DePaul University
University Libraries

DePaul Law Review

Volume 69
Issue 4 *Summer 2020*

Article 4

Unfriending The First Amendment: Social Media, Courts, And Juvenile Gang Members In Chicago .

Nicholas F. Curta

UNFRIENDING THE FIRST AMENDMENT: SOCIAL MEDIA, COURTS, AND JUVENILE GANG MEMBERS IN CHICAGO

Introduction

Between 1999 and 2018, nearly 33,000 juveniles were arrested and labeled gang members by the Chicago Police Department.[1] Illinois juvenile courts, specifically in the First District (Cook County), are imposing probation orders against adjudicated delinquents that prohibit them from associating with gang members and posting gang-related content on their social media accounts. The Illinois Juvenile Court Act empowers the juvenile courts to issue these orders. The courts act in accordance with the doctrine of parens patriae—attempting to rehabilitate the juveniles and provide them with an opportunity for a safer life.[2] However, the probation orders infringe upon the juveniles' First Amendment rights of association and speech—and while the state may be able to put forth a sufficient compelling interest, the probation orders cannot be worded specifically enough to make them practically enforceable. Although the Illinois appellate courts have found these orders to be constitutional, the courts gave too little consideration to the practical application of the orders—calling into question whether or not the orders are narrowly tailored. Moreover, the practical effect of the probation orders may be working to exacerbate the socioeconomic factors that are attributed to youth gang involvement.

The Illinois appellate courts have done an admirable job in trying to correct the inadequacies of these juvenile court probation orders. However, given that better home conditions and social ties to role models may decrease the lure of gangs for juveniles, why do the courts believe that limiting contact with known or *suspected* gang members

1. Annie Sweeney & Paige Frye, *Nearly 33,000 juveniles arrested over last two decades labeled as gang members by Chicago Police*, Chicago Tribune (Aug. 9, 2018), https://www.chicagotribune.com/news/local/breaking/ct-met-chicago-police-gang-database-juveniles-20180725-story.html.

2. Black's Law Dictionary 1144 (8th ed. 2004) [hereinafter *Parens patriae*] ("The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves."); *see also Parens patriae*, Nolo's Plain-English Law Dictionary, https://www.nolo.com/dictionary/parens-patriae-term.html ("Latin for 'parent of his or her country.' The power of the state to act as guardian for those who are unable to care for themselves, such as children or disabled individuals. For example, under this doctrine a judge may change custody, child support, or other rulings affecting a child's well-being, regardless of what the parents may have agreed to.") (last visited Mar. 22, 2020).

on social media will lead to the juveniles avoiding them? Additionally, in the ever-growing world of social media technology, how can these probation orders be drawn sufficiently to avoid catching legitimate—and even helpful and rehabilitative—interactions in the net of regulation and prohibitions? This Comment will proceed as follows. Part I will introduce the gang problem in Chicago and discuss some of the reasons why juveniles join gangs and how previous legislation and ordinances have attempted to address the problem. This Part will also discuss how the juvenile courts in Illinois's First District attempt to curb juveniles gang involvement and contact on social media, and particularly how the First District appellate court has viewed these actions. Part II will argue that, while the court orders may pass a facial test of constitutionality under the First Amendment, in practice they are overbroad. Finally, Part III will introduce paths that courts can take to address the real socioeconomic causes of youth gang involvement. Ultimately, this Comment will show that while the probation orders being handed down in Cook County may, in certain circumstances, pass a facial challenge as supporting a compelling or substantial governmental interest, they are practically impossible and therefore are not narrowly tailored to the interest.

I. Background

The city of Chicago has been dealing with the increasing problem of street gang violence and youth involvement in gangs for several years.[3] Gangs are turning to social media to spread their message, communicate with members, and upload media depicting gang activity and affiliated acts. Gangs use social media to entice and taunt enemies, conceal drug dealing with emoji-text, and even broker peace deals with rival gangs.[4] Local governments, including Chicago's, are attempting to address the problem by issuing special probation orders to adjudicated delinquents. These orders restrict their social media activity relating to gang association and posting gang-related materials. The courts are attempting to keep adjudicated delinquents away from gangs in two distinct ways. Under the approach seen in *In re Omar F.,* courts attempt to construe probation orders as limiting adjudicated delinquents' association and contact with gang members on social media.[5] On the other hand, under the approach in *In re R.H.*, courts in-

3. Sweeney & Frye, *supra* note 1.

4. Michael Tarm, *Gangs Embrace Social Media With Often Deadly Results*, U.S. News & World Report (July 11, 2018), https://www.usnews.com/news/healthiest-communities/articles/2018-06-11/social-media-altering-street-gang-culture-fueling-violence.

5. *In re* Omar F., 89 N.E.3d 1023 (Ill. App. Ct. 2017).

terpret similar probation orders as restricting the type of content-based speech the adjudicated delinquents may exercise by stating that they cannot post gang-related content on their social media accounts.[6] While the courts are using their power under the Illinois Juvenile Court Act to impose such probation conditions, the orders bring up questions of First Amendment protections and jurisprudence—specifically the rights of association and free speech.

A. The Gang Problem in Chicago

The gang problem in Chicago has been a reality this city has been fighting for decades. The number of those involved and affected can be sobering, as well as the reasons why many youths are driven to gang life. This Section will attempt to briefly discuss the gang problem in Chicago and some of the reasons why juveniles may be attracted to gangs. First, this Section will introduce some of the statistics surrounding gangs in Chicago and then discuss their violent reality. The Section will conclude by mentioning some of the reasons why gangs are able to recruit many juvenile members.

1. Chicago Gang Statistics

Chicago has long had a problem with street gang activity associated with drugs and violent crime. Gang violence is predominant in many neighborhoods on the South and West Sides of the city.[7] For example, over a three-day weekend in the summer of 2018, at least seventy-four people were shot and injured from gun violence, leaving twelve dead.[8] Mass shootings in Chicago are often the result of gang violence, with rival gang members targeting one another.[9] The Chicago Police Department (CPD) compiles a list of individuals it has arrested and identified as gang members.[10] As of the fall of 2018, nearly 33,000 juveniles

6. *In re* R.H., 99 N.E.3d 29, 32 (Ill. App. Ct. 2017), *reh'g denied*, 99 N.E.3d 29 (Ill. App. Ct. 2018).

7. GREAT CITIES INST., UNIV. OF ILL. AT CHI., *The Fracturing of Gangs and Violence in Chicago: A Research-Based Reorientation of Violence Prevention and Intervention Policy* (Jan. 2019), https://greatcities.uic.edu/wp-content/uploads/2019/01/The_Fracturing_of_Gangs_and_Violence_in_Chicago.pdf.

8. Editorial Board, *Chicago's great shame, Chicago's Crisis: Blood on the streets*, CHICAGO TRIBUNE (Aug. 6, 2018), http://www.chicagotribune.com/news/opinion/editorials/ct-edit-violence-chicago-gangs-police-20180806-story.html [hereinafter Editorial Board].

9. *Id.*

10. Sweeney & Frye, *supra* note 1. The numbers in the Chicago Police gang list were recovered pursuant to a Freedom of Information Act request and are a source of controversy due to the tactics the police employed in maintaining the list, and to its accuracy. *Id.* However, the figures and article are used only to give a general understanding of the gang problem affecting juveniles in Chicago.

arrested since 1999 were labeled gang members by CPD.[11] The majority of the listed gang members were African Americans and Hispanics aged seventeen and younger.[12] Perhaps the most startling statistic is that 60 of the 33,000 juveniles were eleven years old at the time they were arrested and labeled as gang members.[13] The actual figure of juvenile gang members is unknown, but likely higher than the reported number, since CPD's list only includes juvenile gang members who have been arrested.[14] The juveniles are spread across 112 fragmented gangs, with membership ranging from 9,000 juveniles ascribed to the Gangster Disciples, to several gangs with only one juvenile member listed.[15] Many of the juvenile gang members are from historically poverty-stricken,[16] violent neighborhoods and join gangs for protection.[17]

2. A Violent Reality

Emergency room physicians and practitioners have described the hospitals in light of the raging gun violence as "a war zone."[18] The traffic of victims into the hospitals is so great in some areas that practitioners are often dismayed by the visits of "frequent fliers": "They're shot, you treat them, they shoot someone else, or they get shot again. You just saw them six months ago, and there they are on the stretcher . . . ."[19]

The numbers surrounding the gang and gun violence epidemic in Chicago are sobering. The *Chicago Tribune* has been keeping record of the number of homicides in Chicago since 2013, and the numbers are updated on a weekly basis.[20] There were 519 deaths ruled as homicides in Chicago in 2019[21] Over the course of the year, the large ma-

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Sweeney & Frye, *supra* note 1.
16. *See* CHICAGO DATA PORTAL, *Below Poverty Level by Community*, https://data.cityofchicago.org/Health-Human-Services/below-poverty-level-by-community/b7zw-zvm2 (showing poverty statistics for Chicago broken down by neighborhood) (last visited Apr. 11, 2020).
17. *Id.*; James C. Howell, *Gang Prevention: An Overview of Research and Programs*, JUV. JUST. BULL., Dec. 2010, at 4, https://www.ncjrs.gov/pdffiles1/ojjdp/231116.pdf.
18. John Kass, *ER workers on Chicago gang violence: 'We're in a war zone too*,' CHICAGO TRIBUNE (May 8, 2018), http://www.chicagotribune.com/news/columnists/kass/ct-met-chicago-violence-kass-0509-story.html.
19. *Id.*
20. *Tracking Chicago homicide victims*, CHICAGO TRIBUNE (Mar. 26, 2020), http://www.chicagotribune.com/news/local/breaking/ct-chicago-homicides-data-tracker-htmlstory.html.
21. *Id.*

jority of the victims were African Americans.[22] The majority of those killed were males between the ages of eighteen and thirty-five.[23] As of March 12, 2020, there were eighty-nine homicides during the year in Chicago, which was twenty-eight more at that point than 2019.[24]

3. Why Gangs?

Juvenile gang involvement and the resulting cycle of illegality and violence are often tied to the juveniles' living and learning environments.[25] Some argue that the perpetuating cycle of violence is the result of "the culture" of the city.[26] CPD's chief of patrol, Fred Waller, has offered the theory that "Chicago's terrible tradition of gun violence is connected to many aspects of life in struggling pockets of the South and West sides."[27] Waller stated that a lack of "role models" in these neighborhoods precipitates the cycle of gang involvement and thus gang violence—"[t]hat's the life they know."[28] The most commonly recognized factors that tend to lead to gang involvement in general include poor home and social climates, substance abuse, and personality characteristics.[29] Juveniles often turn to gangs for the possibility of making money, especially as many who choose gang life come from poorer homes and communities than the average citizen.[30] Often associated with the poverty factor in gang involvement is the fact that many juveniles drawn to gangs have a relation to substance abuse.[31] Substance abuse has been found to influence adolescents' decisions to reach out to gangs in their communities and join them.[32] It has been argued that substance abusers are likely to magnify their reactive criminal thinking due to drug-created neurological effects that affect their decision-making and behavioral inhibitions.[33] There has

22. *Id.*

23. *Id.*

24. *Id.*

25. Kyung H. Kim & Robert J. Kipper, *Creativity and Gangs: Who Joins Gangs and Why? A Critical Review of the Literature*, 2 WORLD J. OF BEHAV. SCI. 12, 12 (2016).

26. Editorial Board, *supra* note 8.

27. *Id.*

28. *Id.*

29. Kim & Kipper, *supra* note 25, at 12–14 ("Adolescents who have Type-T personality might be attracted to gangs. Individuals who have Type-T personality include those who seek thrills (T), stimulation, excitement, attention, and arousal. They tend to be risk takers, have unruly behavior, and get into more trouble.").

30. Howell, *supra* note 17, at 7.

31. Kim & Kipper, *supra* note 25, at 13.

32. *Id.*

33. *Id.* Reactive criminal thinking simply refers to criminal behavior that is a reaction to, or a result of, a given situation or environment.

also been reason to link alcohol use, marijuana use, violent behavior, and gang membership together.[34]

Furthermore, juvenile violence is associated with witnessing violence in the home among parents, as well as being surrounded by a violent culture at school.[35] It seems that growing up in a violent culture and being surrounded by a group of older, violent individuals prevents the juvenile from interacting with positive role models. These factors, among others, have combined to lead to the large number of individuals involved in gang contact not only in the United States, but specifically in Chicago.[36]

B. Social Media and Gang Activity

Social media has become an increasingly prominent tool for gang-related communications, recruitment, and activity—"Facebook, Twitter, Instagram, and other sites have 'radically altered' gang culture in Chicago."[37] Rodney Philips, a gang-conflict mediator in the Englewood neighborhood, stated: "These days, there's nearly always a link between an outbreak of gang violence and something online . . . ."[38] Gangs have been known to place "a premium on retaliation for perceived disrespect" and, with the advent of social media, comments that were once only heard through word of mouth in the neighborhood are now available to the masses.[39] Some gangs will provoke rivals by "streaming [a] live video showing them walking through rival turf. Others face off using a split-screen function on Facebook Live and hurl abuse at each other."[40] Furthermore, this type of "internet banging" includes gang-related behaviors such as: "(1) promoting one's gang affiliation; (2) reporting one's part in a violent act; and (3) networking with gang members across the country."[41] Gangs use social media to broaden their criminal network, while also using the platforms to build "tough personas" and map out locations for violence.[42] While gang members use social media to further their illicit

34. *Id.*

35. *Id.* at 12–13.

36. *See* Howell, *supra* note 17.

37. Michael Tarm, *Social media altering Chicago street-gang culture, fueling violence*, CHICAGO SUN-TIMES (June 11, 2018), https://chicago.suntimes.com/news/social-media-street-chicago-gang-culture-fueling-violence/.

38. *Id.*

39. *Id.*

40. *Id.*

41. Desmond U. Patton et al., *Gang violence on the digital street: Case study of the South Side of Chicago gang member's Twitter communication*, NEW MEDIA & SOC'Y 1, 2 (Jan. 26, 2016).

42. *Id.*

agendas, police are attempting to use this internet activity to track and monitor gangs.[43]

C. Previous Efforts to Combat Gang Violence and Culture

Previous governmental actions have attempted to attack gang culture and reduce the public interactions and displays of gang affiliations, all of which have come into conflict with the First Amendment. This Section will discuss previous actions that have attempted to combat youth gang involvement—specifically dress codes and anti-loitering ordinances.

1. Dress Codes

Wearing gang-oriented clothing, including certain religious symbols, is a primary target of some schools and government agencies in reducing the allure and activity of gangs among juveniles.[44] In an attempt to curtail gangs' attraction and control gang activity, cities and towns have imposed curfews, passed "no loitering" ordinances, and even targeted "outward manifestations" of gang membership, imposing dress codes and prohibiting the wearing of colors, insignias, and some religious symbols.[45] The municipal governments argued that the prohibition on wearing gang colors and insignia would reduce the force of the gangs' public persona and presence.[46] These actions were often challenged on constitutional grounds.

The United States Supreme Court noted that "speech" includes not only written or spoken conduct but also expressive conduct, and most courts in judging these dress codes and restrictions used the "incitement" test in judging speech restrictions—"allowing speech to continue until it reaches a point just short of incitement to violence or other illegal action."[47] This test provided the legal foundation many of these towns used to argue for dress codes.[48] Although it has also been argued that school dress codes are symbolic speech, and therefore protected under the First Amendment, they are not considered fully protected today.[49] In order to impose restrictions upon a student's freedom of expression (what can be considered "gang" dress), the

43. Megan Behrman, *When Gangs Go Viral: Using Social Media and Surveillance Cameras to Enhance Gang Databases*, 29 HARV. J.L. & TECH. 315, 320 (2015).

44. Ann Kordas, *Losing My Religion: Controlling Gang Violence Through Limitations on Freedom of Expression*, 80 B.U. L. REV. 1451, 1453–55 (2000).

45. *Id.* at 1454.

46. *Id.* at 1455.

47. *Id.* at 1462–63.

48. *Id.*

49. *Id.* at 1487–88, 1464–65.

school or town must show the expression poses a "threat to the order or the educational mission of the school."[50] Furthermore, schools can prohibit protected freedoms of expression "only if they actually cause substantial disruption or pose imminent threat of disruption."[51] While dress code provisions may still be implemented to some extent today, there is conflicting data on the effectiveness of such regulations.[52]

2. Anti-Loitering Ordinance

Chicago has also attempted to combat gang activity with the use of "anti-loitering" ordinances.[53] In 1992, Chicago enacted its first Gang Congregation Ordinance.[54] The ordinance prohibited gang members from loitering in public places and allowed police officers to order "a person who he reasonably believed to be a criminal street gang member" to disperse from the area.[55] The ordinance further stated that loitering was to be defined as "remain[ing] in any one place with no apparent purpose."[56] The Supreme Court of the United States, in *City of Chicago v. Morales*, held that the ordinance was unconstitutionally vague, and the language of the statute failed to provide an ordinary person with an understanding of what constituted criminal conduct.[57] Furthermore, the Court was afraid that the "no apparent purpose" language would give police an impermissible level of decision-making in issuing a dispersal order.[58] In response to the Court's decision in *Morales*, Chicago revised its Gang Congregation Ordinance in 2000, reflecting the language in Justice Sandra Day O'Connor's concurring opinion.[59] The revised ordinance allows police to disperse anyone engaged in gang loitering in a public place, defines gang loitering, and specifies how one can properly comply with a dispersal order.[60] However, there are questions surrounding the effectiveness of the revised ordinance and whether or not it solves the vagueness problem stated

50. Kordas, *supra* note 44, at 1464.
51. *Id.* at 1465.
52. *See generally id.*
53. Jane Penley, *Urban Terrorists: Addressing Chicago's Losing Battle with Gang Violence*, 61 DEPAUL L. REV. 1185, 1194 (2012).
54. *Id.* at 1189–90.
55. *Id.*
56. *Id.*
57. *Id.* at 1191.
58. *Id.*
59. Penley, *supra* note 53, at 1192.
60. *Id.*; CHI., ILL., MUN. CODE § 8-4-015(d)(1) (2004) ("'Gang loitering' means remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.").

by the Court in *Morales*.[61] Even though the terms were more narrowly defined, the statute was still open to varying interpretations.[62]

D. The Judicial Court Act as a Foundation for Curtailing Gang Contact

This Section discusses the procedural components of the Illinois Juvenile Court Act (JCA) and an adjudicated delinquent's path to receiving a probation order or conditional discharge, as well as their rights to appeal. This Section then looks to Illinois case law to show how the courts have interpreted the provisions of the JCA and the interests that the Act acknowledges as significant for implementing restrictive probation conditions.

1. Procedure and Structure

The JCA provides an outline of options relating to the procedure for handling adjudicated delinquents post-conviction and potential treatment options the court may impose.[63] After a juvenile has been found guilty of a crime, she appears before the court for a sentencing hearing, where both sides present evidence of mitigation and aggravation.[64] The judge then lays out her reasoning for the record if there is to be a commitment to the Department of Juvenile Justice.[65] In order to adequately weigh the factors supporting different lengths and types of sentences, the court will order a social investigation report that is provided to the parties at least three days prior to the hearing.[66] The report will detail the minor's pertinent characteristics for purposes of sentencing, including:

> [P]hysical and mental history and condition, family situation and background, economic status, education, occupation, personal habits, minor's history of delinquency or criminality or other matters which have been brought to the attention of the juvenile court, information about special resources known to the person preparing the report which might be available to assist in the minor's rehabili-

61. Penley, *supra* note 53, at 1202.

62. *Id.*

63. *See* 705 ILL. COMP. STAT. 405/5-1–405/5-925 (2019). A "delinquent minor" is defined by the Juvenile Court Act as "any minor who prior to his or her [eighteenth] birthday has violated or attempted to violate, regardless of where the act occurred, any federal, State, county or municipal law or ordinance." 405/5-105(3). "Minor" refers to a person under the age of twenty-one years. 405/5-105(10). The Act also provides for procedures other than post-conviction handling.

64. 405/5-705.

65. 405/5-705.

66. 405/5-701.

> tation, and any other matters which may be helpful to the court or which the court directs to be included.[67]

The judge uses the report at sentencing to determine the best path for the adjudicated delinquent in an effort to ensure that the goals of rehabilitation are met, or at least strived for.[68]

If a juvenile court deems it appropriate, the court may place the adjudicated delinquent on probation or conditional discharge and release her to her parent, guardian, or legal custodian.[69] The statute states that "the court may as a condition of probation or of conditional discharge require that the minor [among several other provisions]: refrain from having contact, directly or indirectly with certain persons or particular types of persons, including but not limited to members of street gangs and drug users or dealers . . . ."[70] The court may also, at its discretion, order the juvenile to "comply with other conditions" it may order.[71] Illinois juvenile courts have used these two provisions to enact probation orders, such as the one ordered in *In re Omar F.*:

> You're to stay away from gangs, guns, and drugs. You need to clear those from your social media. If you have gang members as friends, you need to stop hanging out with them.
>
> I don't want to see any pictures of you and your friends on Facebook or any other social media if those people are in gangs.
>
> I'm not sure if you're a gang member or if you're just an associate of gangs. I see and hear that there is some contradictory information. I don't care.
>
> One way or the other—I mean it would be nice if you're not a gang member—but if you are now, I can't change that. But you're going to need to change who you're hanging out with, otherwise you can get in trouble on my probation.[72]

The Illinois circuit courts have the ability to limit or prohibit the contact of an adjudicated juvenile on probation with gang members or drug dealers.

---

67. 405/5-701.

68. 405/5-705.

69. 705 ILL. COMP. STAT. 405/5-710(1)(a)(i) (2018).

70. 405/5-715(2)(s).

71. 405/5-715(2)(u). The probation decisions, as well as other sentencing provisions imposed, are appealable as a matter of right to the appellate court in the district in which the sentencing court is located. 705 ILL. COMP. STAT. 25/8.1 (2018).

72. *In re* Omar F., 89 N.E.3d 1023, 1031–32 (Ill. App. Ct. 2017). This probation order will be discussed more extensively later in the Comment but has been placed here for illustrative purposes.

2. Illinois Courts' Interpretation

Illinois courts have also stated that the juvenile courts may impose probation restrictions outside of those enumerated in the statutes. Probation restrictions outside of those enumerated in the statute must be both reasonable and bear some connection to either the underlying crime or the behavior to be corrected.[73] The courts have noted that "a probation condition (whether explicitly statutory or not) is reasonable if the juvenile court believes the condition would be a good idea and the record contains no indication that the court's imposition of the condition is clearly unreasonable."[74]

The Illinois Supreme Court has consistently recognized that probation involves the curtailment of certain liberties due to its nature following a criminal adjudication, and juvenile defendants, because of their age, are afforded lesser rights than adults.[75] Furthermore, the Illinois Supreme Court noted in *Deerfield v. Greenberg*:

> The Court has long recognized that the status of minors under the law is unique in many respects . . . . We have recognized three reasons for justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.[76]

Specifically, in the realm of street gangs, Illinois's Streetgang Terrorism Omnibus Prevention Act states:

> [S]treetgangs are often controlled by criminally sophisticated adults who take advantage of our youth by intimidating and coercing them into membership by employing them as drug couriers and runners, and by using them to commit brutal crimes against persons and property to further the financial benefit to and dominance of the street gang.[77]

The Illinois Supreme Court has also recognized the detriment to society that street gangs pose.[78] This line of reasoning provides a basis for juvenile courts to reasonably believe they have the power to impose probation conditions that target youth involvement in gangs, in hopes

73. *In re* R.H, 99 N.E.3d 29, 33 (Ill. App. Ct. 2017).

74. People v. Hugo G., 750 N.E.2d 247, 256 (Ill. App. Ct. 2001) (quoting *In re* M.P., 697 N.E.2d 1153, 1156 (Ill. App. Ct. 1998)).

75. *See* People v. Chambers, 360 N.E.2d 55, 57 (Ill. 1976) (upholding constitutionality of curfew state and recognizing limits on minors' rights).

76. Deerfield v. Greenberg, 550 N.E.2d 12, 16 (Ill. App. Ct. 1990) (quoting Bellotti v. Baird, 443 U.S. 622, 633–34 (1979)).

77. 740 ILL. COMP. STAT. 147/5(c) (2018).

78. People v. Strain, 742 N.E.2d 315, 320 (Ill. 2000) ("street gangs are regarded with considerable disfavor by other segments of our society").

of having a positive impact on the juvenile's future. If a juvenile fails to adhere to the probation conditions, the court may: (1) order the juvenile to appear before the court, or (2) "order the minor's detention if the court finds that the detention is a matter of immediate and urgent necessity for the protection of the minor or of the person or property of another or that the minor is likely to flee the jurisdiction of the court . . . ."[79]

E. The First Amendment: Speech and Association

The juvenile probation orders issued in Cook County implicate the First Amendment principles of the rights of association and free speech. This Section will explore the development of the constitutional right of association in order to give context to the First District of Illinois's case analysis, and then discuss the basic framework in which the right has been construed and applied. The Section will also introduce the protections content-based speech is afforded under the First Amendment.

1. The Right of Association

When looking at the fundamental social interactions that provide the basis of the right of association, the Court has noted that social contacts that do not occur in the context of an "organized association" may be unprotected.[80] Two main cases described how associational rights may be "burdened by nondiscrimination requirements."[81] In *Roberts v. United States Jaycees*, the Court upheld the decision of the appellate court to use the Minnesota Human Rights Act to prohibit the Jaycees from limiting full membership in their organization to men.[82] The Court stated "the local chapters of the Jaycees are large and basically unselective groups," with age and sex being the only established membership criteria.[83] The Court concluded that the Jaycees, therefore, "lack the distinctive characteristics that might afford constitutional protection to their members' decision to exclude women."[84] In previous opinions, the Court made clear that "a right to

79. 705 ILL. COMP. STAT. 405/5-720(1)(a)–(b) (2018).

80. *Right of Association*, LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, https://www.law.cornell.edu/constitution-conan/amendment-1/right-of-association (last visited Mar. 22, 2020) [hereinafter *Right of Association*].

81. *Id.*

82. 468 U.S. 609, 631 (1984); *Right of Association*, *supra* note 80.

83. *Jaycees*, 468 U.S. at 621; *Right of Association*, *supra* note 80.

84. *Jaycees*, 468 U.S. at 621; *Right of Association*, *supra* note 80 (some of these characteristics include "small size, identifiable purpose, selectivity in membership, perhaps seclusion from the public eyes").

associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion"—"is protected against unreasonable burdening . . . ."[85]

The test for restrictions on the right of association was articulated in *Jaycees*: "Infringements on [the right of association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[86] The Court recognized a long-standing right to engage in activities that are protected by the First Amendment, and implicit to that right is a corresponding right "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[87] In *Jaycees*, the Court stated that the government's interest in eliminating discrimination was unrelated to the suppression of expression and "serve[d] compelling state interests of the highest order."[88]

The *Jaycees* test was reaffirmed, and elaborated upon, as the right of association test by *Boy Scouts of America v. Dale* in 2000.[89] In *Dale*, the Court also stated the test for whether a group is protected by the First Amendment's expressive associational right.[90] In order to be protected by the right, the Court must determine the threshold question of whether the group engages in "expressive association."[91] First Amendment protection "of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private."[92]

2. Content-Based Speech and Incidental Effects on Speech

The First Amendment protects speech from regulations and statutes that are deemed to be "content-based"—a principle that is at the very foundation of the Amendment's protections.[93] The Supreme Court has stated that the First Amendment carries the understanding that "government has no power to restrict expression because of its mes-

85. *Jaycees*, 468 U.S. at 618; *Right of Association*, *supra* note 80.

86. *Jaycees*, 468 U.S. at 623.

87. *Jaycees*, 468 U.S. at 622.

88. Roberts v. United States Jaycees, 468 U.S. 609, 624 (1984).

89. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

90. *Id.*

91. *Id.*

92. *Id.*

93. Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 201 (1994).

sage, its ideas, its subject matter or its content."[94] The Court, in *Simon and Schuster, Inc. v. New York State Crime Victims*, stated that the First Amendment prohibits content-based restrictions on speech unless the government's regulation can pass strict scrutiny—the regulation is necessary to achieve a compelling governmental interest.[95] The Court applies strict scrutiny to regulations that "suppress, disadvantage, or impose differential burdens on speech because of its content" while applying an intermediate level of scrutiny to content-neutral regulations.[96]

In 2015, the Supreme Court in *Reed v. Town of Gilbert* laid out the test for determining whether a given regulation on speech is protected under the Amendment in a multi-level process.[97] First, the Court must determine whether the regulation is content-based or content-neutral. Government regulation of speech is "content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[98] The Court went on to state:

> Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.
>
> Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "'justified without reference to the content of the regulated speech,'" or that were adopted by the government "because of disagreement with the message [the speech] conveys . . . ." Those laws, like those that are content based on their face, must also satisfy strict scrutiny.[99]

Once a regulation has been determined as content-based, the Court will apply strict scrutiny to determine whether the restriction is narrowly tailored to achieve a compelling state interest, and the regulation cannot be over- or under-inclusive in its application.[100] A

---

94. *Id.*

95. *Id.*

96. *Id.* at 202 (quoting Turner Broad. Sys. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 642 (1994)).

97. 135 S. Ct. 2218 (2015).

98. *Id.* at 2227.

99. *Id.* (internal citations omitted).

100. *Id.* at 2231–32. The Court in *United States v. O'Brien* stated:

> [A content-neutral] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

regulation can neither be vague nor overbroad, which would defeat the narrow-tailoring prong of the test.[101] Lastly, there are defined categories of unprotected speech—fighting words,[102] obscenity,[103] and promoting illegal activity[104]—that the government may regulate without the need to satisfy a high level of scrutiny, if any level of scrutiny at all.

The Court, in *United States v. O'Brien*, provided an additional wrinkle to the determination of which standard of scrutiny to apply to conduct-related expression.[105] *O'Brien*'s most significant contribution to the analysis of speech-related jurisprudence was determining the test for regulations that are content-neutral on their face.[106] The Court also addressed the issue of regulations of conduct that have incidental effects on speech.[107] In order to be valid and not abridge the First Amendment, conduct regulations with incidental effects on speech must further an important or substantial governmental interest unrelated to the suppression of free expression and restrict no more speech than necessary to further that interest.[108]

F. Illinois's Court Orders Against Social Media Gang Contact and Content

The circuit courts of Illinois have submitted sentencing orders addressing adjudicated juveniles' use of social media to contact gang members and display gang content. The Illinois Appellate Court for the First District has upheld some orders,[109] while reversing others.[110] This Section will first look to guiding Illinois Supreme Court precedent to illustrate how the courts have interpreted the JCA and applied constitutional tests in determining their validity. The section will then

391 U.S. 367, 377 (1968).

101. *See* Gooding v. Wilson, 405 U.S. 518, 521 (1972) (quoting Coates v. City of Cincinnati, 402 U.S. 611, 619–20 (1971) (White, J., dissenting)).

102. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

103. *See* Miller v. California, 413 U.S. 15, 36–37 (1973).

104. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 (1976).

105. *O'Brien*, 391 U.S. at 376–77.

106. United States v. O'Brien, 391 U.S. 367, 377 (1968).

107. *Id.* at 367–77.

108. *Id.*

109. *See generally In re* Jawan S., 121 N.E.3d 1002 (Ill. App. Ct. 2018); *In re* Elijah H., No. 1-17-2059, 2018 WL 3244654 (Ill. App. Ct. June 29, 2018).

110. *See generally In re* Tyreese J., No. 1-17-1072, 2017 WL 6210750 (Ill. App. Ct. Dec. 6, 2017); *In re* Carlos G., No. 1-17-1953, 2018 WL 1785553 (Ill. App. Ct. Apr. 11, 2018); *In re* J'Lavon T., 117 N.E.3d 230 (Ill. App. Ct. 2018); *In re* K.M., 117 N.E.3d 347 (Ill. App. Ct. 2018); *In re* V.H., No. 1-17-1952, 2018 WL 3244836 (Ill. App. Ct. 2018); *In re* Phazahn D., No. 1-18-0331, 2018 WL 3375064 (Ill. App. Ct. 2018).

discuss *In re Omar F.*'s right of association analysis and *In re R.H.*'s content-based speech analysis.

1. Illinois Supreme Court

There is currently no guiding Illinois Supreme Court case that governs social media no-contact or content probation orders for adjudicated juveniles. It is therefore necessary to look to analogous orders and how the courts respond to constitutional challenges against them. The Illinois Supreme Court has ruled on cases in which the juvenile courts have imposed geographic conditions on the juvenile.[111] The court in *In re J.W.* addressed a circuit court's juvenile probation order restricting the geographic area the juvenile was legally allowed to enter.[112] The court in *J.W.* ruled on an appeal from a case in which the twelve-year-old juvenile delinquent admitted to aggravated criminal sexual assault.[113] J.W. was sentenced to five years of probation and the court imposed, as one of two conditions of his probation order, that he could not visit or reside in South Elgin, Illinois—the location of his crimes.[114] In imposing the geographical restriction, the circuit court relied on JCA's probation section, which allows the court to order the juvenile to "refrain from entering into a designated geographic area *except upon terms as the court finds appropriate*."[115] J.W. appealed the ruling, arguing that "prohibiting J.W. from residing in or visiting South Elgin as a condition of probation [was] overly broad and void."[116] The basic premise of the appeal was that the restrictions were constitutionally overbroad and therefore invalid.[117]

The decision in *J.W.* acknowledged that juvenile courts have "broad discretion to impose probation conditions, whether expressly allowed by statute or not, to achieve the goals of *fostering rehabilitation and protecting the public*."[118] While the courts take a somewhat broad approach in determining the appropriate conditions related to these goals, the supreme court in *J.W.* stated that the "court's discretion is limited by constitutional safeguards and must be exercised in a rea-

111. *In re* J.W., 787 N.E.2d 747 (Ill. 2003), *reh'g denied*, 540 U.S. 873 (2003).

112. *Id.* at 750–51.

113. *Id.* at 750.

114. *Id.* at 750–51.

115. *Id.* at 762; 705 ILL. COMP. STAT. 405/5-715(2)(r) (West 2000) (The geographical restriction section of the statute remains good law today.).

116. *In* re J.W., 787 N.E.2d 747, 750–51, 761–62 (Ill. 2003), *reh'g denied*, 540 U.S. 873 (2003) (The court also imposed a condition on J.W. that he need to register as a sex offender, J.W. appealed the condition as well. The supreme court noted that this was not an erroneous condition.).

117. *Id.* at 763.

118. *Id.* (emphasis added).

sonable manner."[119] The courts are limited by the rights enumerated and implied from the U.S. Constitution, and by a reasonable standard set forth by the court itself. The court further stated that in order to be reasonable, the probation condition may not be overly broad: "a condition of probation must not be overly broad when viewed in the light of the desired goal or the means to that end."[120] The court narrowed its definition of reasonable:

> Where a condition of probation requires a waiver of precious constitutional rights, the condition must be narrowly drawn; to the extent it is overbroad it is not reasonably related to the compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights.[121]

The supreme court further elaborated on the reasonableness requirement of probation conditions in the context of *J.W.*— a context which the courts have extrapolated to other conditions enumerated and derived from the probation section of the JCA.[122] The relationship requirement of the condition, the crime, and the rehabilitative or public safety purpose ensures that such purpose outweighs any impairment of the individual's constitutional rights of "freedom of travel, speech, association, assembly and to the possession and enjoyment of her property."[123] The court set forth a two-part analysis for determining the reasonableness of the condition: (1) relationship to the offense and (2) the practical implications and wording of the condition in regard to the breadth of the restriction.[124] The court found the condition was reasonably related to the offenses due to its nature and the public attitude toward J.W.[125] The children who were victims of J.W.'s sexual crimes resided in the same neighborhood as J.W.[126]

After determining that the condition was adequately related to the offense, the court stated that the condition that J.W. not be allowed to

---

119. *Id.*

120. *Id.* at 764.

121. *Id.* at 763–64 (quoting *In re* White, 158 Cal. Rptr. 562, 565 (Cal. Ct. App. 1979)) In considering the reasonableness of the condition, the court should also consider:

> (1) whether the condition of probation reasonably relates to the rehabilitative purpose of the legislation, (2) whether the value to the public in imposing this condition of probation manifestly outweighs the impairment to the probationer's constitutional rights, and (3) whether there are any alternative means that are less subversive to the probationer's constitutional rights, but still comport with the purposes of conferring the benefit of probation.

In re J.W., 787 N.E.2d 747, 764 (Ill. 2003), *reh'g denied*, 540 U.S. 873 (2003).

122. *Id.*

123. *Id.* at 764 (quoting People v. Beach, 195 Cal. Rptr. 381, 387 (Cal. Ct. App. 2003)).

124. *Id.* at 764–65.

125. *Id.*

126. *Id.*

enter the area "for *any* purpose is a condition of probation which is not narrowly drawn and, thus, an unconstitutionally overbroad restriction on J.W.'s exercise of his fundamental rights."[127] A total restriction on an adjudicated individual's ability to travel to a given location in all conceivable situations was ruled by the court to be impermissibly broad. The reasonableness standard applies to this prong of the analysis as well.[128] The court stated, in regard to a travel restriction, that the condition is reasonable and not overly broad "only if (1) there is a valid purpose for the restriction, and (2) there is a means by which the probationer may obtain exemption from the restriction for legitimate purposes."[129] The showing of a legitimate purpose for breaking the condition—and the court's allowance of such exceptions—"removes the taint" of the restriction and allows for a supervised permissive action that would otherwise be restricted by the probation order.[130] The Illinois Supreme Court noted that in order for the probation condition to survive judicial scrutiny, the condition must be "narrowly drawn."[131] The reasonable standard and legitimate purpose exception detailed in *J.W.* calls for a narrow probation order which allows for exceptions to a restriction when the defendant can put forth evidence of a legitimate purpose.

2. Illinois First Appellate District

The Illinois First Appellate District has looked to apply the *J.W.* reasonableness standard in cases that contain probation orders limiting the associational rights of juveniles with gang members. The Illinois First District appellate courts have also moved away from the *J.W.* standard in instances where the probation orders contain restrictions on the type of content that can be posted on social media.

a. In re Omar F.

Omar F. relies heavily on the reasonable relationship and legitimate purpose standard set forth in *J.W.*[132] Omar F. robbed his victim at

127. *In re J.W.*, 787 N.E.2d at 765 (emphasis in original).

128. *Id.*

129. *Id.* (The court noted: "[a] court may, as a condition of probation or other sentence short of incarceration, bar a defendant from certain areas if the penalty is reasonably related to the offense, *provided* that, if the defendant has a legitimate and compelling reason to go to that area or place, he may apply to a specified authority for specific permission, as here to the probation officer." (emphasis in original) (quoting People v. Pickens, 542 N.E.2d 1253, 1256–57 (Ill. App. Ct. 1989)).

130. *Id.* at 765.

131. *Id.*

132. *In re* Omar F., 89 N.E.3d 1023, 1023 (Ill. App. Ct. 2017).

gunpoint while using a shirt to cover his face.[133] He was convicted of armed robbery with a firearm and was sentenced to thirty-six months of probation with various conditions.[134] During the dispositional hearing, the social investigation report concluded that Omar F. relied heavily on his father and his older brother.[135] Furthermore, the report found that while Omar F. denied gang involvement himself, he acknowledged that his friends were involved in the Black Peace Stones gang.[136] The court imposed a probation order under its authority in the JCA and ordered Omar F. not to associate with any gang members on social media and remove all drug- and gang-related content from his social media pages.[137] The written dispositional order contained a checkmark next to "no gang contact or activity" and contained the handwritten note: "no gangs, guns or drugs," and "clear all social media of gangs, drugs."[138] Omar F. appealed the probation order by arguing that (1) the no gang-related conditions were not reasonably related to the crimes, and (2) the conditions were unconstitutional as applied to him since they were "overbroad and unreasonable."[139]

The court took the language directly from *J.W.* and stated that when determining whether a probation condition is valid, the "overriding concern is reasonableness."[140] Again, the court applied the test in *J.W.* and announced that in order for a condition to be determined reasonable the court must consider:

> (1) whether the condition of probation reasonably relates to the rehabilitative purpose of the legislation, (2) whether the value to the public in imposing this condition of probation manifestly outweighs the impairment to the probationer's constitutional rights, and (3) whether there are any alternative means that are less subversive to the probationer's constitutional rights, but still comport with the purposes of conferring the benefit of probation.[141]

Turning specifically to the matter at hand, the court noted that the JCA allows circuit courts to limit juvenile gang contact.[142] The court cited § 5-715(2)(s) of the JCA and concluded that the court does in

133. *Id.* at 1027.
134. *Id.* at 1026.
135. *Id.* at 1030–31.
136. *Id.* at 1031.
137. *Id.* at 1031–32.
138. *In re Omar F.*, 89 N.E.3d at 1032.
139. *Id.* at 1035.
140. *Id.* at 1037.
141. *Id.*; Sweeney & Frye, *supra* note 1.
142. *In re* Omar F., 89 N.E.3d 1023, 1038 (Ill. App. Ct. 2017).

fact have the power to prohibit gang member contact.[143] The court noted the purpose of the juvenile court is to act as parens patriae[144] to the minor to ensure that the minor follows through with her rehabilitation.[145] Noting that Omar F. had friends who were gang members, the court concluded "attempting to limit the minor respondent's contact (real or virtual) with gang members was a valid condition of probation because it was related to his rehabilitation."[146] Just as the geographical provision in *J.W.* was reasonably related to the public safety of the victims of the defendant's crimes, the no gang contact order in *Omar F.* was reasonably related to preventing a minor from becoming a gang member himself— thus it was related to the crime in a rehabilitative nature.[147]

However, the court stated that the no contact provision, while reasonably related to the probationary goal of rehabilitation, was overbroad and not narrowly tailored.[148] The trial court's blanket order did not allow any exceptions.[149] Noting again the language from *J.W.*, the court objected to the order's lack of an exception for "legitimate purposes" in which the defendant might have been able to communicate with known gang members on social media.[150] The main qualm that the court seemed to have with the order is that in the social investigation report, Omar F. stated he looked up to his brother the most, since his brother "has been in the system but has turned his life around."[151] Without any guidance or opportunity for a legitimate purpose exception to the no-contact order, Omar F. would not be able to have communications with, or content posted with, his older brother.[152] The court ruled that this inability to have legitimate contacts on social media was fatal to the probation order.[153]

---

143. *Id*. ("(2) The court may as a condition of probation require that the minor(s) refrain from having any contact, directly or indirectly, with certain specified persons or particular types of persons, including but not limited to members of street gangs." (quoting 705 ILL. COMP. STAT. 405/5-715(2)(s) (2018)).

144. *Parens patriae*, *supra* note 2.

145. *In re Omar F.*, 89 N.E.3d at 1038.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1038.

151. *In re Omar F.*, 89 N.E.3d at 1039.

152. *Id*.

153. *Id.*

b. *In re R.H.*

R.H. was decided immediately following the *Omar F.* decision and reached the outcome that the defendant's probation order was constitutionally valid, while using an analysis that diverged from the *J.W.* reasonableness analysis.[154] The court stated that its reason for not following the *J.W.* precedent was that the restrictions in the juvenile's probation order were content-based restrictions on speech.[155] R.H. was an admitted gang member and had social media accounts that were full of gang content, which included photographs of him and other gang members flashing gang signs, as well as other images of guns and drugs.[156] After a guilty verdict for unlawful use of a weapon and possession of cannabis with intent to deliver, the juvenile court imposed a content-based restriction on R.H.'s social media sites.[157] The term of probation contained several conditions:

> Among the conditions of probation, the trial court ordered R.H. have no contact with "any gangs, guns, or drugs which means it looks to [the court that] you need to get some new friends." The trial court also ordered R.H. to delete from his social media accounts "all references to gangs, guns, or drugs."[158]

R.H. argued that the condition that restricted his posting on social media was an unconstitutional "content-based restriction that fails for lack of sufficiently narrow tailoring."[159] The court decided that the probation orders were content-based restrictions since "it restricts [R.H's] social media postings on three express topics (gangs, guns, and drugs), even without specifying whether the content is pro- or anti-gangs, guns, or drugs."[160] After determining that this probation order was a content-based restriction, the court proceeded under a strict scrutiny standard, and stated "the regulation must be 'narrowly tailored to serve compelling state interests.'"[161] The asserted interest of the juvenile court is to act in the place of the parent in making a probationary decision to rehabilitate and protect the minor.[162] The court also noted that minors are afforded lesser rights than adults in the probationary setting, based on their vulnerability and susceptibility to

154. *In re* R.H., 99 N.E.3d 29, 32 (Ill. App. Ct. 2017), *reh'g denied*, 99 N.E.3d 29 (Ill. App. Ct. 2018).
155. *Id.* at 32–33.
156. *Id.* at 33.
157. *Id.* at 32–33.
158. *Id.* at 32.
159. *Id.*
160. *In re R.H.*, 99 N.E.3d at 32–33.
161. *Id.* at 33.
162. *Id.*

influence.[163] The court stated the importance of a parental figure in its decision-making process, stating:

> A probation condition that implicates fundamental constitutional rights has to reasonably relate to the "compelling state interest in reformation and rehabilitation." . . . To be reasonable, a probation condition must narrowly focus on its rehabilitative goal. In assessing a probation condition's reasonableness, courts also consider if (i) the probation condition reasonably relates to rehabilitation, (ii) the value of the probation condition to society plainly outweighs the loss of the probationer's constitutional rights, and (iii) less restrictive means are available. Courts also may look to the individual characteristics of the defendant.[164]

The court ultimately held that, in light of the defendant's extensive gang involvement and past postings, and unlike in *Omar F.*, the state had a compelling interest in rehabilitating R.H. and protecting him from influential gang members and the harms associated with gangs in his neighborhood.[165]

The condition must also be narrowly tailored as a means to achieve the valid purpose of rehabilitation and safety.[166] The court noted that juvenile delinquency proceedings are not the same as criminal proceedings, again noting that minors are not afforded the same amount of rights as adults, especially in a probationary setting.[167] The court "[found] the restriction sufficiently narrow. The condition focuses on the goal of reforming R.H.'s behavior and steering him away from involvement with gangs, guns, and drugs. The order limits its reach to the matters specifically related to the exact behavior for which R.H. was an adjudicated delinquent."[168] Although the order did not identify what is gang content specifically, it had a narrow nexus to the crime since it was directly related to the valid purpose of rehabilitation and protection. Furthermore, the minor's social media activity was directly related to his rehabilitation.[169] The court noted that minors are using social media at a quickly growing rate and it is becoming part of everyday use and life.[170] The court went in depth on the practical issues surrounding the writing and implementation of such

163. *Id.* at 34.
164. *Id.* (internal citations omitted).
165. *Id.* at 35.
166. *In re R.H.*, 99 N.E.3d at 34–35.
167. *Id.* at 35.
168. *Id.*
169. *Id.*
170. *Id.* ("If the juvenile court has any hope of steering R.H. toward a new direction and productive life, it would be absurd to target only real-world behavior and ignore online activity. And if the trial court tried to restrict only postings that glorified guns, gangs, or drugs, R.H.'s probation officer would be in the impossible position of parsing each of his social media posts to

valid orders, which primarily center on sufficiently narrowing the orders and descriptions of the barred activities so that they will not improperly impinge on other constitutional rights not related to the rehabilitation of the minor.[171] Specifically the court noted:

> If the trial court aims for specificity, it runs the risk of making the order too narrow to cover the behavior that should be prohibited for the juvenile to rehabilitate him- or herself, and invites an uncooperative and resistant juvenile to find ways to maneuver around the prohibitions. . . . There is no positive benefit to either R.H. or society for allowing R.H. to post about gangs in any context—there is no benefit to muddling the order with specifics.[172]

The court dismissed the notion that a call for specificity in the order would alleviate any perceived issues with the narrow tailoring prong of the content-based speech test.[173]

II. Analysis

First, this Part will show that the court in *Omar F.* failed to properly appreciate and apply the constitutional test for a regulation that infringes on the right of association, despite arriving at the "right" outcome due to the state's compelling governmental interest. The court did not apply the correct test, but in a sense, it can be viewed as harmless error—had it applied the right test, it would have reasoned that the state had a compelling interest and passed strict scrutiny. Second, this Part will show that the state does have a compelling interest—the government is acting under the doctrine of parens patriae in relation to the adjudicated delinquents in an effort to provide rehabilitation. However, this Part will go on to argue that, under both the right of association framework and the regulation of content-based speech framework, the probation orders are not narrowly tailored to the interest of rehabilitation and protecting the juveniles.

---

determine a violation. For the restriction to be effective, it must be practical, it must be feasible, and it must be enforceable.").

171. *Id.* at 36–37. ("We recognize the difficulty of drafting an effective order consistent with constitutional demands and sensitive to the characteristics of young people engaged in delinquency. The dissent contends that the trial court should have named which gangs and which visual symbols, colors, or words associated with those gangs R.H. was prohibited from posting. But this is impractical and counterproductive . . . . The same impracticality extends to the dissent's suggestion that the trial court must define the word 'gang.' The trial judge, the probation officer, and, surely, R.H. know what "gangs" mean, and to suggest otherwise, as do the articles cited by the dissent, is sophistry." (internal citations omitted)).

172. *In re R.H.*, 99 N.E.3d at 37.

173. *Id.*

A. Right of Association in In re Omar F.*'s Reasonableness Analysis*

The court in *Omar F.* adopted the reasonableness standard that the Illinois Supreme Court established for geographical restrictions derived from the JCA.[174] However, this test fails to fully appreciate the test the United States Supreme Court laid out for the right of association in *Jaycees* and *Dale*.[175] It is not illegal to be a member of a gang. Therefore, the first step should be to turn to *Dale* and determine whether or not a gang, or individual connected to a gang, is entitled to the protections of the right of association.[176] In order to be awarded right of association protection, the group must engage in "expressive association."[177] Gangs clearly engage in expression, both public and private.[178] Gangs are federally defined as "[a]n association of three or more individuals . . . [w]hose members" adopt a collective identity.[179] Gangs use "a common name, slogan, identifying sign, symbol, tattoo or other physical marking, style or color of clothing, hairstyle, hand sign or graffiti . . ." to create their collective identity and persona.[180] Gang members engage in criminal activity, and may adopt rules, meet on a recurring basis, and provide physical protection of its members.[181] Gangs, by their federal definition, meet the requirement of a group displaying expressive association, and their members are therefore entitled to the protection of the right of association. The court in *Omar F.* should have then looked to determine if the governmental restriction (in this case, the juvenile probation order) was supported by a compelling governmental interest, unrelated to the suppression of ideas, and that the interest could not be met through other less restrictive means.[182] Put more succinctly, if gangs are entitled to associational rights, then the court in *Omar F.* should have applied the *Jaycees* test to determine whether or not the probation orders infringe on the juvenile's ability to associate with other gang members.

Despite the appearance that gangs may be entitled to First Amendment protection under the right of association, whether or not gangs are involved in sufficient "expressive association" is far from set-

174. *In re* Omar F., 89 N.E.3d 1023, 1037 (Ill. App. Ct. 2017).

175. *See generally* Roberts v. United States Jaycees, 468 U.S. 609 (1984); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

176. *Dale*, 530 U.S. at 648.

177. *Id.*

178. *Id.*

179. NAT'L INST. OF JUSTICE (NIJ), *What is a Gang? Definitions* (Oct. 27, 2011), https://nij.ojp.gov/topics/articles/what-gang-definitions.

180. *Id.*

181. *Id.*

182. Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

tled.[183] However, even if the gangs are not involved in activity protected under the right of association, the probation orders still must pass the test for validity as regulations on conduct with incidental effects on speech.[184] To pass this test, the regulations must further an important or substantial governmental interest unrelated to the suppression of free expression and restrict no more speech than necessary to further that interest.[185] The test is actually quite similar to the test of the right of association protection; however, due to the required interest strength, the test under the incidental effects doctrine is more deferential to the government.

The First District court instead chose to impose the reasonableness test found in *J.W.*, instead of either the *Jaycees* or *O'Brien* test.[186] Essentially, the court adopted the language of the *Jaycees* test, but instilled a "reasonableness" term that entailed a different analysis from the test as it was announced in *Jaycees*. The *J.W.* test, as used in *Omar F.*, asks whether there is a "valid" purpose for the restriction and if there are any exceptions for "legitimate purposes."[187] This reasonableness test is not the same as the constitutional right of association test which calls for a *compelling* governmental interest. "Valid purpose" and "compelling interest" are not synonymous.

Furthermore, the probation order in *Omar F.* also included content-based speech restrictions: "You need to clear [gang, drug, and gun related material] from your social media."[188] In order to survive a challenge to a content-based speech restriction, the regulation must have a compelling governmental interest and be narrowly tailored to achieve that interest.[189] The court orders at issue here are restrictions that target a specific topic, and therefore require a restriction that is narrowly tailored to meet a compelling governmental interest.[190]

183. Determining whether or not they truly are is outside the scope of this Comment and, therefore, that threshold question will not be reached. Furthermore, an exploration of whether the illegal activity gangs participate in disqualifies them from associational protection is also beyond the scope of this Comment.

184. United States v. O'Brien, 391 U.S. 367, 376–78 (1968).

185. *Id.* at 382.

186. *In re* Omar F., 89 N.E.3d 1023, 1037 (Ill. App. Ct. 2017).

187. *Id.*; *In re* J.W., 787 N.E.2d 747, 765 (Ill. 2003), *reh'g denied*, 540 U.S. 873 (2003).

188. *In re Omar F.*, 89 N.E.3d at 1031–32.

189. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231–32 (2015).

190. *Id.*

B. Rehabilitation as a Compelling Governmental Interest

Both *Omar F.* and *R.H.* state that the government's interest in these regulations is the rehabilitation of the adjudicated delinquents.[191] Both the United States Supreme Court and the Illinois Supreme Court have recognized that the rehabilitation of youths is a compelling governmental interest.[192] In light of the courts' view of street gangs, it is clear that the government has a strong interest in rehabilitating juveniles by limiting their contact with gang members. The Illinois Supreme Court has noted that "street gangs are regarded with considerable disfavor by other segments of our society."[193] This interest in protecting minors from street gangs is also motivated by the way courts view their role in protecting the "innocent" nature of children. The United States Supreme Court has also weighed in and stated that "children are constitutionally different from adults for purposes of sentencing."[194] The Court has found that children differ from adults because of their immaturity and lesser sense of responsibility.[195] The Court has further claimed that juveniles are more vulnerable to negative influences resulting from an inability to remove themselves from settings that involve criminal activity.[196]

Lastly, the Court stated that juveniles lack fixed characters and personalities which allows them to further develop along with their poor tendencies or judgments.[197] For instance, studies have shown that juveniles with Type-T personalities tend to be more drawn to gang involvement.[198] Adolescents who have a Type-T personality include those "who seek thrills (T), stimulation, excitement, attention, and arousal. They tend to be risk takers, have unruly behavior, and get into more trouble."[199] Type-T juveniles are more susceptible to the risky, violent, and fringe behavior involved in gang life.[200] Courts, in their goals of rehabilitation and ensuring the safety of juveniles, may consider including personality type-centered treatment to achieve such a goal. In light of the Supreme Court's views on juveniles, proba-

191. *In re* R.H., 99 N.E.3d 29, 32 (Ill. App. Ct. 2017), *reh'g denied*, 99 N.E.3d 29 (Ill. App. Ct. 2018); *In re Omar F.*, 89 N.E.3d at 1023.

192. *See* United States v. Albanese, 554 F.2d 543, 546 (2d Cir. 1997) ("The great desideratum (is) the giving to young and new violators of the law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals . . . .").

193. People v. Strain, 742 N.E.2d 315, 320 (Ill. 2000).

194. Miller v. Alabama, 567 U.S. 460, 471 (2012).

195. *Id.*

196. *Id.*

197. *Id.*

198. Kim & Kipper, *supra* note 25, at 14.

199. *Id.*

200. *Id.*

tion responsibilities, and gangs, it is clear that the government's interest in rehabilitation and guiding adjudicated delinquents away from gang involvement is a compelling interest.

C. The Probation Orders are Fundamentally Overbroad as Applied

Although the state's interest in rehabilitating juveniles and keeping them away from gang members is a compelling interest, once the orders are applied to the individual minors, they will prove to be overbroad and thus not narrowly tailored to the government's interest. The *Omar F.* court acknowledged that the reason for overturning the probation order was that it did not allow for the juvenile to have contacts with his brother.[201] The probation order did not allow for exceptions that would permit the juvenile to talk to a close family member. Especially considering that a poor home environment is a leading cause of gang involvement, the inability to communicate with a sibling could prove to have negative effects on the juvenile's rehabilitation.[202]

The content-based restriction seen in *R.H.* also proves to be unconstitutionally vague and overbroad in practice. Taking for granted that the average person understands what is meant by the term "gangs," the court does not describe with specificity what amounts to gang content. Gang symbols cover a diverse spectrum of the symbolic world—from religious symbols to anything the gang dreams up that is used to identify with and create a collective identity behind.[203] The probation orders, even if drawn to limit only the posting of "gang-related" content, will not catch everything—the probation officer may not fully know what the total collection of the gang's symbols are.[204]

Alternatively, the content order may be overinclusive if the probation order forbids including a color or a common symbol by labeling it as gang insignia. For example, the dissent in *R.H.* noted that "[e]ven a picture of R.H. standing in an open field may violate the court's order—if a court decides that the depiction of the blue sky refers to a gang that uses blue as its gang color."[205] Similarly, if a gang adopts the Chicago Cubs hat as a gang symbol, will a court bar the juvenile from publicly supporting the baseball club? The probation orders in practice, as they are currently being written, include activities and commu-

201. *In re* Omar F., 89 N.E.3d 1023, 1039 (Ill. App. Ct. 2017).

202. Kim & Kipper, *supra* note 25, at 13.

203. *In re* R.H., 99 N.E.3d 29, 39–41 (Ill. App. Ct. 2017), *reh'g denied*, 99 N.E.3d 29 (Ill. App. Ct. 2018) (Neville, J., dissenting).

204. Gangs also use social media to throw verbal jabs at rival gangs, conceal drug dealing with emoji-text in an effort to throw law enforcement of their trail, and even in some situations broker peace deals with rival gangs. Kordas, *supra* note 44.

205. *In re R.H.*, 99 N.E.3d at 39–41 (Neville, J., dissenting).

nications that are not aligned with the rehabilitative goals of the court. It is not an impossible stretch of the imagination to see how the probation orders are overinclusive: A probation order that directs the juvenile not to post "gang content" or talk with "gang members" on social media will sweep up with its content and conduct that may be non-gang related unbeknownst to the court. This is a clear case of an overinclusive application of this type of court order.

The factors which lead to youth gang involvement are also instructive in this regard.[206] It is not difficult to see how a juvenile who is drawn into a gang and surrounded by narcotics and alcohol is more likely to be involved in criminal activity. This also adds to the problem of a small number of role models that juveniles can turn to. Furthermore, an awareness that children are subjected to pressures of narcotics and alcohol can also lend insight into how to best treat and rehabilitate adjudicated delinquents who are in threat of gang involvement. By allowing them to have contacts with reformed gang members, the children would have the opportunity to have a role model in their lives who could help them move away from illicit activities, and thus away from the pull of gangs. A successful parallel is the example of Alcoholics Anonymous. Alcoholics have the opportunity to lean on reformed alcoholics for support from someone in a unique position to understand their struggle. The way the court orders are currently written forecloses this possibility. The way in which the current court orders are being written prevents this possibility.

No matter how the court determines to specify the content or limit the ways in which a juvenile can communicate with gang members, the practical impossibility of preventing the order from overreaching and the resulting ineffectiveness will not allow the orders to be considered narrowly tailored. Both aspects of the orders, the content-based speech regulations and the conduct (contacts) restrictions, cannot survive their respective doctrinal tests if there are less prohibitive alternative means of achieving the compelling or sufficient governmental interest.[207] The courts can avoid the need to adhere to First Amendment scrutiny by crafting the court orders to prohibit conduct or speech that is not protected by the First Amendment. For example, the order could prevent the child from eliciting or conspiring with others to commit an illegal act.[208] Conspiring to commit an illegal act

206. *See infra* Part I.A.3.

207. *See In re* Omar F., 89 N.E.3d 1023, 1038 (Ill. App. Ct. 2017) (citing 705 ILL. COMP. STAT. 405/5-715(2)(s) (West 2016)); Sweeney & Frye, *supra note* 1; *Parens patriae*, *supra* note 2.

208. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 (1976).

is a crime and therefore unprotected speech. The order could also prevent the juvenile from posting words that would "incite an imminent breach of the peace."[209] These postings would be "fighting words," and thus the court would be able to regulate the speech unabated by the First Amendment. These examples demonstrate that there are less prohibitive alternative means to achieving the state's interests. But even in the valid examples above, the regulation would only prohibit actions on social media. This would again call into question the closeness of the fit to the governmental interest of rehabilitation and juvenile safety.

Ultimately, it becomes a question of levels of rights: how much are a juvenile's rights dismissed when they have been found guilty of a crime and are sentenced to a term of probation, conditional discharge, or supervision? Their rights should not be dismissed at a level that deprives them of their rights of association and free speech under the First Amendment. The courts impose these conditions under the notion of parens patriae. However, even under this doctrine, children should not be afforded less rights under the First Amendment simply due to their age.

III. IMPACT

Although it seems that the no-contact and no-gang-content probation orders will not be able to meet the constitutional tests for regulation, it is unlikely that their source, the JCA, will be overturned.[210] Assuming the probation orders will continue to be handed down in line with the rules identified in *Omar F.* and *R.H.*, it is important to understand the practical implications. First, the already overworked probation officers in charge of the supervision and enforcement of the adjudicated delinquents will be given the nearly impossible task of surveying ever-evolving social media platforms. Secondly, the proba-

209. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

210. The Supreme Court has stated that invalidation of a statue as overbroad is unacceptable if the "'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .'" Parker v. Levy, 417 U.S. 733, 760 (1974) (quoting United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580–81 (1973)). Furthermore, when the benefit of the statue substantially outweighs the harm caused by the overbreadth of the regulation, the overbreadth is to be dealt with on a case-by-case basis. New York v. Ferber, 458 U.S. 747, 773–74 (1982). When constitutional objection is raised to a statute as-applied, "a court will typically apply a general norm or test and, in doing so, may engage in reasoning that marks the statute as unenforceable in its totality." Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1328 (2000). It is unlikely that a court will invalidate all of the provisions of the JCA, specifically the probation section, because of the improper application of one of its provisions which attempts to limit juveniles' gang-involvement.

tion orders will unfortunately maintain what the courts and governments are not fully addressing, and perhaps even indirectly aiding—the true socio-economic causes of juvenile gang involvement.

A. Probation Services

The officers of the Illinois Juvenile Probation and Court Services Department of Cook County (JPCSD) are in charge of overseeing the probation of adjudicated delinquents and ensuring they comply with their probation conditions.[211] The objectives of the JPCSD include a thorough investigation and reporting of the circumstances that shape the juvenile's behavior, which the probation officers use to create individual plans to aid the juvenile.[212] In addition to supervising the probation conditions imposed by the court, the probation officers work individually with each of their assigned juveniles to determine a plan that will allow the minors to become better members of their community and mature away from criminal and destructive behaviors.[213] The number of juveniles on probation compared to the number of probation officers, especially in Cook County, illustrates the magnitude of the job that faces the officers. The Cook County Juvenile Probation and Court Services Administration (JPCSA) employs approximately 51 support staff and 322 sworn personnel, with a budget of nearly $46 million in 2020.[214] On the other hand, as of December 31, 2017, there were 5,282 juveniles with open probation cases in the state of Illinois.[215]

Not only do the probation officers have to deal with "ordinary" probation conditions such as geographical location and home confinement, they also must deal with monitoring the social media activity of certain cases in light of the *Omar F.* and *R.H.* decisions. This difficulty is exacerbated by the ever-evolving technologically-driven culture surrounding social media. It should be noted that these probation orders, on their face, may appear to bring up Fourth Amendment concerns in their application due to the government monitoring. However, the Fourth Amendment's third-party doctrine allows for the disclosure of information stored by a third-party custodian without the showing

211. JUVENILE PROBATION & COURT SERVS DEP'T, *Juvenile Probation & Court Services, State of Illinois Circuit Court of Cook County* (2018), http://www.cookcountycourt.org/ABOUTTHECOURT/OfficeoftheChiefJudge/ProbationDepartments/ProbationForJuveniles/Administration.aspx (last visited Apr. 3, 2020).

212. *Id.*

213. *Id.*

214. *Id.*

215. ILL. COURTS, 2017 ANNUAL REPORT: SUPREME COURT OF ILLINOIS, http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2018/SOI_Annual_Report_2017_Bookmarks.pdf.

necessary to obtain a warrant.[216] The Supreme Court in *Carpenter v. United States* turned the third-party doctrine on its head by stating that cell-site location information requires a warrant for its retrieval.[217] However, the Court made clear that its narrow holding did not "address other business records that might incidentally reveal location information[,]" including Facebook.[218]

The probation officer's task is made even more difficult by the ever-evolving technology and culture surrounding social media. First, the gang list maintained by CPD is criticized for being inaccurate and underinclusive.[219] A probation officer, assigned to a juvenile with a no-contact probation order, may check the Facebook interactions of his assigned juvenile while cross-referencing the names with the CPD gang list. However, the under-inclusiveness of the gang list leads to a significant possibility that the probation officer will not catch gang communications. Secondly, the way social media is designed and used may also lead to slips in the system. A juvenile may post a picture or communicate with a known gang member, and the post may be deleted, altered, or expire by the time the probation officer gets around to checking the account. There is also the growing use of "burner" accounts, in which an individual will create an account under a pseudonym.[220] The juvenile may be communicating with a gang member and the probation officer would have no way of knowing. The juvenile may even create a burner account of their own and avoid detection.

B. Avoiding the Problem

The use of the probation orders in *Omar F.* and *R.H.* avoids confronting the socio-economic causes of youth gang involvement head on. As discussed in Part I.A.3 juveniles are drawn to gangs due to the allure of potential illicit income and protection provided by the other members.[221] Additionally, youth are pushed to gangs due to poor home life and a cycle of poverty and violence in some neighborhoods around Chicago.[222] A poor home life is a leading cause of youth gang-

216. Linda Greene, *Mining Metadata: The Gold Standard for Authenticating Social Media Evidence in Illinois*, 68 DEPAUL L. REV. 103, 135 (2018).

217. Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018); Greene, *supra* note 216, at 135–36.

218. *Carpenter*, 138 S. Ct. at 2220; Greene, *supra* note 216, at 136.

219. Sweeney & Frye, *supra* note 1.

220. *See, e.g.*, Nick Schwartz, *Kevin Durant explains why he created burner accounts on social media*, FORTHEWIN (Mar. 15, 2019), https://ftw.usatoday.com/2019/03/kevin-durant-burner-account (explaining that the anonymity of the burner accounts allow him to freely communicate with his family and friends).

221. Kim & Kipper, *supra* note 25.

222. *Id.*

involvement.[223] The probation condition in *Omar F.* limited the contact that Omar F. could have with his older brother.[224] Older siblings are often viewed by their younger counterparts as role models. It seems counterintuitive to limit contact with a role model figure, even if just on social media, if it is your goal to rehabilitate the juvenile and his attitude toward home life and his community. The court should have used the provisions of the JCA it had at its disposal to create real change in the juvenile's life.[225] Perhaps the court could have instituted an order that called for vocational training or community involvement, which would not only have gotten the kid off the streets and away from the gang members' direct influence, but also given him skills and tools to work his way out of the cycle of poverty that engulfs many of the neighborhoods with high gang involvement and crime. Similarly, the court order in *R.H.* ultimately focused on what the juvenile was posting on social media, and not on what perhaps caused him to be in the situation he was when he committed his crime. Courts should turn their focus to imposing conditions that give youth the tools to create a better life for themselves, rather than just telling them what they can and cannot do on Facebook and Twitter.

Conclusion

The neighborhoods most affected by gang violence in Chicago have been witnesses to cycles of poverty, violence, and court interventions. Circuit courts in Cook County have responded to the growing use of social media by gangs with probation orders limiting juveniles' interaction with gang members on social media and gang-related content on their profiles. The hope is that these social media restrictions will steer the kids away from gangs and somehow lower their willingness to join them. While the JCA provides a legal footing for such restrictions that can pass First Amendment scrutiny, the practical application of the orders proves to be missing the mark. It goes without saying that it is beyond the scope and powers of the courts to create social, political, and state policies to try and fix the unfortunate problems of gangs and the socio-economic deficiencies that cause them. However, the courts can use the tools at their disposal to do their part. Incidentally preventing juveniles from socializing on social media with legitimate associates and preventing how they express themselves will prove to be an ineffective path for the court to take, and even add to

223. *Id.*

224. *In re* Omar F., 89 N.E.3d 1023, 1039 (Ill. App. Ct. 2017).

225. *In re* R.H, 99 N.E.3d 29, 33 (Ill. App. Ct. 2017); People v. Hugo G., 750 N.E.2d 247, 256 (Ill. App. Ct. 2001) (quoting *In re* M.P., 697 N.E.2d 1153, 1156 (Ill. App. Ct. 1998)).

the problems. The Illinois juvenile courts should be more concerned with providing juveniles the resources they need to better themselves and others than with what posts they give a thumbs-up to.

Nicholas F. Curta