by the post-injunction crime statistics, violence and crime in the Rocksprings neighborhood have decreased dramatically.²⁹⁵ With further support from the state and its residents, the Rocksprings neighborhood can permanently develop into a neighborly, safe community.²⁹⁶

292. See generally Greg Moran, *Fighting Criminal Activity with Civil Law*, SAN DIEGO UNION-TRIB., Dec. 15, 1997, at A1. This article noted the recent development of civil remedies to a variety of crimes, such as prostitution, drug dealing, and gang violence. With the lower threshold of proof - preponderance of the evidence - civil remedies are considered more flexible and easier to apply by prosecutors. Injunctions also respond to the neighborhoods concerns about safety of public areas, such as parks, streets and sidewalks. Most importantly, when applied to a street gang, the injunction makes it difficult for individuals to be a criminal street gang by breaking them up and taking them off the street. See *id.*

293. See Gary Squire, *Perspective on Urban Decay*, L.A. TIMES, June 5, 1997 at B9. The author listed several ways to stabilize a neighborhood overridden with crime and decay. First one must "break the fever" of crime and violence in order for other corrective measures to have any lasting effect.

The key is to create a period of safety during which the seeds of stability can be planted. You need to push the bad guys out long enough to change the physical environment and to build a social infrastructure among residents and property owners that can resist gangs and crime in the future.

Id.

294. See Mike Cassidy, *S.J. Neighborhood on the Rebound*, SAN JOSE MERCURY NEWS, Sept. 15, 1993 at 1B.

295. See *supra* notes 277-87 and accompanying text for crime statistics before and after the injunction was enforced in Rocksprings.

296. See generally Gary Squire, *Perspective on Urban Decay*, L.A. TIMES, June 5, 1997 at B9. The author recommends additional strategies to transform a depressed urban neighborhood. For example, housing codes should be strictly enforced to prevent physical decline. "Physical decline sends a message that no one is watching there, no one cares; this is a safe place to commit crimes." In addition, cities should improve the infrastructure of decaying neighborhoods. Low-cost improvements, such as installing street lights, paving streets and improving recreational facilities can have a major impact on neighborhood quality and community safety. *Id.*

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D. FUTURE APPLICATION OF PUBLIC NUISANCE LAW

An American Civil Liberties Union attorney who represented the defendants in *People ex rel Gallo v. Acuna*²⁹⁷ predicted that this case would prompt a proliferation of public nuisance injunctions.²⁹⁸ Although the exact consequences are not known yet, cities across California and nationwide have used injunctions similar to *Acuna* to combat their own gang problems.²⁹⁹ Upon carrying out an injunction, each city noticed a marked decrease in crime, violence and intimidation by gang members.³⁰⁰

How far will public nuisance law be extended in the future? Theoretically, anything that falls into the statutory definition of a public nuisance can be enjoined.³⁰¹ Conduct or conditions that are injurious to health, are indecent or offensive to the senses, or interfere with the comfortable enjoyment of life or property by a community, may be enjoined.³⁰² Does this mean the neighbors of a fraternity house could secure an injunction against fraternity residents' noisy parties? Could local residents claim that noise from a newly erected child daycare center created a public nuisance? What about enjoining a neighbor from starting a hog farm? Keeping in mind the objective of

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

298. See Maura Dolan and Alan Abrahamson, *State High Court Allows Injunctions to Restrict Gangs*, L.A. TIMES, Jan. 31, 1997 at A1, A30.

See also John Gibeaut, *Gangbusters*, A.B.A. J., Jan. 1998 at 64, 66.

299. See *supra* note 115.

300. See Maura Dolan and Alan Abrahamson, *State High Court Allows Injunctions to Restrict Gangs*, L.A. TIMES, Jan. 31, 1997 at A1, A30. Residents from cities such as San Jose and Pasadena attested that since the injunction has been in place, a definite improvement in the quality of life has developed. See *id.*

See also Vicki Torres, *Pasadena Studies use of Civil Injunctions to Help Fight Gangs*, L.A. TIMES, May 11, 1995 at J3. Similarly, a 1994 injunction against twenty-two "Orange Street" gang members significantly reduced crime and violence. Before the injunction was imposed, police were summoned to the twenty-block gang-plagued neighborhood an average of eight times a day. After the injunction was imposed, police were called out to gang-related incidents only six times in six months. See *id.*

See also John Gibeaut, *Gangbusters*, A.B.A. J., Jan. 1998, at 64, 67. For example, two months after Los Angeles enforced an injunction against the 18th Street Gang, the police reported a 31% drop in serious crime. See *id.*

301. See CAL. CIV. CODE § 3479 (West 1997) and CAL. PENAL CODE § 370 (West 1988).

See *supra* note 2 for exact language of the civil and penal codes.

302. See *id.*

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abating a nuisance - protecting the rights of the community - public nuisance law appears to have limitless application possibilities.

VII. CONCLUSION

The majority in *Acuna* concluded, in addition to refraining from committing illegal acts, the named defendants could be enjoined from "standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other VST member" and from "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering and residents or patrons or visitors of Rocksprings."³⁰³ The court evaluated the gang's activities in Rocksprings and found that the gang was not engaging in protected First Amendment activity.³⁰⁴ Paragraphs (a) and (k) of the preliminary injunction were also found to not be unconstitutionally overbroad, vague or overreaching.³⁰⁵ Additionally, the court determined that the STEP Act was not the exclusive means of abating gang behavior as a public nuisance.³⁰⁶ In conclusion, the California Supreme Court found the conditions created by the defendant's activities constituted a public nuisance and upheld paragraphs (a) and (k).³⁰⁷

Is an injunction on criminal street gangs the answer? An injunction may be seen as a temporary remedy to an overwhelming problem.³⁰⁸ Certainly, more long-term educational support, alternative recreational activities and career training are all desperately needed in neighborhoods like Rocksprings to prevent and end gang activities.³⁰⁹ Law abiding citizens do not want to live in a world where a police officer stands at every corner, monitoring every activity. However, as communities

303. *Acuna*, 929 P.2d at 618-19.

304. *See id.* at 609.

305. *See id.* at 611, 614, 616.

306. *See id.* at 614.

307. *See id.* at 614-15, 618-19.

308. *See supra* note 284.

309. *See supra* notes 293, 296 for strategies a city may take to transform a depressed neighborhood.

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develop more preventive and remedial measures to end the plague of gang violence, society cannot just sit back idly and watch the destruction of people's lives and property.³¹⁰ In the meantime, as we relax comfortably behind the safe walls of the law school library or the leather recliner in our chambers or office, we cannot lose sight of the true victims in this case: the residents of Rocksprings.³¹¹ Swift and powerful action must be taken against those who destroy the peace and sanctity of what many call home.³¹²

*Bergen Herd**

310. *See id.*

311. *See* V. Dion Haynes, *L.A. Anti-Gang Plan: Three's Company, Four's Illegal*, CHI. TRIB., May 30, 1997, at N4. A resident living in a gang-infested neighborhood in Los Angeles commented, "I think the ACLU needs to get in tune with the gangs and the strife they cause. They need to experience what residents feel, the terror of being a prisoner in their own home." *Id.*

See also supra notes 81-99 and accompanying text for a description of life in the Rocksprings neighborhood with the VST gang before the injunction was enforced.

312. *See supra* notes 292-93.

* I would like to thank the never-ending support from my friends, family, editors, and law school faculty who have helped me develop my article. I could not have done it without you.